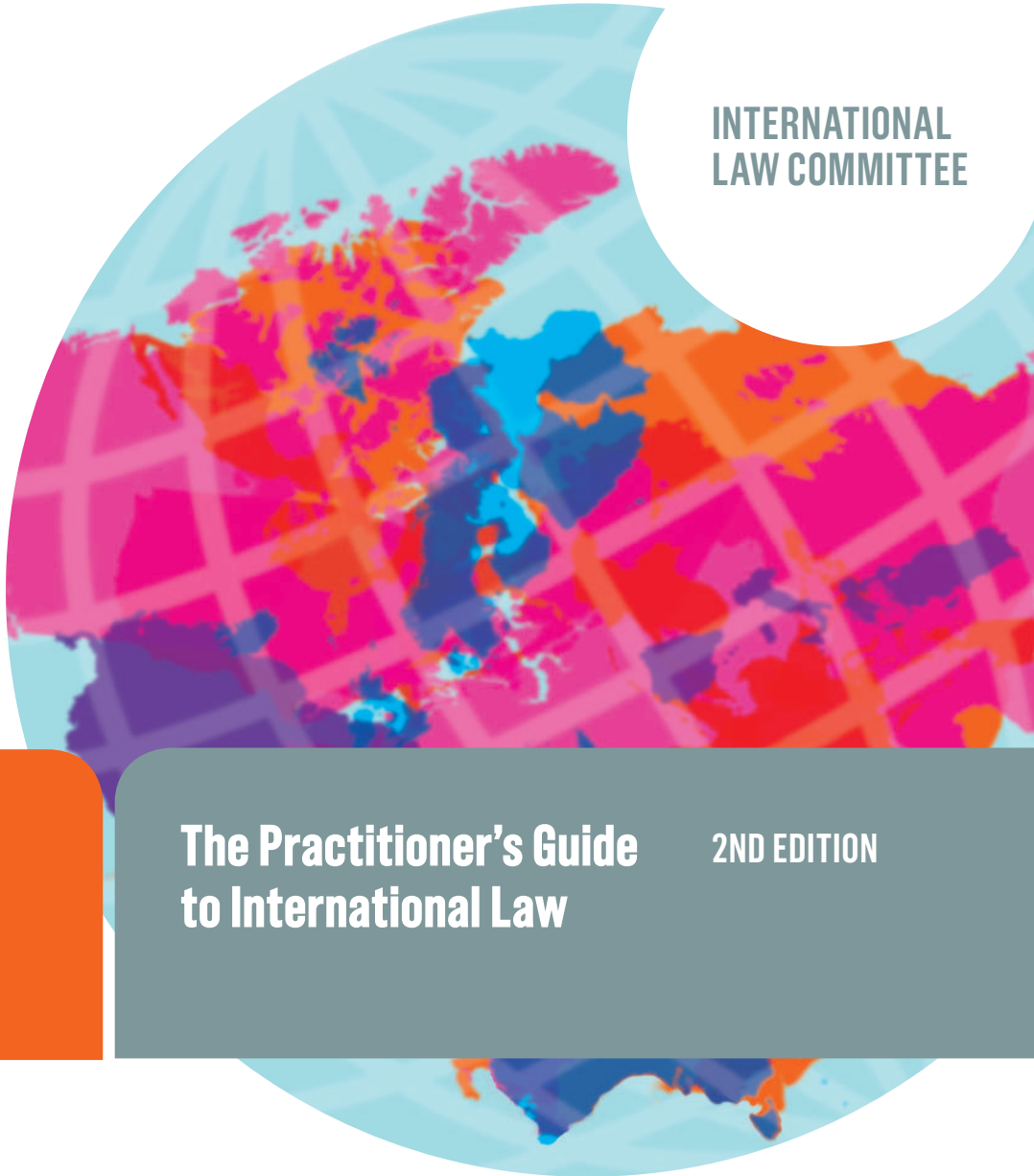

INTERNATIONAL LAW COMMITTEE

The Practitioner's Guide to International Law

2ND EDITION

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THE LAW SOCIETY OF NEW SOUTH WALES young LAWYERS

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2nd Edition

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2014

The Practitioner's Guide to International Law

2nd Edition

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The design represents an ever changing world governed by International Law that can be more easily interpreted with *The Practitioner's Guide to International Law,* 2nd edition

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Foreword

The energy and confidence of young practitioners adds to the Australian scholarship in international law, much of it developed during my professional lifetime, made accessible by this new edition of a respected text. Fifty years ago David Bennett introduced me to Julius Stone, whose classic account of the limits of judicial law-making "*Non liquet* and the function of law in the international community"[1] explains our work in the Special Tribunal for Lebanon.[2] Currently James Crawford affords guidance, both as a scholar and as counsel, to all who are engaged in international law.[3] The present perceptive book both records and contributes to the evolution developed by Stone, Crawford and their compatriots: Australia is no mere critic of an international law created elsewhere, but one of its most vibrant developers. The book evidences the law's basic decency insisted on by O'Connor J in *Potter v Minahan* (1908): "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."[4]

International law is about managing the unfamiliar. A generation ago, save for private international law in which Australians are perforce expert, the law of nations (as it was then known) was largely a matter for politicians and

1 (1959) 35 BYIL 124

2 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL-11-01/I, STL Appeals Chamber, 16 February 2011, para. 23.

3 His *The Criteria for Statehood in International Law* (1976) 48 BYIL 93 is currently the most-read article of the British Yearbook of International Law; his eighth edition of *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012) has been described as "a masterpiece, the fruits of an awesome labour" which has breathed new life into a classic: (2013) 129 LQR 296.

4 [1908] HCA 63, 7 CLR 277. A modern example is *Plaintiffs M70/2011 and M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; 150 ILR 506.

diplomats.[5] Sir Owen Dixon's assumption of the latter role, soon followed by the recognition of human rights in the United Nations Charter and other instruments, evidenced the need for Bentham's larger concept of "international law." The shrinking of distance by modern transport and communications has since made all of us citizens not only of our own State but of a global society. As national borders are increasingly overridden by human interface, so too are national *legal* borders. This in turn has given rise to the need for laws to regulate both changing relationships and the resulting disputes. The result has been a multitude of treaties – including treaties which regulate cross-border environmental conduct and facilitate bilateral investment - and the need for these and other aspects of international law to deal adequately with the frenetic pace of change in our modern times.

Much of international law draws on ancient principles established over centuries since the recognition that foreign heralds must receive a privileged status.[6] They have been developed by legal thinkers who, under the cover of "*lex naturalis*", "*jus cogens*" and other neolatinisms, have applied principles of practical necessity stated by Cicero and repeated by Grotius, which bear an uncommon likeness to those applied in the development of the common law of Australia. The sensitivity of the great judgment in *Mabo*[7] showed how Australian counsel and judges could in nominally domestic litigation reach beyond the limits of precedent to do right to all manner of people according to principles of justice, despite cultural and other differences that had previously seemed unbridgeable. That too is the task of international law. So today's Australian judges do not need to find ambiguity to justify recourse to international law: as authors of that law they have direct recourse to it.[8]

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5 As noted at p. 6 of the present text, it then formed no part of Australian law: *Chow Hung Ching v R* (1948) 77 CLR 449, 462 (Latham CJ), 471 (Starke J) and 477 (Dixon J); compare the Privy Council in *Chung Chi Cheung v R* [1939] AC 160 at 167-8 and the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ungarte* (No 3), [2000] 1 AC 147 (the crime of torture under international law as being actionable and for which immunity could not be pleaded before an English court); *R v Jones* [2006] UKHL 16; [2007] 1 AC 136 [11] per Lord Bingham); also per Merkel J (dissenting) in *Nulyarimma v Thompson* (1999) 96 FCR 153 [131-2]. Nowadays in the absence of contrary indications, Australian law is to be interpreted consistently with Australia's international obligations: p. 6 (citing *The Queen v Tang* [2008] HCA 39 [110] (per Kirby J); *The Commonwealth v Yamirr* [2001] HCA 56 [129] (per McHugh J)) and p. 26 of this text. See also *Minister of State for Immigration and Ethnic Affairs v. Teoh* [1995] HCA 20 [27] (per Mason CJ and Deane J).

6 For an overview of this ancient practice, see D. J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2004), pp. 88-120.

7 (1992) 175 CLR 1

8 *Behrooz v Secretary of the DIMIA* [2004] HCA 36 [126-7] per Kirby J cited at p. 27 of this text.

The role of this book's intended audience, the professional leaders of the next and even more globalised generation, includes maintaining and developing the initiatives of the Australian jurists which it records - demolishing unnecessary differences among national laws and designing and building a new international law. The opportunities are unlimited. In the great sphere of criminal law, fundamental to peace, order and good government within each State, international law is in its infancy. Aside from a handful of precursor events, modern international criminal law, with its noble aim of accountability for political and military leaders, is still developing from the victors' justice at Nuremberg. This recent development may be charted from the United Nations International Criminal Tribunal for the former Yugoslavia (in which Australians played notable roles, including former High Court Judge Sir Ninian Stephen and Judges David Hunt and Kevin Parker together with its current Registrar John Hocking (himself a former Associate to then President of the Court of Appeal of New South Wales, Judge Michael Kirby)) and the United Nations International Criminal Tribunal for Rwanda, the permanent International Criminal Court and the small cluster of specialist tribunals. Your compatriots in these and other international organizations, including Judge David Re in the Special Tribunal for Lebanon and Judge Rowan Downing in the Extraordinary Chambers in the Courts of Cambodia, are trail-blazers, who in developing a career in international law and assisting in the vital development of the rule of law, enhance the respect in which Australian lawyers are held around the world. This book offers the opportunity for you to join them.

Sir David Baragwanath

President, Special Tribunal for Lebanon
Leidschendam, The Netherlands
June 2013

Acknowledgments

The Practitioner's Guide to International Law is the product of considerable collaborative effort. The International Law Committee of NSW Young Lawyers first wishes to thank Sir David Baragwanath, President, Special Tribunal for Lebanon, for contributing a foreword for this publication. In this Part, the Committee also wishes to express its sincere thanks to all others who contributed to the preparation, editing, development and publication of this volume.

New South Wales Young Lawyers is the largest young professionals organisation based in Sydney. The organisation represents the interests of Australian legal practitioners under the age of 36 or in their first five years of practice as well as all law students within the State. Thousands of members participate on a voluntary basis in the organisation's Committees directed at particular legal areas. Among the many activities undertaken by NSW Young Lawyers is the production of practitioner's guides on specific areas of law for several years upon which this Guide is modelled.

The International Law Committee of NSW Young Lawyers offers the opportunity for members of the organisation to discuss international legal issues and network with their peers in the legal profession. The Committee is also a platform for establishing links with other like-minded organisations both within Australia and overseas. The Committee is organised into several distinct streams including public international law, international humanitarian and criminal law, international environmental law, private international law, dispute resolution and international trade law. The Committee organises high-quality continuing legal education seminars on contemporary international legal issues as they affect practitioners, drafts submissions, conducts social events, offers professional development opportunities and monitors developments in international law affecting Australia and Australia's distinctive contributions to international legal development. The Committee also seeks to broaden knowledge of international law within the legal profession for the benefit of its members, as well as providing other information links through the Committee's website.

The Practitioner's Guide to International Law is an update to the first guide of its kind in Australia. The overall objective was to provide an introductory overview of certain aspects of international law for Australian legal practitioners, to facilitate greater understanding of the area and to promote recourse to international law in

resolving disputes before Australian courts and international fora. The Guide seeks to be a valuable practical resource for Australian legal practitioners in addressing international legal issues that could arise in their day to day practice and relevant to their interaction with Australian and international institutions. This idea was first proposed by Pouyan Afshar, the Chair of the International Law Committee in 2008, and its drafting and development was overseen by Stephen Tully, his successor in 2009. The First Guide was written in late 2008 and reviewed in mid-2009 by practitioner members of the Committee each having expertise or interest in a particular area of international law.

In 2013, the Committee determined it was time to update the Guide and worked collaboratively to produce this second edition which was complete in December 2013. The Committee wishes to thank each of the contributors to the second edition of the Practitioner's Guide: Diane Barker, David Freyne, Mariko Lawson, Stephen Tully, Elaine Johnson, Natalie Johnston, Amelia Thorpe, Amy Ward, Sandrine Alexandre-Hughes, Richard Hughes, Justin Sing, Morgane Poullain, Donny Low, Katie Edwards, Manuel Ventura, Peter Yeldham, Sarah Lux, Talia Epstein, Annalise Haigh, Millie Smith, Samantha Holt and Mimbo Wang. General editorial functions were performed by Stephen Tully, Peter Anagnostou and Erika Williams.

The source materials used by authors of the Guide include international and national jurisprudence, conventional instruments and Australian legislation, authoritative commentaries, law journals and internet materials available through the websites (correct at time of press) of the Australian government, intergovernmental organisations and reputable local and international non-governmental organisations. Several academics and practitioners were also consulted in selecting the topic areas and materials for inclusion in the Guide. The Committee also sought to receive insights from legal professionals, members of the academic community, governmental and non-governmental organisations, students and others on the practice of international law. In August 2009, a draft version of the first edition of the Practitioner's Guide was made available without charge for download on the Committee's website. A Call for Comments was also issued to several organisations active within the international legal field. Approximately 20 solicitors and barristers having some degree of international legal expertise recognised within the Australian legal community were individually contacted. All contributions received were considered and incorporated to varying degrees. The draft Guide was also promoted through Debrief, the newsletter for NSW Young Lawyers.

The International Law Committee extends its sincere thanks to the following organisations and their members for promoting the draft version of the Practitioner's Guide and/or contributing helpful suggestions to its development: The Sydney

Centre for Global and International Law (University of Sydney); the Centre for International and Public Law (Australian National University); the Australian and New Zealand Society of International Law; the International Law Section of the Law Council of Australia (particularly Hendryk Flaegel); the Institute for International Law and the Humanities (Melbourne University); the International Law section of the Victorian Law Institute; the Australian Institute of International Affairs; and the International Law Association (Australian branch). The Committee also wishes to thank Elizabeth Lee for promoting the draft Guide through Young Lawyers networks across Australia. The Committee also wishes to acknowledge the efforts of a number of individuals who responded to the Committee or provided invaluable feedback and comments during the preparation of this Guide. These include Justin Hogan-Doran, Anna Talbot, Bernadette Boss, Christopher Ward, Julian Burnside, Nick Poynder, Oliver Jones and several anonymous referees. Of course, the views, statements or opinions expressed in this Guide should not be attributed to any particular individual or organisation as exclusive responsibility for the content and presentation rests with the Committee. It was on this solid foundation that the second edition of the Guide was based.

The Committee also thanks Michael Avery (michael.avery.visual@gmail.com) for the outstanding cover design for this Guide which is based on the transcendent nature of international law, specifically how it transcends borders and countries to regulate nations and bring the world together under one lens. The Committee also thanks those organisations and individuals who may have been inadvertently omitted.

The Practitioner's Guide addresses a select number of topics considered to be the most important for Australian practitioners. These include the sources of international law, their relationship with Australian law, private international law, conducting international law litigation before Australian courts, participation within the United Nations system and before international courts and tribunals, international environmental and trade law and cultural property protection. Other significant legal topics, such as international humanitarian law, have been left for another time. This volume is available at http://www.younglawyers.com.au and will be updated as and when the need arises.

The Committee hopes that the Practitioner's Guide proves helpful and informative for Australian legal practitioners and welcomes suggestions for future editions.

Erika Williams,

Chair,

International Law Committee, 2014.

About this Guide

The practice of international law in Australia was formerly thought to be the exclusive domain of, for example, officials and lawyers employed within government departments, experts on mission for international organisations, appointees to international tribunals or committees and diplomats attending international conferences. This is clearly no longer the case even if it was ever true. Non-State actors have emerged as independent protagonists, private legal counsel appear before international trade panels on Australia's behalf and commercial law firms are consulted on mineral concession contracts or territorial boundary disputes. Fascinating international legal questions are increasingly being brought before Australian courts as relevant and important issues requiring resolution. Indeed, the scope and reach of international law is such that there is no area of Australian law for which it has nothing to contribute.

Within this milieu it might be assumed that Australian legal practitioners, given a professional preoccupation with specialised branches of Australian law, are insufficiently attune to the complexity of international law and its sophisticated interaction with Australian law. Whether or not that assumption is valid, the Practitioner's Guide to International Law seeks to shed light on the essential mechanics. The Guide purports to be a reference document outlining the issues and identifying relevant material or authority for young practitioners and those lawyers for whom international law may be relatively novel. It encourages practitioners to understand, appreciate and utilise international law in terms of substantive argument and procedural opportunity. The Sydney Statement on the Practice of International Law before National and International Fora sets performance objectives for Australian lawyers that the practice of international law before Australian and international fora be of the highest standard.

The Guide presupposes some degree of familiarity with the fundamentals of international law. Reference should be made to standard international legal texts for introductory material upon which the Guide builds. The Guide intends to be a convenient, concise and practical point of departure for Australian legal practitioners on specific topics. It does not purport to be a comprehensive document or constitute legal advice. Practitioners are also advised to refer to the original context from which judicial dicta may have been extracted. Materials have been selected for

inclusion in the Guide on the basis of their relevance to Australian legal practitioners for the purposes of the practice of international law before Australian courts and international institutions. Each chapter reviews topics where the caselaw, legislation and international arrangements are relatively well-established. For example, the interaction between international and Australian law requires an understanding of several essential concepts and is typically an early hurdle which practitioners must meet. Other questions of international law may have to date only been dealt with peripherally, or indeed not at all, by Australian courts. The procedural aspects of international law, for example, are generally of lesser importance to practitioners than the substantive dimension. Practitioners are encouraged to refer to the products of intergovernmental fora and other national jurisdictions, particularly common law States, for comparable developments which may suggest an approach to the matter at hand.

Chapter 1

International Law and Australian Practitioners

Public international law is classically defined as the law governing relations between States. It may have been true that the 'international law of the eighteenth century consisted essentially of the rules governing the relations and dealings among the nations of Europe'.[9] However, contemporary international law includes the rules of law relating to the functioning of international organisations as well as particular rules relating to individuals, corporations, non-governmental organisations and other non-State entities.[10] Given the technological revolution, the search for peace and security, closer interdependence between nations and the involvement of the international community in formerly domestic concerns, '[t]here is now no limit to the range of matters which may assume an international character'.[11] Hence 'it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement'.[12] The rules of international law are moreover dynamic.[13] 'Thus areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding.'[14] Accordingly, it is 'impossible to say a priori that any subject is necessarily such that it could never properly be dealt with by international agreement'.[15] For Australia and all

9 *Mabo v Queensland (No 2)* [1992] HCA 23, [2] (Deane & Gaudron JJ).
10 J G Starke, *Introduction to International Law*, 11th ed, 1994, p.3.
11 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [13] (Wilson J).
12 *R v Burgess* (1936) 55 CLR 608, 680-681 (Evatt & McTiernan JJ).
13 *SRYYY v MIMIA* (2005) 147 FCR 1, [31], citing *NSW v The Commonwealth* (1975) 135 CLR 337, 466 (Mason J).
14 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [25] & [27] (Stephen J).
15 *R v Burgess* (1936) 55 CLR 608, [7] (Latham CJ).

Australians, 'as a nation which prides itself on its legal traditions and its adherence to the rule of law, we must take account of developments in international law.'[16]

International law carries the authority of universal support by the international community, reflects Australia's national interests, is a product of its consent and is detached from parochial national concerns. International law cannot be discounted as not being 'law'. It may be argued that international law lacks enforcement mechanisms, is ineffective without political will or is avoided by powerful States. It has also been suggested that international law contains aspirational statements which identifies goals rather than specific methods for their achievement.[17] International legal rules may additionally be thought to be elusive, rubbery and unable to assist in resolving particular questions of legal construction in concrete cases.[18]

However, international law by definition is universally applicable and authoritative for all States. States recognise international law as 'law' by voluntarily consenting and adhering to agreed standards. Thus Australia, together with States such as Canada and New Zealand, 'consider the rule of law essential to lasting peace and security, the realization of sustainable development and economic growth, and the promotion of human rights, accountability and democracy'.[19] States comply with international legal rules because it is in their self-interest to do so on the basis of reciprocity. Thus it can be assumed 'that the Commonwealth only enters into an international obligation because to do so is believed to be relevant and therefore important to the advancement of the interests of Australia'.[20] Within an interdependent world, cooperation is necessary to address issues of common concern and of a transnational nature. 'The failure of a party to fulfil its obligations becomes a matter of international discussion, disapproval, and perhaps action by way of enforcement'.[21] Thus the great majority of international legal rules are generally observed, even if relatively more mundane in nature and less apparent than occasional violations, and international law is no more vague or imprecise than national law.

Australian lawyers practice international law before Australian courts. Their practice can include holding Australia to account for its international obligations,

16 Sir Anthony Mason, 'International Law and the Australian Practitioner', Opening Address, p.2.

17 Eg *Purvis v NSW (Department of Education and Training)* [2003] HCA 62, [206] (Gummow, Hayne & Heydon JJ).

18 Eg *Polites v Commonwealth* [1945] HCA 3 (per Starke J).

19 Statement by S. Sheeran, Second Secretary, New Zealand Permanent Mission to the UN on behalf of Australia, Canada and New Zealand, 'The Rule of Law at the International and National Levels', 25 October 2007.

20 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [13] (Wilson J).

21 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [34] (Mason J).

identifying the limits of executive power, protecting non-governmental interests and clarifying the roles and responsibilities of Australian courts, the Parliament and the executive. Clients include governments, international organisations or private entities in a range of contexts. These include arranging international finance, co-ordinating major infrastructure projects, enabling access to energy resources, conducting privatisations and resolving trade disputes. Advice may be sought in relation to territorial and boundary disputes, international maritime law, air and water rights, treaty negotiations and accession to treaties, questions of State responsibility, sovereign and diplomatic immunity, the exercise of extraterritorial jurisdiction for worker safety liability, human rights, compliance with economic sanctions, environmental preservation, investor protection and sovereign debt.

In the practice of international law in Australia, Australian courts occupy several important functions. Australian law may require harmonisation with the law of other States. The mark of a civilised country, and the contemporary values of the Australian people, may be assessed against the expectations of the international community.[22] In the context of judicial review, private actors may seek to vindicate their international legal rights by ensuring legal compliance by government agencies and others. Every judicial officer in Australia 'will endeavour to act so as to give effect and substance to the obligations which inure to this country by virtue of international treaties'.[23] The judgments of Australian courts are highly regarded in other jurisdictions and contribute to the development of international law. A judicial decision in relation to a treaty 'has the potential to influence the interpretation of the Convention beyond Australian law'.[24] Thus Australian courts 'should not be hostile to the provisions of international law . . . Facilitation and implementation constitute the correct legal approach'.[25]

Additional Resources

The Office of International Law of the Attorney-General's Department provides legal and policy advice on public international legal issues across government, conducts international litigation, undertakes treaty negotiations, responds to human rights communications and prepares reports. Under a General Counsel

22 *Mabo v Queensland (No 2)* [1992] HCA 23, [42] (Brennan J); *MIEA v Teoh* (1995) 183 CLR 273, [6] (Gaudron J).

23 *Puharka v Webb* [1983] 2 NSWLR 31 (Rogers J).

24 *MIMIA v QAAH of 2004* [2006] HCA 53, [54] (Kirby J).

25 *NBGM v MIMA* [2006] HCA 54, [18] (Kirby J).

and two Senior Counsel, the Office consists of the International Security and Human Rights Branch and the International Law and Trade Branch.

The Commonwealth Government Entry Point provides links to other Australian Government Departments and Agencies (http://www.australia.gov.au).

The Australian Permanent Mission to the United Nations in New York represents Australia at UN conferences and meetings in New York, participates in the work of UN bodies and monitors the activities of the UN's funds, programmes and specialised agencies (http://www.australiaun.org/unny/home.html).

Chapter 2

The Sources of International Law and Australian Law

2.1. The Sources of International Law

Article 38 of the Statute of the International Court of Justice lists the sources of international law as follows:

(i) international conventions, whether general or particular, establishing rules expressly recognised by States;

(ii) international custom, as evidence of a general practice accepted as law;

(iii) the general principles of law recognised by civilised nations; and

(iv) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[26]

Australian courts have recognised this list as stating the relevant sources of international law.[27]

2.2. International Law and Australian Law

The relationship between international and Australian law may be described as 'dualist' insofar as that the international legal system and the Australian legal system are considered separate and distinct.

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26 Art 38, Statute of the International Court of Justice [1945] Aust TS No 1.

27 *Polyukhovich v Commonwealth (the War Crimes Act Case)* (1991) 172 CLR 501 (Brennan J); *Al-Kateb v Godwin* [2004] HCA 37, [64] (McHugh J).

When considering the interaction between international law and Australian law, the following general points may assist practitioners:

(i) International law as such does not form part of Australian law.[28]

(ii) Effect is first and foremost given to Australian law.[29] Australian courts resolve issues before them by first considering the Australian legal position.

(iii) Australian courts may refer to international law. For example, the common law may have 'to march in step with international law in order to provide the body of law to apply'.[30] Where Australian law addresses a point in a similar manner to international law, Australian courts are simply applying Australian law. Alternatively, international law may have no bearing on the issues arising for judicial consideration.

(iv) In the absence of any contrary indications, Australian law is to be interpreted consistently with Australia's international obligations. By this means Australian courts can ensure conformability with international law.[31] However, international law must be clearly established before Australian courts will consider giving effect to it. Although Australian courts 'do not administer international law, they take cognizance of international law in finding facts and they interpret municipal law, so far as its terms admit, consistently with international law'.[32]

(v) The international obligations applicable to Australia are generally to be identified as they exist at the time the interpretive question arises. For example, since customary international law evolves over time, plaintiffs may be required to demonstrate what the applicable principles were at the time the alleged acts were committed.[33]

28 Eg *Chow Hung Ching v R* (1948) 77 CLR 449, 462 (Latham CJ), 471 (Starke J) & 477 (Dixon J).

29 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510, [74] (Allsop J); *NBGM v MIMA* [2006] HCA 54, [69] (Callinan, Heydon & Crennan JJ).

30 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 32 (Brennan J).

31 *The Queen v Tang* [2008] HCA 39, [110] (Kirby J); *The Commonwealth v Yarmirr* [2001] HCA 56, [129] (McHugh J).

32 *Queensland v Commonwealth* [1989] HCA 36, [9] (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

33 *Coe v Commonwealth* [1993] HCA 42, [29]-[30] (Mason CJ). See also *The Commonwealth v Yarmirr* [2001] HCA 56, [217] (McHugh J).

(vi) In the event of conflict, international law cannot be invoked to override clear and valid Australian legal provisions.[34]

(vii) Parliament may legislate on matters in breach of international law, thereby 'taking the risk of international complications'.[35] For example, while 'it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, [but] such an approach is clearly permissible.'[36]

(viii) Australian courts should give especial attention to protecting human rights and fundamental freedoms as recognised under international law.[37] 'The recognition and observance of human rights and fundamental freedoms by a State involves a restraint on the untrammelled exercise of its sovereign powers in order to ensure that the dignity of human beings within each State is respected and that equality among human beings prevails'.[38] Legislation should be strictly construed to prevent violations of fundamental human rights.[39] The nature of Australian society 'and its tradition of respect for individual freedoms, will support an approach to construction which requires close scrutiny and a strict reading of statutes which would otherwise remove or encroach upon those freedoms'.[40] Australian courts should accordingly consider the extent to which a parliamentary intention can be discerned that fundamental and recognised human rights should apply in Australia and be curtailed to the minimum extent possible.

34 *MIMIA v B* [2004] HCA 20, [171] (Kirby J); *MIMIA v QAAH of 2004* [2006] HCA 53, [66] (Kirby J).

35 *Polites v The Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ).

36 *Dietrich v R* [1992] HCA 57, [17] (Mason CJ & McHugh J).

37 *Attorney-General (WA) v Marquet* [2003] HCA 67, [164] (Kirby J).

38 *Gerhardy v Brown* [1985] HCA 11, [20] (Brennan J). See also Dawson J at [13].

39 *Citibank Ltd v FCT* (1988) 83 ALR 144, 152 (Lockhart J); *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 151-152 (Einfeld J).

40 *Citibank Ltd v FCT* (1989) 20 FCR 403, 433 (French J).

2.3. International Law and the Australian Constitution

The Australian Constitution does not identify which branch of the government has treaty-making power. Shortly after Federation it was considered possessed by the Imperial Crown but it has since been subsequently treated as exercisable by the Governor-General pursuant to s. 61 of the Constitution.[41] The power to conduct foreign relations, including negotiating and concluding treaties, is generally considered to reside with the executive.[42]

Section 51 (xxix) of the Constitution 'is intended to enable Australia to carry out its functions as an international person, fulfilling its international obligations and acting effectively as a member of the community of nations.'[43] The Federal Parliament's power to legislate with respect to external affairs – that 'somewhat dark' power[44] – may be used to implement treaty obligations.[45] However, the Commonwealth need not solely rely upon that head of power and a suite of powers can be employed.[46]

Practitioners may confront the question whether the legislation under consideration is a valid exercise of the external affairs power. Where legislation is challenged as beyond the Commonwealth's legislative power, it may be necessary for Australian courts to examine whether the impugned law is a proper exercise of s.51(xxix). Without delving too deeply into questions of constitutional law, various foundations have at times been suggested to establish constitutional validity.

Generally speaking, legislation will have been validly enacted using the external affairs power if:

41 L Zines, *The High Court and the Constitution*, 4th ed, 1997, p.251.

42 *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Victoria v Commonwealth* (1975) 134 CLR 338, 405-6; *Koowarta v Bjelke-Petersen* (1982) 56 ALJR 625, 635, 644, 648 & 654-55.

43 *New South Wales v Commonwealth* [1975] HCA 58, [23] (Murphy J).

44 Harrison Moore, 'The Commonwealth of Australia Bill' (1900) 16 *LQR* 35, 39.

45 See, for example, *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1 (per Deane J); *The Seas and Submerged Lands Case* (1975) 135 CLR 337; *R v Burgess ex parte Henry* (1936) 55 CLR 608 (per Latham J).

46 B. Campbell, 'The Implementation of Treaties in Australia', in B. Opeskin and D Rothwell (eds), *International Law and Australian Federalism*, Melbourne University Press, Melbourne, 1997, 132 at p.138.

(i) the legislation carries out or gives effect to Australia's international treaty obligations.[47] The legislation 'must conform to the treaty and carry its provisions into effect', or, put another way, not go 'beyond the treaty or [be] inconsistent with it'.[48] Regulations may also be assessed as to whether they carry out and give effect to a treaty they purport to implement.[49]

The Commonwealth is accorded a broad discretion when exercising the external affairs power: '[t]he power must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention'.[50] Thus the Parliament enjoys discretion in the manner of implementing Australia's treaty obligations. It is for the Parliament and not the Courts to determine the method of implementation.[51]

Legislative measures employed to give effect to a treaty based on the external affairs power which are 'reasonably considered appropriate and adapted to that end' will be constitutionally valid.[52] The Parliament need not implement all the terms of a treaty.[53]

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47 Eg *Koowarta v Bjelke-Petersen* [1982] HCA 27, [20] (Gibbs CJ); *Richardson v Forestry Commission (Tasmania)* (1988) 164 CLR 261, 321 (Dawson J), 343 (Gaudron J), 332-3 (Toohey J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 687 (Evatt & McTiernan JJ) & [7] (Latham CJ); *Airlines of NSW Pty Ltd v NSW (No. 2)* (1965) 113 CLR 54, 141 (Menzies J).

48 *Commonwealth v Tasmania* (1983) 57 ALJR 450, 478 (Gibbs CJ), 491-2 (Mason J), 505-6 (Murphy J), 513 (Wilson J), 532-33 (Brennan J) & 545 (Deane J); *Gerhardy v Brown* [1985] HCA 11, [18] (Gibbs CJ).

49 *R v Burgess; ex parte Henry* (1936) 55 CLR 608.

50 *R v Burgess ex parte Henry* (1936) 55 CLR 608, 659-660 (Starke J).

51 *R v Poole; ex parte Henry* (1939) 61 CLR 634, 644 (Rich J) & 647 (Starke J); *Gerhardy v Brown* [1985] HCA 11, [11] (Deane J).

52 *Airlines of NSW Pty Ltd v NSW (No 2)* (1965) 113 CLR 54, 87 (Barwick CJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 130 (Mason J), 259 (Deane J); *Richardson v Forestry Commission (Tasmania)* (1988) 164 CLR 261, 289 & 291 (Mason CJ & Brennan J), 303 (Wilson J), 311-12 (Deane J), 327 (Dawson J), 336 (Toohey J) & 342 (Gaudron J); *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486-489. While the 'reasonably capable of being considered appropriate and adapted' test is sometimes expressed in terms of 'reasonable proportionality', there is thought to be no basic difference between these two propounded tests: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562 & 567 (footnote 272); *Mulholland v Australian Electoral Commission* [2004] HCA 41, [205]-[206]; *The Queen v Tang* [2008] HCA 39, [84] (Kirby J).

53 *Commonwealth v Tasmania* (1983) 158 CLR 1, 234 (Brennan J); *Chu Kheng Lim v MILGEA* [1992] HCA 64, [54] (McHugh J).

Legislation may go further than that contemplated by the Convention. However, it has been suggested that the s.51(xxix) power only extends to bona fide treaties such that 'colourable' treaties suggestive of a 'sham' or 'circuitous device to attract legislative power' are impermissible.[54] Nevertheless, the Parliament does have power to legislate with respect to the subject matter of any treaty to which Australia is a party.[55] The treaty must also be sufficiently specific to indicate the course to be adopted by Australia.[56]

The Commonwealth may enact legislation or regulations which are inconsistent with treaties ratified by Australia.[57] It has also been suggested that the external affairs power can be validly exercised to support a legislative enactment implementing a treaty even if the treaty is void, invalid under international law, concluded in violation of Australia's treaty obligations or otherwise inconsistent with international law[58]

A question may also arise as to whether the external affairs power can sustain the enactment in an anticipatory way of legislation intended to give effect to a treaty before it becomes binding upon Australia.[59]

54 *Horta v Commonwealth* (1994) 181 CLR 183,195-7; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [30] (Gibbs CJ), [23] (Mason J), [14] (Brennan J) & [24] (Stephen J); *R v Burgess, ex parte Henry* (1936) 55 CLR 608, 642 (Latham CJ), 687 (Evatt & McTiernan JJ); *Gerhardy v Brown* [1985] HCA 11, [6] (Wilson J) & [8] (Brennan J); *NSW v The Commonwealth* [1975] HCA 58, [41] (Mason J); *Hempel v Attorney-General (Cth)* (1987) 77 ALR 641, 671 (French J).

55 *The Commonwealth v Tasmania* (1983) 46 ALR 625, 696 (Mason J); *Gerhardy v Brown* [1985] HCA 11, [14] (Dawson J); *Queensland v Commonwealth* [1989] HCA 36, [15] (Dawson J); *Richardson v Forestry Commission* (1988) 164 CLR 261, 320-324 & 327 (Dawson J); *Koowarta v Bjelke-Petersen* [1982] HCA 27, [28] & [31] (Gibbs CJ).

56 *Victoria v Commonwealth* (1996) 138 ALR 129, 146 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

57 *Polites v Commonwealth* (1945) 70 CLR 60, 68-9 (Latham CJ); *Tuitupou v MIMA* (2000) 60 ALD 361, 364 (Carr, Sackville & Nicholson JJ).

58 *Chu Kheng Lim v MILGEA* [1992] HCA 64, [52] (McHugh J); *Horta v Commonwealth* (1994) 181 CLR 183, 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron & McHugh JJ); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [99] (Gummow & Hayne JJ).

59 See further *R v Australian Industrial Court, ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235, 243 (Mason J).

Finally, section 51(xxix) could also be used to implement recommendations or other non-legally binding decisions of international organisations established by treaty to which Australia is a party.[60]

(ii) the legislation gives effect to Australia's obligations under customary international law.[61]

(iii) the subject matter of the legislation affects, or is likely to affect, Australia's relations with other international persons including States.[62]

(iv) the legislation is a law with respect to a matter of 'international concern'.[63] Although a matter of 'international concern' need not be evidenced by signing or ratifying a treaty,[64] a treaty is persuasive evidence that a subject matter is of 'international concern'.[65]

(v) there is a sufficient connection on the particular facts with matters or things that are geographically external to Australia.[66]

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60 On recommendations and draft conventions of the International Labour Organisation, see *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 687 (Evatt & McTiernan JJ) and *Victoria v Commonwealth* (1996) 138 ALR 129, 164 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ). On recommendations of the UN and its subsidiary bodies, see *Commonwealth v Tasmania* (1983) 158 CLR 1, 171-2 (Murphy J). On decisions of the World Heritage Committee, see *Queensland v Commonwealth* (1989) 63 ALJR 473, 476 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

61 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [35] (Stephen J) & [30] (Mason J).

62 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [10] (Brennan J) & [19] (Gibbs CJ); *NSW v Commonwealth* [1975] HCA 58, [81] (Stephen J), [15] (Gibbs J) & [41] (Mason J); *R v Sharkey* (1949) 79 CLR 121, 136-137 (Latham CJ) & 157 (McTiernan J); *McKelvey v Meagher* [1906] HCA 56; *Roche v Kronheimer* (1921) 29 CLR 329, 339 (Higgins J); *R. v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643 (Latham CJ), 658 (Starke J) & 684 (Evatt and McTiernan JJ).

63 See, for example, *Koowarta v Bjelke-Petersen* [1982] HCA 27, [31]-[32], [34] – [35] (Gibbs CJ), [24] - [25] (Stephen J), [13] (Murphy J), [21] (Mason J) & [12] (Brennan J).

64 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 561-2 (Brennan J) & 657-8 (Toohey J).

65 See further *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1, 219-220 (Brennan J), 125-6 (Mason J) & 170-1 (Murphy J); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 669 (Dixon J) & 681-684 (Starke J); *NSW v The Commonwealth* (1975) 135 CLR 337, 390 (Gibbs J) & 470 (Mason J); *Airlines of NSW v NSW (No. 2)* (1965) 113 CLR 54, 152 (Windeyer J).

66 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [19] (Gibbs CJ) & [2] (Murphy J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 528-531 (Mason J), 551 (Brennan J), 599-604 (Deane J), 632-638 (Dawson J), 654 (Toohey J), 695-696 (Gaudron J) & 712-714 (McHugh J). See further *NSW v The Commonwealth* (1975) 135 CLR 337, 360 (Barwick CJ), 470-471 (Mason J) & 497 (Jacobs JJ); *Jolley v Mainka* [1933] HCA 43 (Evatt J); *XYZ v The Commonwealth* [2006] HCA 25, [10] (Gleeson CJ) & [49] (Gummow, Hayne & Crennan JJ) (noting Callinan and Heydon JJ at [206] and Kirby J at [147]).

Although the list of subject-matters falling within 'external affairs' can expand, s.51(xxix), like other paragraphs of s.51, is 'subject to this Constitution' including the express and implied prohibitions found within it.[67] Furthermore, practitioners should not overlook relevant principles of constitutional interpretation. For example, legislation should be interpreted, so far as possible, so as to bring it within the application of constitutional power.[68] Similarly, later Acts inconsistent with earlier enactments will prevail, consistent with ordinary rules of statutory interpretation, irrespective of Australia's treaty obligations.[69]

Recourse to s.51(xxix) may not be as hotly contested by litigants as they had previously been. The essential question in the typical circumstance is whether the relevant legislative provisions are reasonably capable of being considered appropriate and adapted to give effect to Australia's treaty obligations and can accordingly be sustained by the external affairs power.[70]

67 For example, ss. 92 & 116. See further *R. v Burgess; Ex parte Henry* (1936) 55 CLR 608, 658 (Starke J); *Airlines of NSW Pty Ltd v NSW (No. 2)* (1965) 113 CLR 54, 85 (Barwick CJ).

68 Eg *Attorney-General (Vic) v The Commonwealth (the Pharmaceutical Benefits Case)* (1945) 71 CLR 237, 267 (Dixon J).

69 *Chu Kheng Lim v MILGEA* (1992) 176 CLR 1, 74 (McHugh J). See also at 38 (per Brennan, Deane and Dawson JJ) & 52 (Toohey J).

70 *The Queen v Tang* [2008] HCA 39, [34] (Gleeson CJ). See also *Thomas v Mowbray* [2007] HCA 33, [150]-[153] (Gummow & Crennan JJ) & [269]-[294] (Kirby J).

Chapter 3

International Conventions

3.1. Treaties and the Parliamentary Process

Treaty-making in Australia is primarily a matter for the executive branch.[71] Australia's practice on treaty ratification since the mid-to-late 1990s has generally involved tabling treaties in Parliament at least 15 sitting days following signature and before taking legally-binding action (with the exception of urgent or sensitive matters). Treaties are typically accompanied by a National Interest Analysis (NIA) which describes its potential economic, social, cultural, environmental and legal impacts, an assessment of direct costs, any implications for national implementation, the possibility of denunciation or withdrawal and the extent of consultation. Responsibility for preparing each NIA lies with the Department having portfolio responsibility before final clearance by the Department of Foreign Affairs and Trade and the Office of International Law of the Attorney-General's Department. A Treaties Council has also been established. Although not legislatively entrenched, it is considered that these measures 'have greatly improved scrutiny, transparency and consultation in the treaty-making process, and community awareness of treaties'.[72]

The Joint Standing Committee on Treaties (http://www.aph.gov.au/house/committee/jsct/index.htm) inquires into and reports on:

(i) matters arising from treaties, NIAs, proposed treaty actions and Explanatory Statements presented or deemed presented to Parliament;

71 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 153 (Einfeld J).

72 Commonwealth of Australia, Review of the Treaty-Making Process, 1999, [1.1].

(ii) any question relating to a treaty or international instrument, whether or not negotiated to completion, referred to the Committee by Parliament or a Minister; and

(iii) other matters as referred to it by the Minister for Foreign Affairs on such conditions as prescribed.

Generally speaking, it is the Commonwealth of Australia rather than the States which has international legal personality.[73] However, in view of Australia's constitutional arrangements, to give effect to Australia's treaty obligations the Commonwealth depends to some degree upon State and Territory legislation. Australia's efforts during the 1970s and 1980s to insert 'federal clauses' into treaties to which it contemplated becoming a party has now been abandoned. Contemporary efforts are directed towards promoting greater consultation and co-operation between the States and Territories and the Commonwealth.[74] Treaty ratification is generally undertaken by Australia when the law and practice of the Commonwealth and the States are in conformity with that treaty.

Once treaty negotiations are concluded and a final text is about to or has been adopted, Australia may commence a consultation process with interested constituencies to enable it to make an informed decision whether or not to become a party. Part of this process involves undertaking a NIA. The Commonwealth may also engage in public consultation to determine community views on the likely impact of a treaty on Australia. Views are generally sought on the obligations imposed by the treaty, what needs to be done to implement it, likely financial costs and the foreseeable economic, environmental, social and cultural effects of implementation.

3.2. Treaties

A treaty has been defined as 'all agreements made by Australia with other international persons so as to be binding upon Australia and one or more other international persons'.[75] The 1969 Vienna Convention on the Law of Treaties (VCLT) addresses a range of treaty-related issues.[76] It 'was a Convention that had

73 *NSW v Commonwealth* [1975] HCA 58, [51] (Barwick CJ), [3] (McTiernan J) & [10] (Murphy J). See also [66] (Stephen J).

74 Council of Australian Governments, Principles and Procedures for Commonwealth-State/Territory Consultation on Treaties, 14 June 1996.

75 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [4] (Brennan J).

76 Ratified by Australia on 13 June 1974 and entering into force for Australia on 27 January 1980: [1974] Aust TS No 2. See also Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) 25 ILM 543 (not yet in force; instrument of accession deposited for Australia on 16 June 1993).

an almost constitutional significance in that it laid down the basic rules that would govern the procedural aspects of treaty relations as well as the question of the essential validity of treaties that were negotiated'.[77] Practitioners should refer to this instrument for any legal questions involving the interpretation, application, withdrawal and the validity of treaties, the mechanics of treaty formation and the position of third parties.[78] Many of the provisions contained in the VCLT are regarded as declaratory of customary international law.

The VCLT also addresses the question of reservations to treaties and their legal effects (see Figure 1). Australia will make a reservation where Australian laws or policies cannot or should not be altered to accord entirely with the requirements of a treaty.[79] Australia considers that 'it is not appropriate' for treaty monitoring bodies or treaty depositories to assess the validity of reservations.[80]

Every treaty in force to which Australia is a party is binding upon it (the principle of *pacta sunt servanda*)[81] and must be adhered to or performed by Australia in good faith.[82] Australia also respects the obligation not to defeat the object and purpose of a

77 Statement by the Australian Representative upon Conclusion of the 1969 Vienna Convention on the Law of Treaties, UN Conference on the Law of Treaties, Second Sess, Vienna, 9 April – 22 May 1969, Official Records, UN Doc A/CONF.39/11/Add.1, p.317.

78 On the question of authoritative languages, see *R v Burgess* [1936] HCA 52 (per Starke J); *The Queen v Tang* [2008] HCA 39, [30] footnote 22 (Gleeson CJ). On the validity of concluding a treaty which potentially conflicts with a peremptory norm of general international law, see *Horta v Commonwealth* [1994] HCA 32; *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [166] (Beaumont J).

79 The Department of Foreign Affairs, Australia and International Treaty Making, Canberra, 1994.

80 Statement by M. Goldsmith, Adviser of Australia to the United Nations, Unilateral Acts of States and Reservations to Treaties, 1 November 2006.

81 '[T]he rule *pacta sunt servanda* was a fundamental principle of the law of treaties': Statement by the Australian Representative to the UN Conference on the Law of Treaties, First Sess, Vienna, 26 March – 24 May 1968, Official Records, UN Doc A/CONF.39/11, p.156, [47]. 'All countries were vitally concerned in upholding the principle of *pacta sunt servanda*. Moreover, the small and middle-ranking states had a particular interest in a soundly based system of international treaty law. Of course, the more powerful states were also interested, but the smaller ones, being in a weaker position to secure redress, were more dependent on the sanctity of treaties and liable to suffer from anything prejudicial to orderly international relations': Statement by the Australian Representative to the UN Conference on the Law of Treaties, First Sess, Vienna, 26 March – 24 May 1968, Official Records, UN Doc A/CONF.39/11, p.14, [29].

82 See *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1, 219-220 (Brennan J).

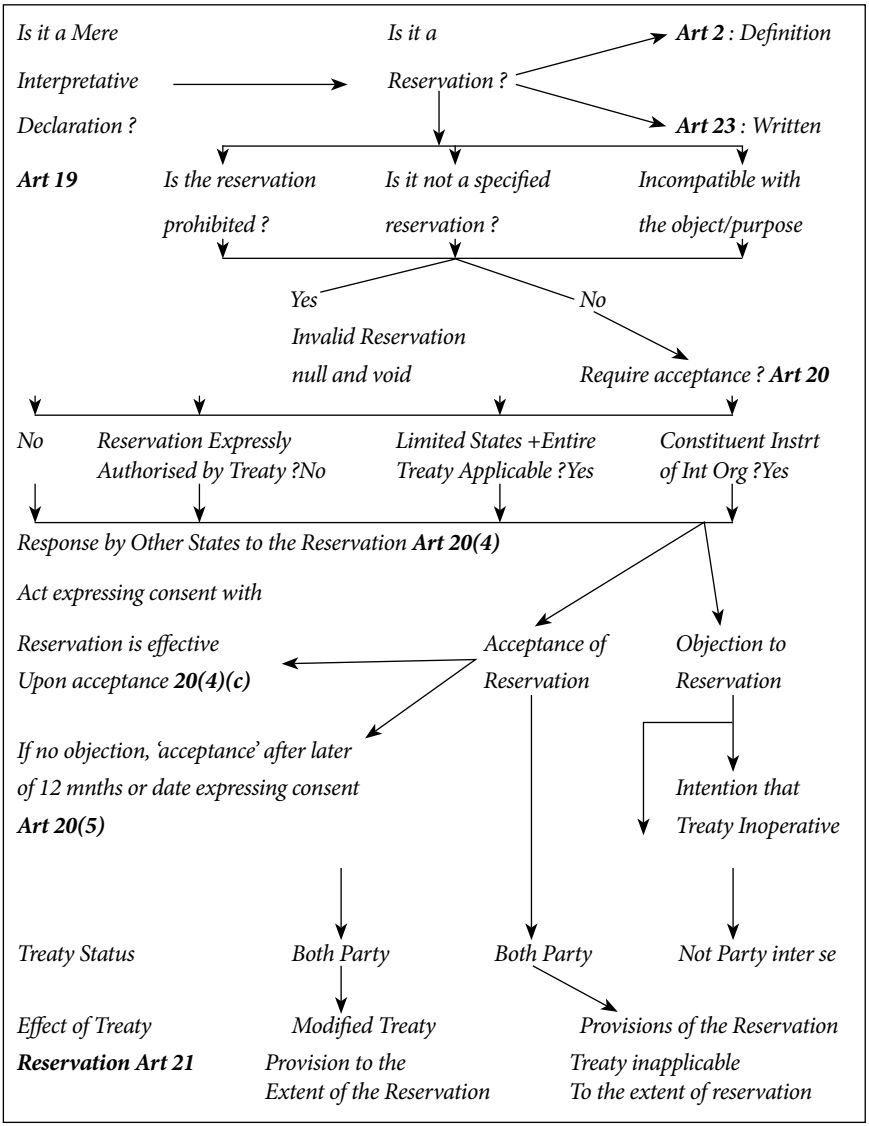

Figure 1 Summary Treatment for Reservations

treaty to which it is a signatory but has yet to enter into force.[83] It is Australian policy not to become a signatory unless it has the intention to ratify it.[84]

Ratification is a significant step for Australia because '[h]owever loosely such obligations may be defined, it is apparent that Australia, by depositing its instrument of ratification, bound itself to observe the terms of the Convention and assumed real and substantive obligations'.[85] The same conclusion has been expressed by the executive branch.[86] Ratification is a 'positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention].'[87] Thus 'an international responsibility to the contracting State parties or other international institutions has been created.'[88]

3.3. Treaties and Australian Law

Australian courts may be reluctant to consider treaties during proceedings. The treaty may not provide assistance in resolving questions of national law, the imprecise, exhortatory or aspirational language of a treaty may not provide a sufficiently exacting standard for judicial review and the treaty may take Australian courts into areas in which they are ill-equipped to deal.

Practitioners should consider the following points:

(i) Has the treaty entered into force generally and more particularly for Australia? Australia must be a party to a treaty which has entered into force before its provisions are potentially applicable. Practitioners should: consult the UN Treaty Series; consult the Australian Treaty Series; identify whether the treaty has been subsequently amended by any subsequent protocol; identify whether Australia lodged any reservations or declarations and whether these have been withdrawn; consider whether

83 Statement by Australian Minister for Foreign Affairs, Senator Evans, House of Representatives, Hansard, 1988 No 164, p.3751.

84 Senate Legal and Constitutional Reference Committees, Trick or Treaty? p.33.

85 *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1 (per Deane J).

86 'Ratification is a message sent by the government to the international community that it intends to observe the provisions of a treaty': Minister for Foreign Affairs/Attorney-General, Joint Statement of 10 May 1995, International Treaties and the High Court Decision in *Teoh*, No M44, reprinted in (1996) 17 *AYBIL* 552-3.

87 *MIEA v Teoh* (1995) 183 CLR 273, [34] (Mason CJ & Deane J). See also [37] (McHugh J).

88 *Re MIMIA; ex parte Lam* [2003] HCA 6, [98] (McHugh & Gummow JJ).

the treaty has been legislatively implemented; collect relevant explanatory materials (for example, any relevant NIA, second reading speeches).

(ii) What is the statutory context? When interpreting legislation, reference may be made to treaties only in certain circumstances. A treaty provision must be capable of providing assistance in construing the meaning and effect of a national legal provision.[89] International law may not be of assistance in construing legislation where there is no ambiguity or merely reiterates the position under Australian law.[90] The prevailing view is that the Australian Constitution is not to be interpreted by reference to international law.[91]

(iii) Has the treaty been incorporated, wholly or partly, into Australian law and, if so, to what extent?

A treaty to which Australia is a party may be incorporated into Australian law:

(i) To define legislative words or expressions. Treaty terms may be used to define legislative words or expressions.[92] The effect of this is that, absent any contrary intention, '[s]uch a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law.'[93] However, a treaty cannot qualify or modify the meaning of legislative words or expressions which are otherwise clear.[94]

(ii) To incorporate the treaty by reference. Legislation may stipulate that a treaty is to have effect under Australian law.[95] This occurs to varying degrees as follows:

(a) Legislation expressly incorporates the treaty text. Legislative provisions may be intended to implement the articles of a treaty

89 *Al-Kateb v Godwin* [2004] HCA 37, [238] (Hayne J).

90 See *AMS v AIF* [1999] HCA 26, [50] (Gleeson CJ, McHugh & Gummow JJ), [168]-[169] (Kirby J), [222] (Hayne J) & [281] (Callinan J); *Cattanach v Melchior* [2003] HCA 38, [35] (Gleeson CJ).

91 *Polites v Commonwealth* (1945) 70 CLR 60, 78 (Dixon J); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 385 [98] (Gummow & Hayne JJ); *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh & Gummow JJ); *Al-Kateb v Godwin* [2004] HCA 37, [62]-[63], [66], [68] & [71] (McHugh J). The contrary view has also been expressed, most frequently by Kirby J: see, for example, *Al-Kateb v Godwin* [2004] HCA 37, [175] & [190].

92 For example, legislation may use a definition contained in a treaty: *Gerhardy v Brown* [1985] HCA 11, [12] (Dawson J).

93 *Applicant A v MIEA* (1997) 190 CLR 225, 239-40 (Dawson J).

94 *Yager v The Queen* (1977) 139 CLR 28, [10] (Mason J).

95 *Jago v District Court of NSW* (1988) 12 NSWLR 558 (Samuels JA).

when the statute refers to the treaty[96] or where the provisions precisely or substantially reflect those articles.[97] Where legislation transposes treaty text into legislation so as to enact it as part of Australian law, the prima facie Parliamentary intention is that the transposed text should bear the same meaning in the legislation as it bears in the treaty.[98] To give it that meaning, the rules applicable to treaty interpretation must be applied to the transposed text and the rules generally applicable to statutory interpretation give way.[99] However, it is the legislative provision rather than the treaty provision which is ostensibly given effect.[100]

(b) The treaty text is annexed or scheduled to an Act. Annexing or scheduling treaty text to legislation suggests a Parliamentary intention to grant it a privileged status. However, this does not create justiciable rights for individuals.[101] While this appears to be the prevailing view,[102] it is 'strongly arguable' that scheduling a treaty to legislation may render it a source of Australian law, particularly where the exercise of discretion is contemplated.[103]

(c) The legislation may stipulate in its object and purpose that its provisions are intended to be construed consistently with a treaty.[104] Preambular words which refer to a treaty do not make

96 See, for example, s.36, *Migration Act 1958* (Cth) and the 1951 Convention relating to the Status of Refugees [1954] ATS 5: *NBGM v MIMA* [2006] HCA 54, [14] (Kirby J).

97 *Tasmanian Wilderness Society Inc v Fraser* [1982] HCA 37, [4] (Mason J); *NSW v Commonwealth* [1975] HCA 58, [11] (McTiernan J).

98 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 124 (Gummow J).

99 *Applicant A v MIMA* (1997) 190 CLR 225, 230-231 (Brennan J); *Koowarta v Bjelke-Petersen* [1982] HCA 27, [25] – [26] (Brennan J); *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 148 (Einfeld J); *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 32 ALR 609, 618 (Mason and Wilson JJ, Gibbs & Aickin JJ concurring).

100 *Bluett v Fadden* (1956) 56 SR (NSW) 254, 261 (McLelland J).

101 *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ & McHugh J) & 359-360 (Toohey J).

102 *Kioa v West* [1985] HCA 81, [40] (Brennan J); *Minogue v Williams* [2000] FCA 125, [21]-[25] (Ryan, Merkel & Goldberg JJ).

103 See *Re Jane* (1988) 94 FLR 1 and *Re Marion* (1990) 14 Fam LR 427, 451. See also *R v Stolpe* (1987) 10 *AYBIL* 512 (Robson J, NSW Dist Ct); *R v Carbone* (1995) 82 A Crim R 1, 17 (Legoe AJ); *Collins v South Australia* [1999] SASC 257 (Millhouse J).

104 *The Queen v Tang* [2008] HCA 39, [110] (Kirby J); *Bertran v Honourable Amanda Vanstone* [1999] FCA 1117, [26].

that treaty part of Australian law.[105] However, a recital indicating the desirability that Australian law should conform with treaty provisions 'may supply a ground for contending that the Minister should at least take into account the principles expressed therein' when exercising a power.[106] The Parliamentary intention to act consistently with Australia's international obligations is clear.[107]

(d) The treaty is part of the extrinsic materials to legislation. When interpreting legislation, if any material not forming part of the Act is capable of assisting in ascertaining its meaning, then consideration may be given to that material to confirm that the ordinary meaning is that conveyed by the text, taking into account the legislative context and purpose or object, or to determine its meaning when the provision is ambiguous or obscure or where the ordinary textual meaning leads to a manifestly absurd or unreasonable result.[108] Extrinsic materials used during statutory interpretation include explanatory memoranda, second reading speeches,[109] and treaties or other international agreements referred to within legislation.[110]

(e) Legislation is enacted in anticipation of ratifying a treaty. Where legislation is ambiguous, and it is apparent that it adopted the nomenclature of a treaty in anticipation of subsequent ratification, then it is permissible to refer to the treaty to resolve the ambiguity, but not to displace the plain words of the legislation.[111]

105 *Kioa v West* [1985] HCA 81, [21] (Gibbs CJ).

106 *Sezdirmezoglu v Acting MIEA* (1983) 74 FLR 348 (Smithers J).

107 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 385 (McHugh, Gummow, Kirby & Hayne JJ). See, for example, s.4, *Fisheries Act 1967-78* (Cth).

108 Section 15AB(1), *Acts Interpretation Act 1901* (Cth).

109 Second reading speeches which invoke international legal principles may be unable to overcome statutory deficiencies: see further *Re Bolton; Ex Parte Douglas Beane* [1987] HCA 12, [6] (Mason CJ, Wilson & Dawson JJ), [6] (Deane J) & [24] (Toohey J).

110 Section 15AB(2), *Acts Interpretation Act 1901* (Cth). It may be sufficient to attract s.15AB that the agreement, whilst 'not referred to' in the statute itself, was referred to in the Second Reading Speech: *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 124 (Gummow J) citing *ICI Australia Operations Pty Ltd v Fraser* (1992) 106 ALR 257, 262-3. See also *MIMIA v B* [2004] HCA 20, [222] (Callinan J).

111 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 124 (Gummow J) citing *D and R Henderson (Mfg) Pty Ltd v Collector of Customs (NSW)* (1974) 48 ALJR 132, 135 (Mason J) aff'd 49 ALJR 335; *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112, 120.

3.4. Treaty Interpretation

Practitioners may be called upon to offer (an) interpretation(s) of a treaty. The VCLT generally applies when Australian courts are called upon to interpret a treaty.[112] Australian courts follow the approach envisaged by Articles 31 and 32 (reflected in Figure 2).[113] Furthermore, the provisions of the VCLT, although not part of Australian law through legislative implementation, have been accepted as codifying customary international law on the question of treaty interpretation and have been applied by Australian courts as such.[114]

Treaty interpretation is a 'holistic exercise'. Primacy is given to a treaty's text but the context and object and purpose of the treaty are also considered in ascertaining its true meaning.[115] The starting point for treaty interpretation is always the text itself. This 'is consistent with the basic principles of interpretation that courts should focus their attention on the 'four corners of the actual text' in discerning the meaning of that text'.[116] When construing treaty provisions:

> '(i) it is to be remembered that the terms used are not those drafted by Parliamentary Counsel, but are the result of negotiations between a number of contracting state parties with various legal systems and methods of legislative drafting;
>
> (ii) if the text or one of the texts is not in English, a question may arise as to the extent to which the municipal court takes judicial notice of the foreign language which has been used for what is now part of the municipal law; and

112 *Applicant A v MIEA* (1997) 190 CLR 225, 251-252 (McHugh J); *Minister of Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305 (Gummow J).

113 *NBGM v MIMA* [2006] HCA 54, [11] (Kirby J); *MIMA v Respondents* S152/2003 [2004] HCA 18, [67] (McHugh J); *Gerhardy v Brown* [1985] HCA 11, [17] (Brennan J); *In the Marriage of Hanbury-Brown* (1996) 130 FLR 252; *Koowarta v Bjelke-Petersen* [1982] HCA 27, [26] (Brennan J); *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 148 (Einfeld J).

114 *Commonwealth v Tasmania* (1983) 46 ALR 625, 663 (Gibbs CJ), 734 (Murphy J) & 774 (Brennan J); *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 349 (Dawson J) & 356 (McHugh J); *Applicant A v MIEA* (1997) 190 CLR 225, 277 footnote 189 (Gummow J); *MIMIA v QAAH of 2004* [2006] HCA 53, [34] (Gummow ACJ, Callinan, Heydon & Crennan JJ) & [74] (Kirby J).

115 *Applicant A v MIEA* (1997) 190 CLR 225, 230 (Brennan CJ agreeing with McHugh J), 240 (Dawson J), 251-56 (McHugh J), 277 (Gummow J agreeing with McHugh). See also *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* (2002) 127 FCR 92, 100 [26].

116 *A v MIEA* (1997) 190 CLR 225, 255-6 (McHugh J).

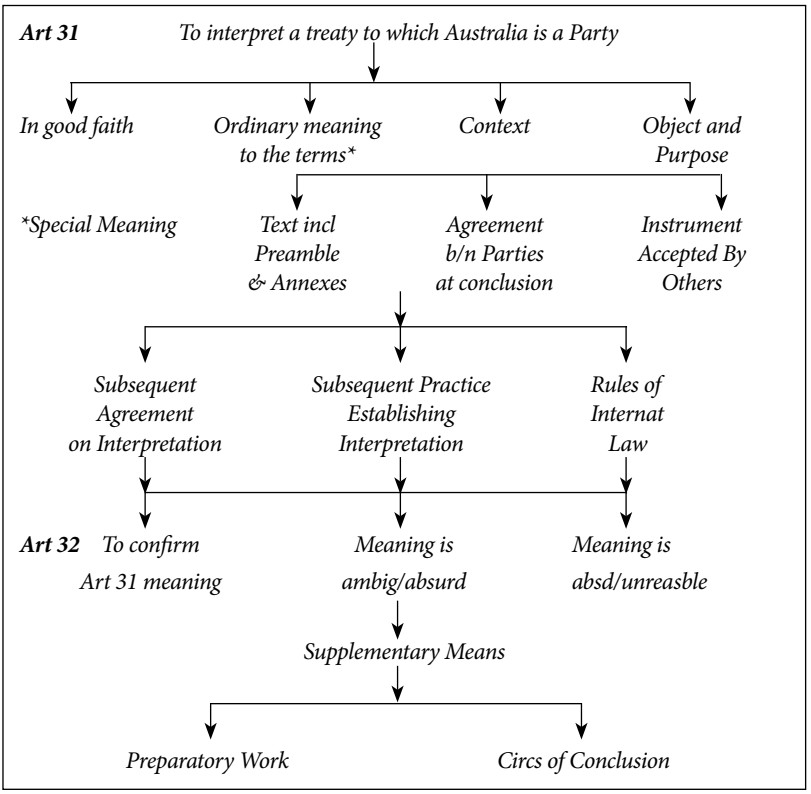

Figure 2 The Interpretation of Treaties

(iii) the applicable rules of interpretation are those recognised by customary international law, as codified by the Vienna Convention on the Law of Treaties.'[117]

Practitioners should not overlook familiar rules of statutory construction, including the application of the *Acts Interpretation Act 1901* (Cth). However, note that the canons of construction ordinarily applicable to legislation can fail as a guide to the proper interpretation of a treaty.[118] Practitioners should anticipate that, as a product

117 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 125 (Gummow J).

118 *Justus Scharff & Co v Hagen* (1922) 22 SR 612 (Cullen CJ). See to identical effect *Re Frederic Gerhard (No 2)* (1901) 27 VLR 484 (A'Beckett J).

of diplomatic negotiation and political compromise, treaties are not drafted with the same degree of precision as legislation. Accordingly 'technical principles of common law construction are to be disregarded in construing the text'.[119] Treaties should be interpreted in a liberal manner 'unconstrained by technical rules of [national] law, or by [national] legal precedent, but on broad principles of general acceptation.'[120] The lack of precision, however, does not mean any absence of international obligation.[121]

The preparatory work or travaux préparatoires to a treaty includes the drafting records, negotiating history, earlier drafts and reports. The provisions of the VCLT reflect the position under customary international law.[122] Australian courts have had regard to the preparatory work.[123] Reference thereto is a legitimate exercise when determining the meaning to be ascribed to treaty provisions.[124] However, resort to the travaux may not always be of assistance.[125] Such materials may be partial, incomplete or misleading and thus a cautious approach is advisable.[126]

Assistance may also be obtained from extrinsic sources such as the form in which a treaty is drafted, its subject-matter, the mischief that it addresses, the negotiating history and comparisons with earlier or amending instruments relating to the same subject.[127] The practice of other States can provide influential examples on how a treaty may be interpreted to ensure compliance by Australia with its obligations.[128] Treaties

119 *Applicant A v MIEA* (1997) 190 CLR 225, 240 (Dawson J).

120 *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce), cited with approval in *The Shipping Corporation of India Ltd v Gamlen Chemical Co. (A/Asia) Pty Ltd* (1980) 147 CLR 142, 159 (Mason & Wilson JJ); *Applicant A v MIEA* (1997) 190 CLR 225, 240 (Dawson J) & 255 (McHugh J); *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* (2002) 127 FCR 92, 100 [26]; *Morrison v Peacock* (2002) 210 CLR 274, [16] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

121 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 46 ALR 625, 807 (Deane J).

122 *Qantas Airways Ltd v SS Pharmaceutical Co Ltd* [1991] 1 Lloyd's Rep 288, 298-9 (Kirby P).

123 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161, 186 [70]-[71] (McHugh J); *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, 550 [80].

124 *MIMIA v Al Masri* [2003] FCAFC 70, [152] (Black CJ, Sundberg & Weinberg JJ); *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 (French J).

125 *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 46 ALR 625, 699 (Mason J) & 775 (Brennan J); *The Queen v Tang* [2008] HCA 39, [25] (Gleeson CJ) & [137] (Hayne J).

126 Preparatory works cannot be used to create a legislative ambiguity which is then resolved by reference to them: *Barry R Liggins Pty Ltd v Comptroller-General of Customs and Excise* (1991) 103 ALR 565, 573 (Beaumont J, Lockhart & Gummow JJ concurring).

127 *Applicant A v MIEA* (1997) 190 CLR 225, 231 (Brennan J).

128 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 150 (Einfeld J).

are also to be construed in the light of any particular international legal principles or particular standards accepted by the international community in relation to the topic with which they deal.[129]

Practitioners should strive for consistency in treaty interpretation with the position taken by other States. Regard may be had to the construction of a treaty given by institutions established under that instrument and responsible for monitoring implementation by State Parties.[130] Consideration may be given to the position taken by other national courts, although where there are divergent interpretations, Australian courts will be compelled to form their own view. It is also a 'proper interpretive consideration' to consider how other States have legislatively implemented the treaty obligation in question.[131]

Australian courts have had regard to commentaries published after a treaty's conclusion.[132] Academic commentary may provide a convenient analysis or review of the travaux.[133] The persuasive value generally depends upon the eminence, experience and reputation of the author.

3.5. Treaties and Australian Courts

When construing legislation in light of a treaty, Australian courts generally take the following approach:

(i) The provisions of a treaty to which Australia is a party do not form part of Australian law unless and to the extent they have been legislatively implemented.[134] However, there is a limited class of treaties, including

129 *Riley v Commonwealth* (1985) 159 CLR 1 (per Deane J).

130 On the views of the UN Human Rights Committee, see *MIMIA v Al Masri* [2003] FCAFC 70, [148] (Black CJ, Sundberg and Weinberg JJ). See also *Johnson v Johnson* (2000) 201 CLR 488, 501-502 (Kirby J); *Commonwealth v Hamilton* (2000) 108 FCR 378, 387 (Katz J).

131 *The Queen v Tang* [2008] HCA 39, [120] (Kirby J).

132 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 122 (Gummow J).

133 *MIMIA v Al Masri* [2003] FCAFC 70, [143]-[145] (Black CJ, Sundberg & Weinberg JJ).

134 Eg *MIEA v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ & Deane J), 304 (Gaudron J) & 298, 301 (Toohey J); *Kioa v West* (1985) 159 CLR 550, 570-571 (Gibbs CJ); *Kruger v Commonwealth of Australia* (1997) 190 CLR 1 (per Dawson J); *Ruddock v Vadarlis* [2001] FCA 1329, [203] (French J).

peace treaties,[135] treaties limiting belligerent rights during maritime warfare, treaties concluded within prerogative power and boundary treaties, which may be directly applicable without implementing legislation.

(ii) A treaty to which Australia is a party does not grant rights for or impose obligations upon members of the Australian community under Australian law. It is well-established that treaties do not generally have 'direct effect' or are 'self-executing' under Australia law. This proposition has been affirmed judicially[136] and in other contexts.[137] Thus an unincorporated treaty cannot be relied upon to create directly enforceable rights or deprive private actors of existing ones.

(iii) A treaty cannot be used to qualify or modify an express statutory definition or be referred to for the purposes of interpretation where it is not apparent that the legislation was intended to give effect to that treaty.[138] The legislative terms and their history may indicate that Parliament did not intend to implement a treaty.[139] Australia is free to implement a treaty 'in its own way' so that it is 'accommodated to the local scene', in which case Australian courts should interpret legislation in a method narrower than the manner by which that treaty is interpreted between States.[140]

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135 Argument of Sir Robert Garran, Solicitor-General of Australia, in *Roche v Kronheimer* (1921) 29 CLR 329, 333-4. See also *Chow Hung Ching v R* (1948) 77 CLR 449, 478 (Dixon J); *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ & Gibbs J); *Koowarta v Bjelke-Petersen* (1982) 56 ALJR 625, 648 (Mason J).

136 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 644 (Latham CJ) & 669 (Dixon J); *Chow Hung Ching v The King* (1949) 77 CLR 449, 478 (Dixon J); *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ & Gibbs J); *Simsek v McPhee* (1982) 56 ALJR 277, 280 (Stephen J); *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417, 434 (Gibbs CJ), 449 (Stephen J) & 459 (Mason J); *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 (Mason J); *Dietrich v The Queen* (1992) 177 CLR 292, [17]-[18] (Mason CJ & McHugh J), [24] (Dawson J) & [6], [23]-[24] (Toohey J); *MIEA v Teoh* (1995) 183 CLR 273, 287 (Mason CJ & Deane J); *Victoria v Commonwealth* (1996) 187 CLR 416, 480-482 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ); *Sinanovic v The Queen* (1998) 154 ALR 702, 707; *Povey v Qantas Airways Ltd* (2005) 79 ALJR 1215, [12]; *Re MIMA; Ex parte Lam* [2003] HCA 6, [99] (McHugh & Gummow JJ); *Minogue v HREOC* [1999] FCA 85, [35] (Sackville, North & Kenny JJ); *Nulyarimma v Thompson* [1999] FCA 1192, [220] (Merkel J).

137 'Australia's Answers to Questions asked by the European Committee on Legal Co-operation of the Council of Europe in a Survey of State Practice on Treaty-making (1986)' (1991) 11 *AYBIL* 500.

138 *Yager v R* (1977) 139 CLR 28, 43-4 (Mason J).

139 *MIMIA v B* [2004] HCA 20, [220]-[221] (Callinan J).

140 *Scaniainventor v Commissioner of Patents* (1981) 36 ALR 101, 106.

(iv) Where legislation purports to give effect to a treaty, Australian courts may look at the treaty as an aid to interpretation in order to resolve any legislative ambiguity.[141] It is presumed that Parliament intends to give effect to Australia's international legal obligations. However, judicial opinion may differ on whether legislative ambiguity is discernable,[142] as well as the degree of ambiguity required before regard may be had to international law.[143]

(v) Legislation is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with established rules of international law.[144] It is well-accepted that if statutory language is susceptible to a construction which is consistent with the terms of a treaty and the obligations imposed upon Australia, then that construction should prevail.[145] The presumption of compliance or compatibility provides that consistency with Australia's international obligations will be assumed in

141 *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49, 54; *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167, 181; *Kruger v Commonwealth of Australia* (1997) 190 CLR 1 (per Dawson J); *Bashford v Information Australia (Newsletters) Pty Ltd* [2004] HCA 5, [179] (Kirby J). On s.15AB, *Acts Interpretation Act 1901* (Cth), see *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529, 535 (Gummow J).

142 For an example of no legislative ambiguity, see *Australian Paper Manufacturers Ltd v CIL Inc* (1981) 37 ALR 289, 293 (Stephen J, Mason & Wilson JJ concurring).

143 *Chu Kheng Lim v MILGEA* (1992) 176 CLR 1, 38 (Brennan, Deane & Dawson JJ); *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 274-6 (Kirby P); *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683, 692 (Kirby P, Campbell & James JJ agreeing); *Chen v MIEA* (1994) 123 ALR 126; *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 129 ALR 401, 411; *Jones v Dodd* (1999) 73 SASR 328, 337-8 (Perry J, Millhouse & Nyland JJ agreeing); *Nordland Papier AG v Anti-Dumping Authority* (1999) 161 ALR 120, 127. On human rights treaties, see *Austin v The Commonwealth of Australia* [2003] HCA 3, [252] (Kirby J). In *Behrooz v Secretary of the DIMIA* [2004] HCA 36, Kirby J at [126]-[127] considered that this canon of construction could be applied in the absence of legislative ambiguity.

144 *MIEA v Teoh* (1995) 183 CLR 273, 287-8 (Mason CJ & Deane J); *Kruger v Commonwealth of Australia* (1997) 190 CLR 1 (per Dawson J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow & Hayne JJ); *AMS v AIF* [1999] HCA 26, [50] (Gleeson CJ, McHugh & Gummow JJ); *Re MIMA; Ex parte Lam* [2003] HCA 6, [100] (McHugh & Gummow JJ); *MIMIA v QAAH of 2004* [2006] HCA 53, [145] (Kirby J); *Jago v District Court of NSW* (1988) 12 NSWLR 558 (Kirby P).

145 *MIMIA v Al Khafaji* [2004] HCA 38, [27] (Kirby J); *MIMIA v VFAD of 2002* (2003) 196 ALR 111, [114]; *MIMIA v Al Masri* [2003] FCAFC 70, [140] & [155] (Black CJ, Sundberg & Weinberg JJ); *MIEA v Ah Hin Teoh* (1995) 183 CLR 273, 287-8 (Mason CJ and Deane J); *Polites v Commonwealth* (1945) 70 CLR 60, 77 (Dixon J); *Jumbunna Coal Mine NL v Victorian Coal Miners' Assoc* (1908) 6 CLR 309, 363 (O'Connor J).

the absence of clear words to the contrary.[146] Thus, for legislation enacted after or in anticipation of treaty ratification, Parliament is intended to legislate consistently with its existing international obligations.[147] It is more controversial whether Parliament will have intended to legislate contrary to unincorporated treaty obligations.

(vi) Effect will be given to clear and unambiguous legislation even if that may be inconsistent with or contrary to international law.[148] Australian courts will attempt to avoid constructions which could occasion a breach of Australia's international obligations.[149] However, an interpretation or application of Australian law may unavoidably put Australia in breach of its international obligations and becomes a matter for the executive. Legislation otherwise within Commonwealth power may not become invalid simply because it conflicts with international law.

(vii) Human rights and fundamental freedoms can only be curtailed or abrogated by clear and specific words. It is well-accepted that Australian courts will not impute to Parliament an intention to abrogate or curtail certain human rights or fundamental freedoms, including rights and privileges recognised under the common law, unless such an intention is clearly manifested by unambiguous and unmistakable language.[150] General words will not suffice. Australian courts will look for a clear indication that Parliament has directed its attention to the rights or

146 *Brown v Classification Review Board* (1998) 154 ALR 67, 78; *Polites v Commonwealth* [1945] HCA 3 (per Latham CJ).

147 *MIEA v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ & Deane J).

148 *Polites v Commonwealth* [1945] HCA 3 (per Latham CJ) (Parliament assumes 'the risk of international complications') approved in *Meyer Heine Pty Ltd v China Navigation Co Ltd* [1966] ALR 191; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 204; *Riley v Commonwealth* (1985) 62 ALR 497; *Kartinyeri v Commonwealth* [1998] HCA 22, [97] (Gummow & Hayne JJ); *Al-Kateb v Godwin* [2004] HCA 37, [298] (Callinan J).

149 *Behrooz v Secretary of the DIMIA* [2004] HCA 36, [131]-[132] (Kirby J).

150 *Al-Kateb v Godwin* [2004] HCA 37, [19] (Gleeson CJ) & [241] (Hayne J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30] (Gleeson CJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow & Hayne JJ); *Coco v The Queen* (1994) 179 CLR 427, [13] (Mason CJ, Brennan, Gaudron & McHugh JJ) & [2] (Deane & Dawson JJ); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 12 (Mason CJ); *Bropho v Western Australia* [1990] HCA 24, [13] (Mason CJ, Deane, Dawson, Toohey, Gaudron & McHugh JJ); *Hamilton v Oades* (1989) 166 CLR 486, 495, 500; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *Baker v Campbell* (1983) 153 CLR 52, 96, 116 & 123; *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *X v MIMA* [2002] FCA 56, [26] (Gray J).

freedoms in question and consciously decided upon abrogation or curtailment. It is also appropriate to consider the fundamental nature of the right and the extent to which abrogation or curtailment may occur: the more serious the interference, the clearer the expression of intention to bring about that interference must be.[151] This approach is consistent with the principle of legality which provides that general words in legislation should be construed in accordance with fundamental human rights. Such a rule of construction has been applied by Australian courts in the context of protecting property rights,[152] personal liberty[153] and the privilege against self-incrimination.[154] While the balance between public interest and individual freedom is struck by Parliament, Australian courts can enhance the Parliamentary process by securing greater attention to the impact of proposed legislation upon fundamental rights.

3.6. Treaties and Australian Common Law

International law also interacts with interpreting the content of Australian common law. For example, well-settled common law principles cannot be modified by an unincorporated treaty[155] and Australian courts will act with due circumspection.[156] However, reference may be made to international law in certain circumstances. The broad and generally accepted view is that international law is a legitimate guide to developing the common law.[157] Judicial opinions may differ on whether 'development' of the common law is desirable in a particular case.[158] The narrower view is that

151 *MIMIA v Al Masri* [2003] FCAFC 70, [92] (Black CJ, Sundberg & Weinberg JJ).

152 *Durham Holdings Pty Ltd v NSW* [2001] HCA 7, [28] (Kirby J).

153 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J). See also *Williams v The Queen* (1986) 161 CLR 278, 292 (Mason & Brennan JJ); *MIMIA v VFAD of 2002* [2002] FCAFC 390, [113]-[114] (Black CJ, Sundberg & Weinberg JJ).

154 *Sorby v Commonwealth* [1983] HCA 10, [1] (Murphy J).

155 *R v Sandford* (1994) 33 NSWLR 172.

156 *MIEA v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ & Deane J).

157 *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 28-9 (Brennan J). See also *MIEA v Teoh* (1995) 183 CLR 273, 288 (Mason CJ & Deane J); *Jago v Judges of the District Court of NSW* (1988) 12 NSWLR 558, 569 (Kirby P); *The Commonwealth v Yarmirr* [2001] HCA 56, [297] (Kirby J).

158 *Western Australia v Commonwealth (the Native Title Case)* (1995) 183 CLR 373, [486] (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); *Western Australia v Ward* (2002) 191 ALR 1 (Callinan J); *Dietrich v R* [1992] HCA 57, [24]; *Jago v Judges of the District Court of NSW* (1988) 12 NSWLR 558, 582 (Samuels JA).

international law is limited to filling 'lacuna' or addressing 'ambiguity' within the common law.[159]

3.7. Additional Resources

The Australian Treaties Database is an online research guide to the full text of treaties to which Australia is a signatory or where treaty action has been undertaken. Its administrator can be contacted at treaties@dfat.gov.au.

Treaty texts are added to the Australian Treaties Library on the Australasian Legal Information Institute (AustLII) database (www.austlii.edu.au). The Library also includes national interest analyses, proposed treaty action and treaty related material. 'Instruments of less than treaty status' are relatively more difficult to locate and an incomplete list may be available through DFAT. Implementing legislation giving effect to treaty instruments is listed in the Australian Yearbook of International Law. The Joint Standing Committee on Treaties also issues reports describing the treaties tabled during a given period.

159 *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J) & 360 (Toohey J); *MIEA v Teoh* (1995) 183 CLR 273, 315 (McHugh J); *Cachia v Hanes* (1991) 23 NSWLR 304, 313 (Kirby P); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

Chapter 4

Other Sources of International Law

4.1. Customary International Law

Customary or general international law is the general practice of States accepted as law by them. It consists of two elements: (i) the uniform, widespread and consistent practice of States over a period of time; and (ii) the belief by States that such conduct is required because a rule of law renders it obligatory (*opinio juris sive necessitates*).

These elements have been recognised by Australian courts as establishing customary international law.[160] Australian courts also generally apply the correct methodology for determining rules of customary international law.[161] For example, the legislation of other States has been identified as evidence of State practice.[162] Australian courts have considered customary international legal rules such as the prohibition against committing crimes against humanity,[163] respect for fundamental human rights,[164] the right of 'innocent passage' under the international law of the sea[165] and the prohibition against genocide.[166]

160 *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 559-60, 562-3 (Brennan J) & 674 (Toohey J).

161 For example, see the approach of Dixon J in *Chow Hung Ching v R* (1949) 77 CLR 449; *Koowarta v Bjelke-Petersen* [1982] HCA 27, [35] (Stephen J) ('customary international law, as both created and evidenced by state practice and as expounded by jurists and eminent publicists').

162 Eg *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 (per Toohey J).

163 *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 (per Toohey J).

164 On arbitrary or unlawful interference with privacy, family, home or correspondence, see *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, [115] fn 129 (Kirby J).

165 *The Commonwealth v Yarmirr* (2001) 208 CLR 1, [58]; *Re The Maritime Union of Australia & Ors; Ex parte CSL Pacific Shipping Inc* [2003] HCA 43, [46]-[48] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan & Heydon JJ).

166 *Kruger v Commonwealth of Australia* (1997) 190 CLR 1 (especially Dawson, Toohey & Gummow JJ).

Conflicts arising between customary international legal rules can be resolved by resort to interpretative maxims (for example, the later in time prevails and lex specialis prevailing over lex generalis).

The highest form of a customary international legal rule is a rule of *jus cogens*.[167] Australian courts[168] and others[169] have acknowledged that certain customary international law rules may attain that status. These rules include the prohibition against genocide[170] and the prohibition against slavery.[171]

The relationship between customary international law and Australian law can be described in terms of:

(i) the doctrine of transformation or adoption. Customary international law becomes a part of Australian law only when formally adopted or positively recognised by Parliament or its courts through legislation or the common law, thus becoming transformed from international into national law.[172]

(ii) the doctrine of automatic incorporation. Customary international law is automatically a part of or a 'source' of Australian law unless inconsistent with a legislative provision or common law rule to the contrary.[173]

Australia has not clearly adopted either approach.[174] For example, it has been stated that customary international law automatically forms part of Australian law.[175]

167 Defined in Article 53, Vienna Convention on the Law of Treaties [1974] Aust TS No 2.

168 Eg *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 1192, [57] (Whitlam J).

169 'Rules could only be regarded as having that status if there was general agreement on the part of the international community as a whole': Statement by the Australian Representative at the UN Conference on the Law of Treaties, First Sess, Vienna, 26 March – 24 May 1968, Official Records, UN Doc A/CONF.39/11, p387, [16].

170 *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 1192, [18] (Wilcox J), [57] (Whitlam J) & [81] (Merkel J).

171 *The Queen v Tang* [2008] HCA 39, [111] (Kirby J).

172 For an example of legislation implementing a customary international legal rule, see *Chen Yin Ten v Little* (1976) 11 ALR 353, 357 (Jackson J).

173 *Chow Hung Ching v R* [1948] HCA 37, [9] (Starke J).

174 See further *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 203-4 (Gibbs CJ); *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 1192, [23] (Wilcox J) & [84] and [131] (Merkel J); Mason A., 'International Law as a Source of Domestic Law', in Opeskin B. & Rothwell D., 'International Law and Australian Federalism', Melbourne University Press, 1997, 210 at p.218. For Dixon J's 'sources' theory, see *Chow Hung Ching v R* (1949) 77 CLR 449, 477.

175 *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 495 (Griffiths CJ), 506-7 (Barton J) & 510 (O'Connor J); *Polites v Commonwealth* (1945) 70 CLR 60, 80-81 (Williams J); *Bonser v La Macchia* (1969) 122 CLR 177, 214 (Windeyer J). Per contra *Re Jane* (1988) 12 Fam LR 662 (Nicholson CJ).

However, it has also been stated that international law is not as such part of Australian law but that a universally recognized international legal principle would be applied by Australian courts.[176]

One suggested approach may be conveniently summarised as follows:[177]

(i) the adoption in Australian law of a customary international legal rule is predicated upon general acceptance or assent by the international community as a rule of international conduct, evidenced by treaties, authoritative textbooks, State practice and judicial decisions. Once a rule has been established as having general acceptance it will be given the force of Australian law.

(ii) Australian courts must consider whether the operation of a rule of custom is to be treated as having been adopted or received into, and so become a source of, Australian law. A customary international legal rule is adopted and received if not inconsistent with legislation or finally declared by the courts.[178] 'Inconsistency' or 'conflict' with common law precedent means inconsistency with the general policies of Australian law or a lack of logical congruence with its principles. Where 'inconsistency' is established, no effect can be given to the customary rule without enacting legislation to change the common law, thereby subordinating rules of custom to Australian law.

(iii) Rules of customary international law, once adopted or received into Australian law, enjoy the force of law in the sense of having modified or altered the common law. A decision by an Australian court to adopt and receive a rule of custom is declaratory as to what the common law is.

(iv) Any evolution and change in international law from time to time must be established by evidence and other appropriate material. It may be that the adoption will only be from the date the particular rule was established.

Australian courts may consider themselves ill-equipped to weigh up the voluminous State practice and *opinio juris* required to authoritatively establish the existence of a

176 *Chow Hung Ching v The King* (1949) 77 CLR 449, 462 (Latham CJ).

177 Taken from *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 1192, [132] (Merkel J).

178 For a similar view, see *Wright v Cantrell* (1943) 44 SR (NSW) 45, 46-7 (Jordan CJ); *Polites v Commonwealth* (1945) 70 CLR 60, 80-1 (Williams J); *Chow Hung Ching v The King* (1949) 77 CLR 449 (Starke J).

rule of customary international law.[179] Indeed, regard need not be had to customary international law where the relevant rule is already reflected in the common law or legislation.[180] A rule of customary international law must moreover be capable of formulation with sufficient precision and specificity. Any exceptions or qualifications should be identified. It must also be possible to clearly identify what obligations follow from the application of that rule to the facts at hand.

Practitioners may be called upon to establish the existence of a rule of customary international law. Discerning the existence and scope of a novel rule of custom can be a time-consuming, challenging and potentially unrewarding exercise. Practitioners must consider the duration of State practice, the degree of consistency between States, how many States demonstrate the practice, whether it is universal or regional, the degree of repetition, the relative importance of States, particularly those whose interests may be specially affected and any evidence of acquiescence or protest.[181] For the purpose of judicial notice, evidentiary materials should be relevant, accessible, comprehensive, succinct and persuasive.

Practitioners should consider the following points:

(i) A customary international legal rule must be demonstrated to exist at the time the claim is made. Well-accepted rules of custom may be simply referred to as a 'rule of international practice' with little or no judicial consideration of State practice and opinio juris.[182] On other occasions the judicial approach to establishing a rule may be more rigorous.

(ii) Rules of customary international law can be characterised under Australian law as analogous to foreign law. A customary international

179 For example, on when the right of innocent passage became part of customary international law, see *The Commonwealth v Yarmirr* [2001] HCA 56, [58] (Gleeson CJ, Gaudron, Gummow & Hayne JJ). On whether there is a rule of custom that States enjoy universal jurisdiction over certain international crimes, see *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 1192, [52] (Whitlam J). On an international legal rule preventing States from imposing military service obligation upon aliens resident within their territory, see *Polites v Commonwealth* [1945] HCA 3 (per Latham CJ and Williams J).

180 Shearer I., 'The Relationship between International Law and Domestic Law' in Opeskin B. & Rothwell D. (eds), International Law and Australian Federalism, Melbourne University Press, 1997, p.51.

181 For useful indicia when discerning the establishment of a customary international legal rule, see International Law Association, London Statement of Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee on Formation of Customary (General) International Law as amended at the London Conference, 2000 and adopted by International Law Association Resolution No. 16/2000, London, 2000.

182 *Truong v The Queen* [2004] HCA 10, [54] (Gummow & Callinan JJ) & [117] (Kirby J).

legal rule may also have to be characterised in terms of its procedural or substantive nature as well as the relevant 'branch' of law to which it relates.[183]

(iii) State practice can be derived from diplomatic correspondence,[184] policy statements, press releases, the opinions of official legal advisers,[185] official manuals on legal questions, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the International Law Commission, legislation including constitutional provisions,[186] international and national judicial decisions, recitals in treaties, patterns of treaties in the same form, the practice of international organs, and General Assembly resolutions.[187] To establish State practice, Australian courts have had regard to government reports, judicial decisions, the views of publicists, legislation and constitutional provisions.[188] Consideration has also been given to statements made at international conferences or expert meetings.[189]

(iv) Customary international legal rules may conveniently be stated in codified form. For example, rules of custom may be reflected in treaty provisions[190] or identified in authoritative treatises by reputable publicists.[191]

(v) The practice of Australia deserves especial attention. Rules of customary international law applicable to and acknowledged by Australia, as well as evidence of Australian practice, can be derived from the reports of the Department of Foreign Affairs and Trade, Australian Parliamentary committees, diplomatic correspondence, executive decisions, judicial decisions, legislation and statements made by Australia before

183 *Nulyarimma v Thompson* [1999] FCA 1192 (per Merkel J).

184 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 (Gummow J).

185 *NSW v Commonwealth* [1975] HCA 58, [36] (Mason J).

186 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (Kirby J).

187 *Al-Kateb v Godwin* [2004] HCA 37, [64] (McHugh J).

188 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 138-9 (French J) & 149 (Einfeld J).

189 *MIMIA v QAAH of 2004* [2006] HCA 53, [46] (Gummow ACJ, Callinan, Heydon & Crennan JJ).

190 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* [1988] HCA 25; (1988) 165 CLR 30, [25] (per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

191 *Al-Kateb v Godwin* [2004] HCA 37, [106] (Gummow J); *The Commonwealth v Yarmirr* [2001] HCA 56, [227] (Kirby J); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 384 (n 199) (Gummow & Hayne JJ).

international fora.[192] The oral and written submissions made by Australia in judicial or arbitral proceedings to which it is a party, as well as before other international fora which produce non-legally binding outcomes, should also be considered.[193]

(vi) The practice of some States is accorded more weight than others. The practice of influential States, particularly those having common law jurisdictions such as Canada and the UK, will be particularly persuasive for Australian courts.[194]

4.2. General Principles of Law

Article 38 of the Statute of the International Court of Justice expressly directs that Court to apply 'general principles of law recognised by civilised nations' as a source of international law. This category offers a gap-filling role where the application of other sources may not yield a clear answer. However, like all general principles, their formulation may be so broad and flexible as to provide little guidance in concrete cases.

General principles of law typically relate to general principles of legal liability, reparation for breaches of international obligations, administering international justice and questions of jurisdiction, procedure, evidence and other aspects of the judicial process. Australian courts have considered general principles of law including the principle that all persons are equal before the courts[195] and that individuals constrained by the exercise of executive authority should be able to access judicial

192 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 139 (French J) (the views of DFAT officials); *MIMIA v B* [2004] HCA 20, [162] (Kirby J) (the views of the Attorney-General's Department in a Parliamentary Committee report); *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [52] (Black CJ & Hill J) ('qualified persons having the conduct of Australia's foreign affairs') & [93] (Beaumont J) (statement made by the Minister for External Affairs before the House of Representatives, a diplomatic note from Australia and a memorandum of understanding). See generally the section entitled 'Australian Practice in International Law' in annual editions of the *Australian Yearbook of International Law*.

193 *The Commonwealth v Yarmirr* [2001] HCA 56, [220] (McHugh J) (Memorandum of the Commonwealth Government submitted to the Preparatory Committee of Experts at a League of Nations Conference).

194 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 149 (Einfeld J).

195 *Muir v The Queen* [2004] HCA 21, [28] (Kirby J).

review.[196] General principles of international law may be conveniently summarised by publicists.[197]

Although international law is not as such part of Australian law, it has also been observed that a 'universally recognized principle of international law would be applied by our courts.'[198] Legislation may also specifically require judicial consideration of international legal principles.[199] General principles can 'assist in the resolution of ambiguous provisions in Australian legislation or gaps in the common law of Australia.'[200] Principles of international law considered by Australian courts include the prohibition on racial discrimination;[201] that a treaty to which Australia is a party imposes obligations;[202] principles of international human rights law, particularly insofar as they coincide with rights upheld by the common law;[203] that the courts of one State will not adjudicate upon the validity of acts or transactions of foreign States within their own territory;[204] the speciality rule for extradition;[205] the principle of double criminality;[206] and the principle of comity between States.[207]

4.3. Judicial Decisions

Judicial decisions include judgments of the International Court of Justice, its predecessor, the Permanent Court of International Justice, judgments from other international courts and tribunals and decisions from national courts. The International Court of Justice, as the principal judicial organ of the United Nations, exercises jurisdiction over cases referred to it by States party to its Statute, all matters provided by the UN Charter or treaties and legal disputes under the 'Optional Declaration' procedure.[208]

196 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514.

197 *Truong v The Queen* [2004] HCA 10, [11] (Gleeson CJ, McHugh & Heydon JJ); *The Commonwealth v Yarmirr* [2001] HCA 56, [294]-[295] (Kirby J).

198 *Chow Hung Ching v R* [1948] HCA 37, [13] (Latham CJ).

199 See, for example, s 6(5), (9), *Crimes At Sea Act 2000* (Cth).

200 *The Commonwealth v Yarmirr* [2001] HCA 56, [292] (Kirby J).

201 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [37] (Gibbs CJ).

202 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [10] (Murphy J).

203 *Attorney-General (WA) v Marquet* [2003] HCA 67, [184] (Kirby J).

204 *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [33] (Black CJ & Hill J).

205 *Truong v The Queen* [2004] HCA 10, [11] (Gleeson CJ, McHugh & Heydon JJ), [54] (Gummow & Callinan JJ) & [121] (Kirby J).

206 *Riley v The Commonwealth* (1985) 159 CLR 1, 16 (Deane J).

207 *Truong v The Queen* [2004] HCA 10, [178] (Kirby J).

208 On 21 March 2002, Australia withdrew its 1975 Declaration and replaced it with a further declaration containing a reservation.

Australian courts may be guided by authoritative interpretations given by a court, tribunal or other institution established under a treaty when called upon to interpret that instrument.

Australian courts have considered judgments and advisory opinions emanating from the International Court of Justice,[209] the Permanent Court of Justice,[210] the International Military Tribunal at Nuremberg,[211] international criminal tribunals[212] and the European Court of Human Rights.[213] Particular attention should be given to international proceedings in which Australia is a participant.[214] Although not 'judicial decisions' per se, Australian courts have also considered the views, concluding observations and general comments of UN human rights committees[215] and decisions from international arbitral panels.[216]

209 *The Commonwealth v Yarmirr* [2001] HCA 56, [276] (Kirby J) (contentious cases); *Kartinyeri v Commonwealth* [1998] HCA 22, [167] (Kirby J) (an Advisory Opinion); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, footnote 484 (Kirby J) (an Advisory Opinion); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Brennan J); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [40] (Brennan J) & [18] (Toohey J) (an Advisory Opinion); *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ); *Gerhardy v Brown* [1985] HCA 11, [26] & [37] (Brennan J) (a Dissenting Opinion and an Advisory Opinion); *Koowarta v Bjelke-Petersen* [1982] HCA 27, [38] (Gibbs CJ) (advisory and contentious cases); *NSW v Commonwealth* [1975] HCA 58, [61] (Gibbs J), [29], [57] (Mason J) & [12] (Murphy J) (a contentious case) and [90] (Stephen J) (an Advisory Opinion); *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 137 (French J) (contentious proceedings).

210 *Gerhardy v Brown* [1985] HCA 11, [25] (Brennan J); *The Commonwealth v Yarmirr* [2001] HCA 56, [297] (Kirby J).

211 *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 (Toohey J).

212 *Nulyarimma v Thompson; Buzzacott v Hill & Ors* [1999] FCA 1192, [199] (Merkel J); *SRYYY v MIMIA* (2005) 147 FCR 1; *The Queen v Tang* [2008] HCA 39, [28] (Gleeson CJ).

213 *The Queen v Tang* [2008] HCA 39, [30] (Gleeson CJ); *Behrooz v Secretary of the DIMIA* [2004] HCA 36, [127] (Kirby J); *MIMIA v Al Masri* [2003] FCAFC 70, [151] (Black CJ, Sundberg & Weinberg JJ); *Dietrich v R* [1992] HCA 57, [20] (Mason CJ & McHugh J); *Ruddock v Vadarlis* [2001] FCA 1329, [73] (Black CJ).

214 Eg *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [93] (Beaumont J).

215 The views of the UN Human Rights Committee carry the weight of 'persuasive influence. No more; but no less': *MIMIA v B* [2004] HCA 20, 148 (Kirby J). See also *Behrooz v Secretary of the DIMIA* [2004] HCA 36, [127] (Kirby J); *Al-Kateb v Godwin* [2004] HCA 37, [239] (Hayne J); *Dietrich v R* [1992] HCA 57, [20] (Mason CJ & McHugh J); *Attorney-General (WA) v Marquet* [2003] HCA 67, [176]-[177] (Kirby J).

216 *NSW v Commonwealth* [1975] HCA 58, [85] (Stephen J, citing the *Island of Palmas Case* (1928) 2 UN Rep 829 (International Arbn Awards) & [13] (Murphy J) (citing the *Abu Dhabi Case* (1952) 1 *ICLQ* 247).

National courts can declare the content of international law and their judgments may be cited as evidence of State practice. The decisions of national courts from other States illustrate possible approaches for Australian courts.[217] This is particularly appropriate where there is no Australian precedent determinative of the point at issue.[218] Australian courts, when deciding cases to which international law is relevant, are said to be exercising a form of 'international jurisdiction'.[219] National judicial decisions may be considered persuasive, particularly where analytically cogent, and suggest the possible direction of jurisprudential development for Australia.[220] Of course, the decisions of other national courts are not legally binding or require unquestioned adherence. Care must be taken given their different constitutional or statutory context and variable social background[221] and they do not always provide useful assistance.[222]

Australian courts will strive for consistency when interpreting treaties, thereby facilitating the uniform interpretation sought to be achieved by these instruments.[223] Courts 'should avoid parochial constructions which are uninformed (or ill-informed) about the jurisprudence that has gathered around' treaties because to do otherwise would lead to 'forum shopping or the unequal application of an international treaty'.[224] The caselaw of other States provides guidance in discerning any generally accepted construction. Australian courts demonstrate a preference for authorities

217 For example, *Potter v The Broken Hill Pty Ltd Co* (1906) 3 CLR 479 (Griffith CJ) (US decisions); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (Mason CJ, Wilson, Deane, Dawson, Toohey & Gaudron JJ) (US and UK decisions); *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 (Toohey J) (Canadian decisions).

218 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [11] (Mason CJ & Toohey J).

219 *Al-Kateb v Godwin* [2004] HCA 37, [156] & [168] (Kirby J).

220 *The Commonwealth v Yarmirr* [2001] HCA 56, [382] (Callinan J).

221 *Al-Kateb v Godwin* [2004] HCA 37, [3] (Gleeson CJ) & [296] (Callinan J); *Austin v Commonwealth of Australia* [2003] HCA 3, [301] (Kirby J); *Australian Conservation Foundation v Commonwealth* [1979] HCA 1; (1980) 146 CLR 493, [18] (Gibbs J).

222 *Al-Kateb v Godwin* [2004] HCA 37, [240] (Hayne J).

223 *Shipping Company of India Ltd v Gamlen Chemical Co (Aust) Pty Ltd* (1980) 147 CLR 142, 159 (Mason & Wilson JJ, Gibbs and Aickin JJ concurring); *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448, 453; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd* (1998) 196 CLR 161, [137]-[138]; *Povey v Qantas Airways Ltd* (2005) 79 ALJR 1215, [25] & [128]; *MIMIA v QAAH of 2004* [2006] HCA 53, [34] (Gummow ACJ, Callinan, Heydon & Crennan JJ).

224 *SS Pharmaceutical Co Ltd v Qantas Airways* [1991] 1 Lloyd's Rep 288, 294 (Kirby P).

drawn from other common law jurisdictions,[225] particularly those from the UK, New Zealand, Canada and South Africa.[226] However, such material is ultimately subject to Australian constitutional provisions or statutory provisions to the contrary.

For example, Australian courts could consider developments in New Zealand concerning the influence of international obligations upon the exercise of statutory powers.[227] New Zealand utilises the common law presumptions of consistency with international law and consistency with fundamental rights recognised by the common law.[228] These presumptions, like Australia, arise in the context of administrative decision-making.[229] For example, the presumption of legislative consistency with international law is assessed on a case-by-case basis and is rebuttable by an inconsistent statutory scheme depending upon several factors, including the strength of the international obligation under consideration.[230] International obligations such as the principle of freedom of the high seas has a long pedigree, is reflected by treaties and customary international law, reflects close historical and contemporary links between maritime and international law and has a long history of consideration by national courts.[231]

225 *MIMIA v Al Masri* [2003] FCAFC 70, [96] & [169] (Black CJ, Sundberg & Weinberg JJ); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [28] (Mason CJ & Toohey J).

226 *NSW v Commonwealth* [1975] HCA 58, [50] (Gibbs J). See, for example, the adoption of the act of State doctrine as described in *Underhill v Hernandez* (1897) 168 US 250 by Griffith CJ in *Potter v Broken Hill Co Pty Ltd* (1906) 3 CLR 479, 495.

227 It is 'well within the competence of a government department – and one would have thought it admirable – to see that international obligations...are respected': *Ye v Minister for Immigration* [2008] NZCA 291, [393] (Hammond & Wilson JJ). See further Geiringer C., 'Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and International Law' (2004) 21 *NZULR* 66; Conte A., 'From Treaty to Translation: The Use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand' (2001) 8 *Canterbury LR* 54-69.

228 See *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289; *Zaoui v Attorney-General* [2005] 1 NZLR 577, 646. For comment, see Geiringer C., 'International Law through the Lens of Zaoui: Where is New Zealand At?' (2006) 17 *PLR* 300.

229 See, for example, *Rajan v Minister for Immigration* [1996] 3 NZLR 543; *Ding v Minister for Immigration* (2006) 25 FRNZ 568; *Huang v Minister for Immigration* [2008] NZCA 377; Poole M., 'International Instruments in Administrative Decisions: Mainstreaming International Law' (1999) 30 *VUWLR* 91.

230 *New Zealand Airline Pilots Association v Attorney-General* [1997] 3 NZLR 269, 289 (Keith J).

231 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 46, 57-9 & 61; Dunworth, 'Hidden Anxieties: Customary International Law in New Zealand' (2004) 2 *NZJPIL* 67.

International institutions possess expertise in the application and implementation of one treaty across many States. Although their views are not binding upon Australian courts, due weight can be given to any guidance offered by them.[232]

4.4. Publicists

The 'teachings of the most highly qualified publicists' are a source of international law. Academic commentaries are particularly useful for conveniently summarising State practice. However, academic opinion is a subsidiary means for determining the content of international law. The weight to be attached to this source depends on relevance, the identity of the author and the persuasiveness of their reasoning or analysis.

Australian courts have considered academic opinion when determining the content of international law.[233] This includes the draft articles, commentaries and reports prepared by the International Law Commission of the UN,[234] a distinguished body of international legal experts. Publicists are required to be 'authoritative',[235] 'distinguished' or 'learned',[236] 'leading',[237] or producing 'works of high authority'[238]

232 On the Guidelines and Handbook of the UN High Commissioner for Refugees, see *Chan v MIEA* (1989) 169 CLR 379, 424 (McHugh J); *MIMA v Khawar* (2002) 210 CLR 1, [73] (Gummow & McHugh JJ); *MIMA v Respondents S152/2003* [2004] HCA 18, [62] (McHugh J); *MIMIA v QAAH of 2004* [2006] HCA 53, [79]-[81] (Kirby J).

233 *MIMIA v Al Masri* [2003] FCAFC 70, [148] (Black CJ, Sundberg & Weinberg JJ); *Koowarta v Bjelke-Petersen* [1982] HCA 27, [38]–[39] (Gibbs CJ); *Gerhardy v Brown* [1985] HCA 11, [36] (Brennan J); *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 (Toohey J & Brennan J); *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 484-486 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ); *Re The Maritime Union of Australia & Ors; Ex parte CSL Pacific Shipping Inc* [2003] HCA 43, [47] & [50], (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan & Heydon JJ); *Gamogab v Akiba* [2007] FCAFC 74, [9] (Kiefel J) & [53] (Gyles J); *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 136-8 (French J).

234 *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119, 137 & 140 (French J). Reference was made to the International Commission of Jurists by Williams J in *Polites v Commonwealth* [1945] HCA 3.

235 *Polites v Commonwealth* (1945) 70 CLR 60 (Latham CJ, Starke, Dixon, McTiernan & Williams JJ).

236 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [30] & [32] (Stephen J).

237 *NSW v Commonwealth* [1975] HCA 58, [35] (Gibbs J); *R v Burgess* (1936) 55 CLR 608, 680-681 (Evatt & McTiernan JJ).

238 *Polites v Commonwealth* [1945] HCA 3 (McTiernan J).

before Australian courts are likely to consider them. A survey may be useful to identify what position the 'preponderance of opinion by the text writers' supports.[239] As Justice McHugh has noted, '[g]one are the days when the rules of international law were to be found in the writings of a few well-known jurists'.[240] The opinions of publicists may not always provide assistance to a court in discerning the content of international law, particularly where it is unsettled or conflicting.[241] Judicial notice may be taken of academic opinion which has been rejected, including by subsequent views.[242]

4.5. The Decisions of International Organisations

Australia is a party to the Charter of the United Nations (UN).[243] The documentary material produced by the UN, some of which pertains to international law, may be considered by Australian courts.[244]

Security Council Resolutions are the means by which the UN imposes economic sanctions, arms controls, travel prohibitions, asset freezes and other measures against States and other actors. These Resolutions are binding upon Australia by virtue of Article 25 of the UN Charter. They must first be implemented, typically through regulations, before they are capable of conferring rights and establishing obligations under Australian law.[245] Security Council resolutions may be admitted as evidentiary material in proceedings.[246]

239 *Ruddock v Vadarlis* [2001] FCA 1329, [26] & [29] (Black CJ).

240 *Al-Kateb v Godwin* [2004] HCA 37, [63] & [65].

241 *Chow Hung Ching v R* [1948] HCA 37, [14]-[15] (Latham CJ), [15]-[16] (Starke J), [4] & [20] (Dixon J) & [2] (McTiernan J); *NSW v Commonwealth* [1975] HCA 58, [14] (Murphy J).

242 Eg *Re Bolton; Ex Parte Douglas Beane* [1987] HCA 12, [1] (Brennan J).

243 United Nations Charter [1945] Aust TS No 1 entering into force for Australia on 1 November 1945. See further s.5, *Charter of the United Nations Act 1945* (Cth); *Bradley v Commonwealth of Australia* (1973) 128 CLR 557, 582 (Barwick CJ & Gibbs J).

244 *Simsek v MacPhee* [1982] HCA 7, [21] (Stephen J). See, for example, *Purvis v NSW (Department of Education and Training)* [2003] HCA 62, [43] (McHugh & Kirby JJ) and [197] (Gummow, Hayne & Heydon JJ) (World Programme of Action Concerning Disabled Persons); *The Commonwealth v Yarmirr* [2001] HCA 56, [264] & [297] (Kirby J) (UN Special Rapporteur report); *The Queen v Tang* [2008] HCA 39, [26] (Gleeson CJ) (UN Secretary-General memorandum).

245 *Bradley v Commonwealth of Australia* (1973) 128 CLR 557, 582 (Barwick CJ & Gibbs J).

246 *Bradley v Commonwealth of Australia* (1973) 128 CLR 557, [4] (Barwick CJ & Gibbs J).

General Assembly Resolutions are only recommendations under Article 10 of the UN Charter. Australia assesses them on that basis.[247] However, these Resolutions are binding upon Australia insofar as they spring from the UN's internal operations (for example, budgetary matters, elections) or independently establish rules of customary international law. Thus General Assembly resolutions may acquire a status and effect greater than a recommendation.[248]

Australian courts have considered General Assembly Resolutions[249] on the basis that they may provide interpretative assistance.[250] Reference has also been made to other international instruments associated with intergovernmental organisations including international trade agreements,[251] the Conventions of the International Labour Organisation,[252] guidelines adopted by the World Health Organisation[253] and European Community Directives.[254]

247 'We do not, therefore, see ourselves as being either legally or morally obliged to implement all General Assembly Resolutions, but we take them into account as recommendations': Statement by the Australian Minister for Foreign Affairs, Mr Andrew Peacock, House of Representatives, Hansard, 1979 No 116, p.1824.

248 '...while it is important to consider the detailed wording of any specific resolutions, the reservations [sic] and observations made at the time by country representatives, and the precise voting pattern, such resolutions do have a force greater than merely 'recommendations": Senate Standing Committee on Foreign Affairs and Defence, Report on the New International Economic Order: Implications for Australia, 1980.

249 *The Commonwealth v Yarmirr* [2001] HCA 56, [276] (Kirby J) (General Assembly Resolution 53/152 on a Universal Declaration on the Human Genome and Human Rights); *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) HCA 32, [6] (Deane J) and [22], [24]-[25] & [63] (Brennan J); *Gerhardy v Brown* [1985] HCA 11, [20] (Brennan J) (Universal Declaration of Human Rights); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (Kirby J) (Universal Declaration of Human Rights).

250 *Wu Yu Fang v MIEA* (1996) 135 ALR 583, [71].

251 *Tasman Timber Ltd v Minister for Industry & Commerce* (1983) 46 ALR 149, 169-70 (Lockhart J) (General Agreement on Tariffs and Trade and the Subsidies Code); *Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCAFC 423 (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994); *Director of Animal and Plant Quarantine v Australian Pork Ltd* [2005] FCAFC 206 (WTO Agreement on the Application of Sanitary and Phytosanitary Measures).

252 For example, *Hart v Jacobs* (1981) 39 ALR 209, 213 (Smithers J).

253 *Purvis v NSW (Department of Education and Training)* [2003] HCA 62, [74] (McHugh & Kirby JJ) (the International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease).

254 *Purvis v NSW (Department of Education and Training)* [2003] HCA 62, [200] footnote 125 (Gummow, Hayne & Heydon JJ).

4.6. Unilateral Declarations

A State which unilaterally makes a declaration in public concerning a legal or factual situation, with the intention of becoming legally bound according to its terms, will assume a legal obligation to conduct itself consistently with that declaration. Australia considers that the legal effects of unilateral declarations must take into account their content, the factual circumstances, reactions, the intention of the person making the declaration and whether they were vested with the power to do so.[255] Australian courts have occasionally considered unilateral actions made by Australia and other States.[256]

4.7. Arrangements of less than Treaty Status

Australia concludes 'instruments of less than treaty status' including memoranda of understanding, arrangements or declarations.[257] These instruments are not regarded as legally binding unless otherwise stated. The distinction between treaties and instruments of less than treaty status is whether the parties intend to make undertakings from which international legal rights or obligations flow. This is discerned from the language and form of the document, the nature of the subject matter, whether it is intended to be public, the mechanisms for modification, amendment and dispute settlement and the authority necessary to conclude it.[258]

'Arrangements of less than treaty status' are 'instruments in which the parties do not intend to create, of their own force, legal rights or obligations, or a legal relationship, between themselves'.[259] Such documents are 'intended to have moral, political or practical effect, but as they are not intended to be legally binding, the rigorous scrutiny of the treaty-making process is not appropriate for them'.[260] However, it should be noted that Australia's practice of treating 'memoranda of understanding', 'arrangements' or 'declarations' as not being legally binding is not accepted by all States.

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255 Statement by M. Goldsmith, Adviser of Australia to the United Nations, Unilateral Acts of States and Reservations to Treaties, 1 November 2006.

256 *NSW v Commonwealth* [1975] HCA 58, [61] (Gibbs J) & [12]-[13] (Murphy J) (the US Truman Proclamation, asserting rights over the continental shelf, and the Commonwealth Government Proclamation of 10th September 1953, Commonwealth Gazette, 11th September 1953, 2563).

257 Department of Foreign Affairs and Trade, Review of the Treaty-Making Process, 1999, [7.15]. On the application of principles of interpretation to memoranda of understanding, see *Lu Ru Wei v MIMA* (1996) 68 FCR 30.

258 N Campbell, 'Australian Treaty Practice and Procedure', in Ryan K., International Law in Australia, Law Book Co, Sydney, 2nd ed, 1984, 53 at p.61.

259 DFAT, Australia and International Treaty-Making Information Kit, 2002, [4].

260 Commonwealth of Australia, Review of the Treaty-Making Process, 1999, [5.4].

Chapter 5

Private International Law/Conflict of Laws

This section provides 'quick reference' information to young lawyers unfamiliar with the legal concepts that arise in disputes involving multiple legal systems in the international context. This is a highly complex area of law, therefore only very general points have been distilled in simplified form to suggest the types of issues that might be encountered in practice.

This section is primarily concerned with the discipline of 'Private International Law' which is mainly concerned with municipal laws that govern the resolution of conflicts that involve more than one legal system. In contrast the discipline of 'Public International Law' is mainly concerned with relations between sovereign States.[261] In practice this distinction is increasingly 'rubbery'; for example in some legal systems, private citizens can assert rights extended by international treaties or conventions.

5.1. What are the main issues involved in private international law disputes?

To understand the legal process used by courts if the dispute is judicially considered, three key questions provide a general framework:

(i) what is the source of the court's jurisdiction to determine the case notwithstanding its foreign elements?

(ii) what law applies, and what are the rules that determine this?

(iii) if a party seeks recognition or enforcement of a foreign judgment, when and how will this be done?

This section will consider some of the issues that arise from these questions.

261 M. Davies, A. Bell and P. Brereton, Nygh's Conflict of Laws in Australia, 9th Edition, 2014, [1.4].

5.2. On what basis can the court assert jurisdiction over a foreign defendant?

The jurisdiction of Australian courts is perfected by service of originating process. As a general rule, any foreign defendant who is present in the jurisdiction of the court at the time of service can be made a defendant in any proceeding, as with any local defendant.

However, the courts will not assert jurisdiction over, permit service upon (where leave to do so is required), or allow the continuation of proceedings against, foreign defendants in every case in which it will assert jurisdiction over such 'local' defendants.

The court's willingness to assert jurisdiction over foreign defendants not present in the jurisdiction depends upon identifying one or more grounds for the right to serve Australian court documents in a foreign country.

In Australia, there are ten potential jurisdictions that regulate this area, the High Court, the Federal Court and the State and Territory Supreme Courts. Familiarity with the relevant court rules is increasingly important due to the growing prevalence of actions arising from e-commerce transactions that frequently transcend national barriers.[262]

The enumerated grounds on which a party may serve a foreign defendant are broadly similar in each of these jurisdictions. Federal Court rules for example enumerate the types of proceedings[263] and leave must *first* be given to serve outside of Australia before the application is served.[264] Typically a plaintiff must show that:

(i) the case is appropriate for service outside the country; and

(ii) the case is within the grounds of jurisdiction specified in the rule.

By contrast, leave to serve is not required by the High Court[265] or the Supreme Court of NSW. However, the Supreme Court of NSW requires leave to proceed if the defendant does not enter an appearance.[266] Information on the court rules[267]

262 B. Fitzgerald, A. Fitzgerald, G. Middleton, Y. Lim and T. Beale, Internet and E-Commerce Law – Technology, Law and Policy (2007) [2.40].

263 FCt O 8 r 2.

264 FCt O 8 r 3(1)(a).

265 HCt r 9.07.1.

266 HCt r 9.07; NSW r 11.4.

267 Australian Government Attorney-General's Department, *Service of Australian court process abroad - relevant legislation,* <http://www.ag.gov.au> at 14 October 2014.

can be obtained from the Attorney-General's website, as can more comprehensive information on the service of Australian court process abroad by country.[268] Practitioners should also be aware that further complicating factors may need to be addressed if their client wishes to seek interlocutory relief orders.

5.3. Grounds for jurisdiction

The following table lists some of the established grounds for service:

Grounds for Service	
Matter	**Grounds**
Breach of statute	Breach of statute within the jurisdiction of the relevant court.[269]
Contract	Contract made in the forum; Breach of contract in the forum; Contract governed by the law of the forum.
Foreign judgments and awards	Enforcement of foreign judgment in the State.
Personal Connection	A person who is domiciled or ordinarily resident in the territory of the forum.
Probate and administration	Deceased left assets in the forum; Deceased died domiciled in the forum.
Property	Property within the forum; Land in the forum (not available in NSW); Instrument affecting property in the forum; Mortgage of personal property in the forum; Trusts of property governed by the law of the forum.
Tort	Cause of action arising in the forum; Tort committed in the forum; Damage suffered in the forum.

268 Australian Government Attorney-General's Department, <http://www.ag.gov.au> at 7 October 2014.

269 Eg s.18, Schedule 2, *Competition and Consumer Act 2010* (Cth).

5.4. Restraints on Proceedings

Proceedings related to foreign jurisdictions are subject to a range of potential restraints.

(i) Forum non conveniens

The defendant may apply for the action to be stayed on the basis that the forum is clearly inappropriate. The general rule for many Commonwealth jurisdictions for granting a stay of proceedings is defined in the *Spiliada case*:[270] '[w]here the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice'.

In Australia the 'clearly inappropriate forum' test defined in *Voth*[271] has been applied and contrasts with the 'more appropriate forum' test. The Australian test has been the subject of significant criticism.[272] Arguably in practice, the *Voth* test does not provide defendants much opportunity to restrain proceedings in Australia.[273] Practitioners must be careful not to inadvertently submit to a foreign jurisdiction when contesting jurisdiction or the discretionary exercise of jurisdiction in a foreign court.

(ii) Pending proceedings

The principle of *lis alibi pendens* applies when there is litigation in another jurisdiction between the same parties on the same matter. The court will consider whether the proceedings are sufficiently 'vexatious and oppressive' to establish that the forum is clearly inappropriate: '[q]uestions of priority in commencing the action, recognition of an eventual foreign judgement, the connection between the parties and the subject matter of the litigation with the jurisdiction in question, and equality of access to justice in the competing jurisdictions, are all relevant considerations.'[274]

On the other hand the court will consider other factors such as the alternative remedies available[275] and tactical advantages[276] of the concurrent proceedings.

When concurrent proceedings are related but raise different issues, the question is not 'whether the Australian court is a clearly inappropriate forum' but whether

270 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 482.

271 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

272 Eg Richard Garnett, 'Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test? (2002) *MULR* 2.

273 M Keyes, 'Jurisdiction in International Family Litigation: A Critical Analysis' (2004) *UNSWLJ* 42.

274 *Henry v Henry* (1996) 185 CLR 571, [60].

275 *Morgan v Higginson* (1987) 13 WN (NSW) 146.

276 *Hollander v McQuade* (1896) 12 WN (NSW) 154.

'having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the *Voth* sense'.[277]

5.5. What conflict of law rules apply to the matter?

Conflict of law rules do not of themselves provide the substantive law to resolve the dispute but instead are used to identify the substantive law relevant to dispose of the matter.[278] The court must first characterise or classify the subject matter in dispute. In *Macmillan*, the court stated 'the rule of conflict of laws must be directed to the particular issue of law which is in dispute, rather than the cause of action which the plaintiff relies on'.[279] The problem of characterisation can be highly theoretical. Collins exemplifies the issue:[280]

> 'Assume, for example, that it is claimed that a marriage is void because the parties did not have the consent of their parents: should this be regarded as falling into the category "formal validity of a marriage" or should one take the view that is comes under "capacity to marry"? The answer could clearly demonstrate the outcome of the case: this would be so if the parties' domicile required them to obtain the consent of their parents, while the law of the place where the marriage was celebrated did not'.

More detailed study of Private International Law is recommended to appreciate the extent of the issues involved. When issues of classification are resolved, the subject matter is 'allocated' to this choice of law classification. With the exception of property,[281] generally classification is undertaken in accordance with the law of the forum.[282] Only when the subject matter has been classified, and it is not a procedural law matter, is the conflict of law rule identified.

The conflict of law rule identifies 'the law of the cause' or *lex causae*; this is the jurisdictional body of law that will be used to determine the case. When the choice of law rule determines the appropriate law of a foreign jurisdiction, the party asserting the difference in law bears the onus of proving the foreign law as fact by expert evidence.[283] The following table lists some of the general conflict of law rules that occur in practice:

277 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 401.
278 M. Davies, A. Bell and P. Brereton, Nygh's Conflict of Laws in Australia (9th Edition, 2014), [14.1].
279 *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, 596.
280 Dicey, Morris and Collins, The Conflict of Laws, 14th ed, 2006, V1, [2-003].
281 *Raiffeissen Zantralbank Osterreich AG v Five Star General Trading LLC* [2001] 3 All ER 257, 269.
282 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 225.
283 *Temilkovski v Australian Iron and Steel Pty Ltd* (1966) 67 SR (NSW) 211; *King of Spain v Machado* (1827) 4 Russ 225, 239; 38 ER 790, 795.

Conflict of Law Rules Summary	
Matter	**Conflict of law rule**
Capacity to marry and validity of marriage	Law of the domicile of the party.
Chattels	Law of location of chattels at time matter arises.
Choses in action	As property, the location of the debtor.
Contracts (creation, validity and effect of the contractual obligation)	Law of the contract**;** express, implied or substantial connection.
Corporation	Law of the place of incorporation.
Equity	*Lex fori* or depending on their source e.g. *lex contractus* for contract, *lex delicti* for torts.
Formalities of Marriage	Law where parties were domiciled at time of celebration.
Insolvency	Law of court making the relevant order.
Law of evidence	Law of the forum.
Matrimonial immovable property regime	Law of the place of the property.
Matrimonial movable property regime	Law of the matrimonial domicile at the time of marriage.
Personal status	Law of the domicile.
Probate and administration	Law of the domicile.
Real Property	Law of the place of property is situated.
Restitution	Depends on the law governing the relationship or the place having the closest and most real connection.
Succession of immovable property regime	Law of the place of the property.
Succession of movable property regime	Law of the deceased's last domicile.
Torts	Law of the place where the wrong was committed.
Trusts	Express trust: Law chosen by settlor. Implied/constructive trust: depends on the event that creates them.

Where foreign law applies, the content of that law must be proven as a matter of fact, by expert evidence.

5.6. Application Issues

(i) Renvoi

Renvoi occurs when there is a referral in determining which jurisdiction will determine the matter. This occurs when the matter is:

(i) resolvable with reference to another jurisdiction's body of law; and

(ii) the resolving jurisdiction remits or returns the matter to the original forum or transmits to a third jurisdiction's body of law.

When confronted by a renvoi, the court may decide to ignore it or to recognise it. If the court ignores the renvoi, the matter is determined with reference to the resolving jurisdiction's body of law, and accordingly ignores the remission or transmission problem. If the court recognises the renvoi, the matter may be determined in a number of different ways. There are 'at least' four different theories that may be used by the court which include:

(i) the désistement theory;

(ii) accepting the renvoi;

(iii) rejecting the renvoi; or

(iv) double renvoi.[284]

Double renvoi has received significant acceptance in Australia. The cases suggest that the doctrine may be available to resolve a renvoi issue for any area of law.[285] It is noteworthy that double renvoi adopts the solution that would be adopted to the problem of renvoi *in the resolving jurisdiction* and therefore discourages forum shopping.

There is no *renvoi* in contractual matters. That is, if there is an express or implied choice of foreign law, that is a choice of foreign law not including its conflict of law rules (which might have chosen some other law).

(ii) Exclusion of certain foreign laws

In certain circumstances the forum may refuse to apply the foreign law to the matter under consideration. The court may refuse to apply foreign law if foreign law is from

284 R G Mortensen, Private International Law in Australia (2006), [7.19].

285 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 221 ALR 213.

an unrecognised state, if it is a penal or revenue law, or if the law is contrary to the public policy of the forum.

5.7. Recognition and enforcement of foreign judgment

(i) At common law

The following requirements should be considered for common law recognition and enforcement matters:

(i) the basic principle for recognising the jurisdiction of the foreign court is that the foreign court had jurisdiction over the defendant at the time the foreign jurisdiction is invoked. Jurisdiction is supported by the presence of the defendant in that jurisdiction at the time of service or by voluntary submission to the jurisdiction (by agreement or by conduct);

(ii) the foreign judgment must be final and conclusive in the sense that the matter cannot be contested in court at a later time.[286] A matter subject to appeal is regarded as final and conclusive;[287]

(iii) the plaintiffs and defendants in the foreign judgment must be identical;[288] and

(iv) foreign judgments can only be enforced for a fixed or calculable sum of money.[289]

There are a number of defences that may be available to the defendant including: judgment has been obtained by fraud, the judgment is penal or for a revenue debt, the judgment is contrary to the public policy of the forum, or the judgment is in excess of its jurisdiction (based on a statute directed at punitive anti-trust proceedings, especially in the United States[290]).

Suing for recognition and enforcement at common law requires a summons or statement of claim that pleads the foreign judgment.

(ii) By statute

Foreign judgments can be enforced by registering the judgment in a local court authorised by the *Foreign Judgments Act 1991* (Cth). Statutory enforcement applies

286 *Nouvion v Freeman* (1889) 15 App Cas 1 9.
287 *Colt Industries v Sarlie (No 2)* [1966] 3 All ER 85.
288 *Blohn v Desser* [1962] 2 QB 116.
289 *Taylor v Begg* [1932] NZLR 286.
290 Sections 10(3), 11(2), *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth).

to a broader range of matters than are available at common law. The Act only applies to the superior courts of the States set out in schedule 1 of the *Foreign Judgments Regulations*, and to the inferior courts of those States if they are specifically mentioned in schedule 5. The following requirements should be considered for statutory recognition and enforcement matters:

(i) the application to register the foreign judgment must be made within six years of the date of judgment;

(ii) the foreign court must have exercised jurisdiction over the judgment debtor in certain circumstances, largely similar to the grounds for recognition and enforcement at common law;

(iii) the judgment that is to be enforced must be final and conclusive but may be subject to an appeal; and

(iv) the rights under judgment must be vested in the applicant.

Statutory enforcement of foreign judgment may be set aside on grounds such as fraud, if the judgment is contrary to public policy or natural justice, if the judgment would not be enforced in the foreign jurisdiction, or if the foreign court lacked jurisdiction. A registered judgment has the same force and effect as if the judgment had been determined by the court of registration.

5.8. Enforcement of judgments outside Australia

Ultimately, this is a question of foreign law on which the assistance of foreign lawyers will be necessary. The grounds and methods used to enforce Australian judgments in foreign jurisdictions must be determined according to the rules of the foreign jurisdiction. Practitioners may be assisted by an example of this process. The United States is not party to any international conventions governing recognition or enforcement of Australian judgments. Applications to enforce Australian judgments must be made according to the laws of the particular state jurisdiction in question. Some state courts have a requirement of reciprocity (i.e. a US state judgment would be recognised in Australia in the same circumstances) and all require that the foreign court exercised jurisdiction in accordance with US constitutional guarantees of due process. This is a matter of both procedure (including notice to the defendant) of the foreign court that was fair (even if different to US procedure) and jurisdiction was exercised where there were sufficient "minimum contacts" between the foreign court and the defendant and the cause of action.[291]

291 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

5.9. Implications for Practice

Practitioners involved in drafting agreements that involve foreign jurisdictions should carefully consider including a range of clauses that may assist their clients.

'Choice of Court' clause

Parties may agree to resolve disputes in a particular jurisdiction exclusively or non-exclusively. Even when there is no other connection with the forum, the parties cannot deny the forum court's jurisdiction to exercise jurisdiction.[292] If not expressly stated in the agreement, it is unlikely that submission to a specific forum can be inferred.[293] Commonly, the validity of the clause is determined with reference to the law of the forum.[294] A clause that merely submits to a certain jurisdiction is not an exclusive clause and would not prevent another forum from exercising jurisdiction.[295]

Australia has signed the 2005 *Hague Convention on Choice of Court Agreements*. The Convention requires the courts of States parties to hear disputes if they are the chosen court, not to hear the dispute if they are not the chosen court, and to give recognition and enforcement to the decisions of the chosen court. Although not yet in force, once ratified, the Convention will apply to exclusive choice of court clauses in civil or commercial matters. A choice of court clause that selects a foreign court, without saying whether it is exclusive or non-exclusive, will be deemed to be exclusive. The Convention is likely to benefit Australian businesses by 'increasing certainty about the enforcement of judgments'.[296] So far, the EU and the US have signed the Convention, along with other States. Implementing legislation in Australia is still pending.

'Choice of Law' Clause

In contractual matters, the parties should include a clause choosing the substantive law that will apply to the contract and any dispute arising out of or in relation to the contract. The choice can also expressly extend to tortious and other such conduct

292 *Capin v Adamson* (1875) 1 Ex D 17; *Feyerick v Hubbard* (1902) 71 LJKB 509.

293 *Vogel v Kohnstamm* [1973] 1 QB 133; cf *Adams v Cape Industries Plc* [1990] Ch 433.

294 *Oceanic Sun Line Special Shipping Co Inv v Fay* (1988) 165 CLR 197.

295 *Green v Australian Industrial Investment Ltd* (1989) 90 ALR 500, 511-2.

296 Dr Rachel Bacon, 'Review of developments in international trade law by the Attorney-General's Department' (Paper Presented at the International Trade Law Symposium, Canberra, 3-4 March 2006), p.12.

arising out of or in relation to the negotiation of the agreement, and the agreement itself including its performance. Typically, courts will give effect to such clauses.

Choice of Arbitration clause

Including an arbitration clause may provide significant advantages to clients in the event of a dispute involving foreign elements, particularly due to the availability of a more unified enforcement process for international commercial arbitration awards. The clause would specify that the parties have chosen arbitration, and requiring them to use it if one or the other triggers an arbitration. It should specify where the arbitration has its 'seat' and the arbitration would then be subject to arbitration laws of that place (including law governing the conduct and validity of the arbitration including the legal basis of judicial review).

Procedural rules can be expressly formulated, or chosen by incorporating various institutional model rules (such as the Australian Centre for International Commercial Arbitration), or can be left to the arbitral tribunal. Typically, a choice of arbitration does not (according to the law of the seat of the arbitration) prevent the parties approaching a court in aid of urgent interlocutory relief, but the substance of the dispute must go to arbitration if that is possible.

Practitioners unfamiliar with this area of law should refer at the first instance to the *International Arbitration Act 1974* (Cth).

5.10. Evidence

The *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* provides procedures for the taking of evidence in foreign countries.

5.11. Forum Shopping

Forum shopping occurs when a party seeks to litigate in a forum that provides some additional advantage not available to the other side. Bell states that 'the reason why the venue is critical lies in the lack of uniformity in the conflict of laws and the considerable advantages which aspects of a forum's procedure may yield for either party'.[297] Despite the 'pejorative connotations' associated with forum shopping, practitioners should be aware of the incentives for seeking to control the litigation forum.

297 A. Bell, 'The Why and Wherefore of Transnational Forum Shopping' 69 (1995) *ALJ* 124, 141.

5.12. Anti-suit injunction

An anti-suit injunction is the mechanism used to execute the court's power to restrain another party from commencing or continuing proceedings in a foreign court. Before granting an anti-suit injunction the court would first determine whether it should restrain the exercise of its own jurisdiction or whether it should require the plaintiff in the local proceedings to apply to the foreign court for a stay or dismissal of proceedings.[298] The grounds for an anti-suit injunction are the inherent powers of the court to protect its own processes,[299] or to restrain foreign proceedings that are unconscionable,[300] or to restrain proceedings that are vexatious or oppressive.[301] Typically, these injunctions are awarded where there is an exclusive choice of court clause or choice of arbitration clause in a contract between the parties, and one party threatens to sue other than in the chosen court or threatens to sue in a court rather than proceed to arbitration in accordance with the agreement between the parties.

5.13. Additional Resources

Australian Government Attorney-General: The Attorney-General Department website provides information on procedures for transmitting documents of service, the taking of evidence in foreign proceedings, the enforcement of foreign judgments and jurisdictional issues. The website also provides information on the service of foreign process in Australia, the service of Australian court process abroad, the taking of evidence in Australia for use in foreign proceedings and the taking of evidence in foreign jurisdictions for use in Australian proceedings. The International Law and Trade Branch of the Department provides information in the areas of law relevant to regulation at the state level.

Hague Conference on Private International Law (HCCH): The Hague Conference is a global inter-governmental organisation that seeks 'progressive unification' of private international law rules by agreeing uniform rules on jurisdiction of courts, applicable law and the enforcement of judgment.[302]

298 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 341-55.

299 *Continental Bank NA v Aeokas Comania Naviera SA* [1994] 2 All ER 540.

300 *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225, 234.

301 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871.

302 Hague Conference on Private International Law, Overview, <http://www.hcch.net> at 10 October 2014.

The International Institute for the Unification of Private Law (UNIDROIT): UNIDROIT seeks to harmonise and coordinate private international law between countries and thereby to facilitate the adoption of uniform rules of private law internationally.[303]

United Nations Commission on International Trade Law (UNCITRAL): UNCITRAL is a subsidiary of the United Nations that seeks 'harmonisation' and 'unification' of the law of international trade by drafting conventions, model law, legislative guides, rules and practice notes. UNCITRAL deals with private parties in international transactions and has six working groups covering the areas of procurement, international arbitration and conciliation, transport law, electronic commerce, insolvency law and security interests.[304] Australia has enacted legislation arising from model law produced by the Commission.[305]

The following legal texts and references provide comprehensive detail on the area of private international law. The information presented in this section of the Guide has been derived from extensive consultation with these sources:

A. Dicey, Dicey, Morris & Collins: The Conflict of Laws (2006).

B. Fitzgerald, A. Fitzgerald, G. Middleton, Y. Lim and T. Beale, Internet and E-Commerce Law – Technology, Law and Policy (2007).

M. Tilbury, G. Davis and B. Opeskin, Conflict of Laws in Australia (2002).

O. Bigos, Conflict of Laws for Commercial Lawyers (2005).

P. Nygh and M. Davies, Conflict of Laws in Australia (2002).

R. Mortensen, Private International Law in Australia (2006).

J. Hogan-Doran "Registration, Recognition And Enforcement of Foreign And Interstate Judgments and Foreign Arbitral Awards – Summary Guide and Checklist".[306]

303 See generally, International Institute for the Unification of Private International Law, *About UNIDROIT*, <http://www.unidroit.org> at 14 October 2014.

304 See generally, United Nations Commission on International Trade Law, *Working Groups*, <http://www.uncitral.org> at 14 October 2014.

305 See eg *International Arbitration Act 1974* (Cth).

306 Available at: http://www.sevenwentworth.com.au/publications/JH-D-Registration-in-NSW-of-Foreign-Judgments.html.

Chapter 6

Specialist Topics of International Law

6.1. Jurisdiction

A State cannot generally exercise its authority on the territory of another State or interfere within that State's internal domestic affairs. This rule of international law gives effect to the principle of the sovereign equality among States.[307] Although difficult to define and whose meaning varies with the particular context, a State is 'sovereign' if it is 'a nation which governs itself by its own authority and laws without dependence on any foreign power'.[308]

The jurisdiction enjoyed by a State consists of 'prescriptive jurisdiction' (the ability to make national law) and 'executive' jurisdiction (the power to enforce national law). The five heads established under international law by which a State may exercise jurisdiction are the territorial principle, the nationality principle, the protective principle, the universality principle and the passive personality principle.

The authority of Australian courts is ordinarily restricted to Australia's geographical territory, any internal or proximate territorial waters and any events or things having relevant connections with Australia.[309] The lastmentioned requires a substantial and bona fide connection between the subject matter and the source of the jurisdiction relied upon.[310]

Australia enjoys sovereignty over its 'territorial sea' which currently extends up to 12 nautical miles from the territorial sea baseline or the low water mark. Following

307 Art 2(1), UN Charter [1945] Aust TS No 1.

308 *New South Wales v Commonwealth* [1975] HCA 58, [9], Gibbs J. See also [25] (Barwick CJ) & [11] (Jacobs J).

309 *Blunden v Commonwealth of Australia* [2003] HCA 73, [72] & [74] (Kirby J).

310 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 528 (Kirby J).

the High Court's determination in 1975 that the Commonwealth has sovereignty over the territorial sea and the seabed beneath coastal waters, the Commonwealth and the States negotiated an Offshore Constitutional Settlement which delimits the exercise of jurisdiction by them in the territorial sea.[311] This arrangement also deals with resource management, marine parks, shipwrecks, shipping, marine pollution and fishing.[312]

6.2. Judicial Abstention Doctrines

Judicial proceedings involving international legal questions can give rise to controversies concerning the functions or responsibilities of other government branches. Such questions may be considered beyond the competence of Australian courts or 'non-justiciable' on the basis that there are no judicially-manageable standards by which such questions can be resolved. The legal issue may entail assessing the transactions of foreign States, encroaching upon the executive's conduct of external affairs, assuming functions committed to other government branches, undermining a single-voiced statement of government views or dealing with controversial outcomes carrying the potential for embarrassment. Judicial restraint may have to be exercised in appropriate cases where jurisdiction is lacking or claims unenforceable.

Although not susceptible of precise definition,[313] 'justiciability' has been equated with judicial power. It signifies that an issue is not appropriate or fit for judicial determination, not capable of judicial review (used in an administrative law sense) or is one for which there is no jurisdiction to entertain an issue or to grant relief. The consequence of non-justiciability is that a court lacks, rather than abstains from, exercising jurisdiction.[314]

311 See further the *Seas and Submerged Lands Act 1973* (Cth), the *Coastal Waters (State Powers) Act 1980* (Cth), the *Coastal Waters (State Title) Act 1980* (Cth), the *Coastal Waters (Northern Territory Powers) Act 1980*, the *Coastal Waters (Northern Territory Title) Act 1980*; the Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006, the Seas and Submerged Lands (Historic Bays) Proclamation 2006, the Seas and Submerged Lands (Limits of Continental Shelf in the Tasman Sea and South Pacific Ocean) Proclamation 2005, the *Admiralty Act 1988* (Cth) and the *Marine Insurance Act 1909* (Cth).

312 On international fisheries, see the *Fisheries Management Act 1991* (Cth) and the *Torres Strait Fisheries Act 1984* (Cth).

313 *State of South Australia v State of Victoria* (1911) 12 CLR 667, 708 (O'Connor J).

314 Mason A., 'The High Court as Gatekeeper' (2000) 24 *MULR* 787, p.788.

Matters pertaining to international relations and non-justiciable as falling within the prerogative powers of the executive (in US parlance, the 'political question' doctrine) include sovereign jurisdiction over land, seas or the continental shelf under a treaty or unilaterally where it has not been previously asserted;[315] territorial boundaries;[316] recognising the status of diplomatic representatives;[317] treaty-making and ratification;[318] maintaining national security;[319] and excluding aliens, including their custodial detention for the purposes of deportation or expulsion.[320] However, it would be erroneous to assume that every case touching upon foreign relations is beyond judicial cognisance.[321] The conduct of international relations may create private rights or impose liabilities, thereby giving rise to justiciable matters at the suit of individuals. It is the nature of the question before a court that renders it non-justiciable, although the Commonwealth's views may influence that assessment.[322] It would not be interfering with the exercise of executive power to determine the threshold question whether non-justiciability exists in relation to the subject matter to which it is applied and whether what was done is within its scope.[323] So too will no problem of non-justiciability arise where a court adjudicates on matters going to restraints upon and the extent and nature of executive power (including agreements and understandings between Australian and foreign governments) as a constitutional question.[324] It is also open for Parliament to specify that an action is justiciable notwithstanding a political context.[325] However, where a prerogative power is well-used, well-established and important to the functioning of the executive, a clear manifestation of a Parliamentary intention to abrogate that power

315 *NSW v Commonwealth* (1973) 135 CLR 337, 388-9 (Gibbs CJ) & 451 (Stephen J).

316 *Petrotimor v The Commonwealth of Australia* (2003) 126 FCR 354.

317 *Duff v R (*1979) 28 ALR 663, 695 (FCA) (Brennan, McGregor & Lockhart JJ).

318 *Simsek v MacPhee* (1982) 56 ALJR 277, [15] (Stephen J); *MIEA v Teoh* (1995) 183 CLR 273, 286-7 (Mason CJ & Deane J); *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 476 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

319 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, [36] (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

320 *Chu Kheng Lim v MILGEA* (1992) 176 CLR 1, 32 (Brennan, Deane & Dawson JJ) & 57 (Gaudron J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 555-556 (Latham CJ, with whom McTiernan J agreed); *R v Carter* [1934] HCA 50 (Evatt J); *Robtelmes v Brennan* (1906) 4 CLR 395, 414-5 (Barton J); *Ruddock v Vadarlis* [2001] FCA 1329, [37] (Black CJ) & [193] (French J).

321 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 83 ALR 265, 284 (Gummow J).

322 *Gamogab v Akiba* [2007] FCAFC 74, [40] (Kiefel J).

323 *Ruddock v Vadarlis* [2001] FCA 1926, [30] (Black CJ & French J).

324 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J).

325 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [12]-[13] (Black CJ & Finkelstein J, Moore J concurring at [38]).

or an inescapable implication is required before that power is extinguished by legislation.[326]

Australian courts have considered the following matters to be non-justiciable:

(i) certain acts committed by Australia in conducting foreign affairs (the domestic act of State doctrine).[327] For example, if it is determined that any allegedly tortious act carried out by any Commonwealth agent can be properly characterised as an act of State then the court's jurisdiction will be excluded to the extent required by law and plaintiffs will be unable to succeed in their claims.[328] Australian courts are also mindful of the doctrine of the separation of powers. This has arisen in several contexts including the exercise of the treaty-making power in respect of both conclusion and implementation;[329] intergovernmental negotiations and agreements;[330] requesting the surrender of individuals suspected to have committed offences against Australian law;[331] preserving friendly relations with other States including sending and receiving diplomatic representatives;[332] the breach by Australia of an international obligation;[333] exercising belligerent rights during wartime;[334] Australia's territorial claims;[335] and nominating properties for inclusion in the World Heritage List.[336]

(ii) certain acts of foreign States (the foreign act of State doctrine). An 'act of State' is a prerogative act of foreign policy performed by a State in the conduct

326 *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barton J), 491 (McTiernan & Menzies JJ), 501 (Mason J) & 508 (Jacobs J); *Ruddock v Vadarlis* [2001] FCA 1329, [37] & [40] (Black CJ) & [185] (French J).

327 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 555 [92].

328 *Ali v The Commonwealth* [2004] VSC 6, [21] (Bongiorno J). The Court's duty at that point would be clear: *Thorpe v The Commonwealth (No 3)* (1997) 71 ALJR 767, 779 (Kirby J).

329 Judicial review of the executive's judgment whether a treaty benefits Australia is 'a course bristling with problems': *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [20] (Mason J); *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 307-308 (Wilcox J).

330 *Gamogab v Akiba* [2007] FCAFC 74, [34] (Kiefel J).

331 *Barton v Commonwealth* (1974) 131 CLR 477, 498-9 (Mason J).

332 *R v Sharkey* (1949) 79 CLR 121, 136-7.

333 *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, [4] (Mason J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* [1988] FCA 490; (1988) 19 FCR 347 (Gummow J).

334 *Zachariassen v Commonwealth* [1917] HCA 77.

335 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, [13] (Allsop J).

336 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278-279 (Bowen CJ) & 306-308 (Wilcox J).

of its relations with other States or their nationals. Acts of State include making, terminating and performing treaties,[337] the meaning or validity of agreements and other transactions,[338] territorial annexation,[339] seizing land or goods as conquest, declaring war, detaining and deporting enemy aliens during wartime and holding on trust certain rights pursuant to agreements and statutes.[340] Acts of State are non-justiciable in Australian courts.

Australian courts will refrain from adjudicating upon the validity of acts and transactions of a foreign State committed within that State's territory.[341] Those acts and transactions are examinable by the national courts of that other State. This principle rests upon international comity and expediency, respect for the independence of States and the abstention inherent in the nature of the judicial process. However, the exceptions to that principle include:

(a) where the act or transaction of the foreign State is not directly but only incidentally the subject of inquiry,[342] in which case Australian courts may simply note the foreign act of State without passing judgment.

(b) Where giving effect to that act or transaction is contrary to Australian public policy because it entails, for example, one State plainly breaching an established international legal principle against another[343] or grave human rights infringements.[344]

337 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J); *In Re Ditfort; Ex parte Deputy Cmr of Taxation* (1988) 19 FCR 347 (per Gummow J).

338 *Re Ditfort: ex parte Deputy Commissioner of Taxation* (NSW) (1988) 19 FCR 347, 370 (Gummow J); *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 307-308.

339 *Coe v Commonwealth* (1979) 53 ALJR 403, 408 (Gibbs J).

340 *Dagi v Broken Hill Proprietary Co Ltd (No. 2)* [1997] 1 VR 428.

341 *Potter v The Broken Hill Pty Ltd Co* (1906) 3 CLR 479, 495 (Griffith CJ) (granting a patent); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, [20] (per Mason CJ, Wilson, Deane, Dawson, Toohey & Gaudron JJ) (enforcing a foreign public or penal law); *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* (2003) 197 ALR 461, [46]ff (Black CJ & Hill J) (granting and title to concessions); *Dagi v Broken Hill Proprietary Co Limited (No 2)* [1997] 1 VR 428, 441 (Byrne J) (land rights being non-justiciable but the loss of amenity or enjoyment being otherwise).

342 *Potter v Broken Hill Proprietary Company Ltd* (1906) 3 CLR 479, 514 (O'Connor J) & 498-499 (Griffith CJ). *Potter* was reserved 'for further consideration in an appropriate case': *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, [76] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ). See also *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [42] (Black CJ & Hill J).

343 *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883, 1080-81 (Lords Wilberforce & Nicholls).

344 *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883, 1108 (Lord Hope).

(c) whether the act of State involves asserting title to territory through expropriation and negatives the common law presumption that pre-existing native land interests are to be respected and protected;[345]

(d) where the Parliament has made a particular act of State justiciable through statutory exception.

The acts of a foreign State, even where committed within its own territory, may have extraterritorial implications for other States. There are some cases 'in which the very subject-matter of the claims and the issues which they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign.'[346] Accordingly actions to enforce a foreign State's governmental interests (that is, interests arising from exercising certain powers peculiar to government) within Australia may not be enforceable.

In proceedings which raise the act of State doctrine, the principle of non-justiciability and the exercise of prerogative powers, Australian courts may take into account submissions made by the Attorney-General for the Commonwealth articulating 'considerations that are peculiarly within the field of the Executive Government'.[347] However, these doctrines and principles have not escaped criticism.[348] Thus '[t]he modern law in relation to the meaning of 'justiciable' and the extent to which the court will examine executive action in the area of foreign relations and acts of State is far from settled, black-letter law.'[349]

6.3. Immunity

Australian courts previously employed, consistent with the requirements of international law, the theory of absolute State immunity which prevented

345 *Mabo v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1, [31] (Deane & Gaudron JJ).

346 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, [29] (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

347 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, [24]-[25] (Allsop J).

348 *Potter v Broken Hill Proprietary Company Ltd* [1906] HCA 88, Barton J (acts of State or exercising prerogative power offering 'no practical advantage') & O'Connor J (an act of State is 'at best a vague and unsatisfactory term'); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 83 ALR 265, 287 (Gummow J) (criticising the principle of non-justiciability); *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [157] (Beaumont J) (neither the act of state doctrine nor the non-justiciability' principle 'lends itself to ready application in a new fact-situation').

349 *Hicks v Ruddock* [2007] FCA 299, [93] (Tamberlin J).

impleading a foreign State or rendering it a party to proceedings without its consent.[350] A legislative solution was adopted consistent with subsequent international legal developments which recognised the contemporary doctrine of restrictive State immunity.[351] The *Foreign States Immunities Act 1985* (Cth) provides for the immunity of a 'foreign State' (defined in s.3) from the jurisdiction of Australian courts (s.9) in any 'proceeding'. However, notable exceptions include submitting to jurisdiction (s.10), where the proceedings concern certain 'commercial transactions' (s.11) and death, personal injury or damage to property caused by acts or omissions in Australia (s.13).[352] Australian common law remains relevant in certain circumstances (for example, for contracts entered into prior to the Act's commencement). A distinction may have to be drawn between public acts connected with exercising sovereign power (*acta jure imperii*) and acts of a private law character which any private actor can perform (*acta jure gestionis*).[353]

The *Foreign States Immunities Act 1985* (Cth) also identifies the procedures relevant to initiating process against a foreign State before Australian courts. The service provisions of Part Three apply whether or not the claim in fact relates to a matter in relation to which that State has immunity. The procedures intend to 'avoid the risk of plaintiffs attempting private service in Australia and thereby harassing diplomats or visiting State representatives'.[354] Applications for service through the diplomatic channel should be sent to the Attorney-General, with the request transmitted to the foreign State concerned through the Department of Foreign Affairs and Trade.[355]

Immunity may be *rationae personae* (attaching to a person by virtue of their position) or *rationae materiae* (attaching to the subject matter, typically the official functions performed). A former head of State may continue to enjoy immunity for acts done in performing their official functions whilst in office.[356] Australian courts

350 *Grunfeld v US* [1968] 3 NSWR 36 (Street J). See also Parliamentary Debates, House of Representatives, 1968, No 59, 2080-1.

351 *Foreign States Immunities Act 1985* (Cth). See further Foreign States Immunities Bill 1985, Second Reading Speech, Hansard, House of Representatives, 1985, No 143, p141 (L. Bowen, Attorney-General); Australian Law Reform Commission, Foreign State Immunity, Report No 24, 1984.

352 See further *Tokic v Government of Yugoslavia* (NSW Sup Ct, unreported, 21 June 1991).

353 The distinction is 'much more easily stated than made': *Reid v Republic of Nauru* [1993] 1 VR 251 (Vincent J).

354 Australian Law Reform Commission, Report on Foreign State Immunity, Report No 24, [150].

355 See particularly Form 1, Request for Service of Originating Process on a Foreign State.

356 *R v Bow Street Magistrates; Ex P Pinochet* [2000] 1 AC 147 (per Lord Browne-Wilkinson).

may lack jurisdiction in certain proceedings conducted against serving ambassadors or diplomatic agents.[357]

6.4. Diplomatic, Consular and Other Relations

The term 'privileges' typically describes the concessions traditionally accorded to foreign consular posts and their staff, while the term 'immunities' describes the jurisdictional immunities which international law confers upon them.

The Vienna Convention on Diplomatic Relations[358] establishes the principle of immunity for diplomatic staff,[359] premises[360] and property.[361] The Convention has been partly implemented into Australian law.[362] Furthermore, 'it is an established rule of international law that each State, in the conduct of its official business in another State, is accorded certain facilities and immunities which are necessary to enable it to carry on its lawful business without hindrance'.[363] Whether an Ambassador acts in their official capacity is a factual question to be determined in the circumstances.[364] These circumstances have included traffic infringements[365] and tax liability.[366]

357 *Australian Federation of Islamic Councils Inc v Westpac Banking Corp* (1988) 17 NSWLR 623; *Diplomatic Immunity Case*, Family Ct Aust (1991) 11 *AYBIL* 472.

358 Vienna Convention on Diplomatic Relations [1968] Aust TS No 3.

359 On the treatment of an Australian diplomatic officer in Fiji, see 'The Case of the Australian Diplomat in Fiji' (1991) 11 *AYBIL* 468.

360 The premises of a diplomatic mission are inviolable: *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298.

361 See further 'Diplomatic Immunity Case' (1991) 11 *AYBIL* 427 (FCA) (Renaud J).

362 Articles 1, 22-24 & 27-40 of the Vienna Convention are implemented through s.7(1), *Diplomatic Privileges and Immunities Act 1967* (Cth). See further Diplomatic Privileges and Immunities Bill 1967, Second Reading Speech, Hansard, House of Representatives, 1967, No 54, p504; 'The Case of Gamal El Surnai and the Right to Issue Diplomatic Passports', Hansard, Senate, 1975, No 64, p2473; *Overseas Missions (Privileges and Immunities) Act 1995* (Cth) & the *Overseas Missions (Privileges and Immunities) (Consequential Amendments) Act 1995* (Cth).

363 *International Organisations (Privileges and Immunities) Bill 1963* (Cth), Second Reading Speech, Hansard, House of Representatives, 1963, No 38, p.1161 (G. Barwick).

364 *Australian Federation of Islamic Councils Inc v Westpac Banking Corp* (1989) 17 NSWLR 623 (Cole J).

365 See further 'Applicability of Traffic Rules to Diplomats', Hansard, Senate, 1969, No 40, p.771.

366 *Federal Commissioner of Taxation v Efstathakis* (1978) 78 Aus Tax Cases 4,486 (NSW SC) (Meares J).

The Vienna Convention on Consular Relations[367] has also been partly implemented into Australian law.[368]

Prime Ministers and the Foreign Ministers of other States do not enjoy immunity from the jurisdiction of Australian courts but enjoy protection as an internationally protected person.[369] A Head of State[370] enjoys the same legal status as an Ambassador.[371]

Diplomatic missions and consular posts are protected under international law by the principle of inviolability.[372] Furthermore, the dignity of a diplomatic mission cannot be impaired.[373] These principles have arisen in several contexts, for example, a shooting from the Yugoslav Consulate General in Sydney during 1988 which wounded a protestor[374] and the establishment in 1978 of a 'Croatian embassy' in

367 Vienna Convention on Consular Relations [1973] Aust TS No 7 as amended by [1984] Aust TS No 1.

368 Articles 1, 5, 15, 17, 31 (paras 1, 2, 4), 32, 33, 35, 39, 41 (paras 1, 2), 43-45, 48-54, 55 (paras 2, 3), 57 (para 2), 58 (paras 1-3), 60-62, 66, 67, 70 (paras 1, 2, 4) & 71 have been implemented through s.5(1), *Consular Privileges and Immunities Act 1972* (Cth) and are scheduled to that Act. On the role of consuls, see *Morris v FCT* (1989) 25 FCR 556 (Hartigan J); *Consular Privileges and Immunities Bill 1972* (Cth), Second Reading Speech, Hansard, House of Representatives, 1972, No 78, p.3007.

369 The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents [1977] ATS No 18 is implemented by and scheduled to the *Crimes (Internationally Protected Persons) Act 1976* (Cth). See also *Crimes (Internationally Protected Persons) Bill 1976* (Cth), Second Reading Speech, Hansard, House of Representatives, 1976, No 99, p.3050; *Public Order (Protection of Persons and Property) Act 1971* (Cth); *Public Order (Protection of Persons and Property) Bill 1971* (Cth), Second Reading Speech, Hansard, House of Representatives, 1971, No 71, p.926; *Police v Grech* (Canberra Magistrates Court, unreported 24 October 1989).

370 See further *Kubacz v Shah* [1984] WAR 156 (Kennedy J).

371 See further s.36, *Foreign States Immunities Act 1985* (Cth); Australian Law Reform Commission, Foreign State Immunity, Report No 24, 1984, [70], [153] & [163].

372 See further *R v Turnbull; ex parte Petroff* (1971) 17 FLR 438 (ACT SC) (Fox J).

373 See, for example, *Wright v McQualter* (1970) 17 FLR 305 (ACT SC) (Kerr J); ss.5A & 5B, Diplomatic Privileges and Immunities Regulations (Amendment) Stat Rules 1992 No 7; Minister for Foreign Affairs and Trade, Explanatory Statement: Statutory Rules 1992 No 7; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 (FCA); SR 1992 Nos 41 & 18.

374 Questions without Notice: Diplomatic Immunity, Hansard, Senate, 1988, No 130, p.3433. See also Questions without Notice: Yugoslav Embassy Shooting, Hansard, Senate, 1988, No 130, p.3167.

Canberra.[375] Diplomatic premises may be used for the purpose of granting diplomatic asylum, a position consistent with customary international law.[376]

An international organisation in Australia has juridical personality and possesses the legal capacity necessary to exercise its powers and perform its functions.[377] The privileges and immunities of international organisations, including specialised agencies,[378] are typically implemented through regulations.[379] Their representatives, determined to be performing certain functions by a common mission, enjoy diplomatic immunity where the mission's functions substantially correspond to those exercised by a diplomatic mission.[380] Representatives of international organisations attending international conferences enjoy immunity in certain circumstances.[381]

A person charged with an offence under Australian law is not liable to be tried if, at the time of its alleged commission, they were a member of a visiting armed force or of a civilian component. The jurisdiction of Australian courts is ousted in a limited class of cases including where the alleged offence arose out of performing a duty, was an offence solely against the security of the sending State or concerns an offence against other members of the same force. However, the individual may be prosecuted where the Attorney-General certifies that the sending State does not intend to proceed under its national law.[382]

375 A. Peacock, Minister for Foreign Affairs, Ministerial Statement, Hansard, House of Representatives, 1978, No 108, p.993. See further s.4, *Diplomatic and Consular Missions Act 1978* (Cth); *Despoja v Durack* (1979) 27 ALR 466 (FCA) (Blackburn, St John & Northrop JJ).

376 See 6 *AYBIL* 303-5 & 10 *AYBIL* 484-6.

377 Convention on the Privileges and Immunities of the United Nations [1949] Aust TS No 3; s.5, *International Organisations (Privileges and Immunities) Act 1963* (Cth).

378 Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations [1988] Aust TS No 41. See further *Specialized Agencies (Privileges and Immunities) Regulations 1986* (Cth).

379 See further s.13, *International Organisations (Privileges and Immunities) Act 1963* (Cth) repealing the *International Organizations (Privileges and Immunities) Act 1948* (Cth). See also *International Organisations (Privileges and Immunities) Bill 1963* (Cth), Second Reading Speech, Hansard, House of Representatives, 1963, No 38, p.1161 (G. Barwick). On the tax treatment of individuals associated with international organisations, see 'Case 108', 10 *AYBIL* 548-52 (Taxation Board of Review No 3).

380 See further s.5A(1), *Diplomatic Privileges and Immunities Act 1967* (Cth) as amended by *Diplomatic Privileges and Immunities (Amendment) Act 1980* (Cth).

381 See further *International Organisations (Privileges and Immunities) Act 1963* (Cth), para 7(1)(a); *International Organisations (Privileges and Immunities) Act 1963* (Cth), Third Schedule.

382 See s.9, *Defence (Visiting Forces) Act 1963* (Cth); *Defence (Visiting Forces) Bill 1963* (Cth), Second Reading Speech, Hansard, House of Representatives, 1963, p.2259 (G. Barwick). On this topic, see *Wright v. Cantrell* (1943) 44 SR (NSW) 45; *Chow Hung Ching v R* [1948] HCA 37; *Re Bolton; Ex Parte Douglas Beane* [1987] HCA 12.

6.5. Recognition of States and Governments

Recognition is an executive act. Australia previously recognised both States and governments. However, since 1988 and consistent with the practice of other States, Australia decided that 'the practice of formally recognising or withholding recognition of foreign governments should be abandoned'.[383]

6.6. Executive Certificates

Executive certificates or statements can be accepted by Australian courts as evidence or prima facie evidence[384] of certain matters in litigation involving foreign relations. These matters include[385] whether a person is a State, whether a State exists, whether territory belongs to a State, whether a person is recognised as an ambassador or diplomatic staff member[386] or whether a ship is a warship or public vessel. Executive certificates have a specific status for the purposes of establishing foreign sovereign immunity[387] and extradition.[388] Where an executive certificate has not been tendered then an applicant asserting a right to diplomatic immunity typically carries the onus of proof.[389]

Conclusive effect can be given to official statements and factual matters which the executive is authorised to determine (for example, the extent of territory claimed by it).[390] For matters involving foreign relations Australian courts can rely upon executive certificates which are conclusive in certain circumstances.[391] However, the executive

383 Commonwealth Minister of Foreign Affairs and Trade, Release, 19 January 1988, (1991) 11 *AYBIL* 205.

384 Compare s.12, *Consular Privileges and Immunities Act 1972* (Cth); s.14(2), *Diplomatic Privileges and Immunities Act 1967* (Cth); s.11, *International Organisations (Privileges and Immunities) Act 1963* (Cth); s.14, *Crimes (Internationally Protected Persons) Act 1976* (Cth).

385 *Chow Hung Ching v R* (1948) 77 CLR 449, 467 (Latham CJ).

386 *Duff v R* (1979) 28 ALR 663, 695 (FCA) (Brennan, McGregor & Lockhart JJ).

387 Section 40(1) & (5), *Foreign States Immunities Act 1985* (Cth). See further *Kubacz v Shah* [1984] WAR 156 (Kennedy J).

388 Section 52, *Extradition Act 1988* (Cth).

389 *R v Stolpe* (1987) 10 *AYBIL* 512 (Robson J) (NSW DC).

390 *Ffrost v Stevenson* (1937) 58 CLR 528, 549 (Latham CJ).

391 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (NSW) (1988) 19 FCR 347, 368 (Gummow J). On the weight to be accorded to affidavits from Commonwealth officers relative to executive certificates, see *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [98] (Beaumont J).

cannot compel Australian courts to accept a particular statutory interpretation.[392] While a certificate may be helpful and relevant, it is not conclusive of the proper construction to be given to legislation where an issue arises as a matter of Australian law.[393]

392 *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128, 149-150 (Gaudron, McHugh, Gummow, Kirby, Hayne & Callinan JJ).

393 *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3, [32] (Black CJ & Hill J).

Chapter 7

International Dispute Resolution

BY STEPHEN TULLY & DONNY LOW

7.1. Conducting International Law Litigation before Australian Courts

Practitioners conducting litigation raising international legal questions must identify the appropriate forum having the jurisdiction to grant the remedy sought.[394] This Chapter outlines several relevant considerations.

7.1.1. Standing

Practitioners must ensure that applicants or plaintiffs have the requisite standing to commence claims. A plaintiff must establish locus standi to challenge an impugned decision or have legislation declared invalid. Depending on the nature of the relief sought, plaintiffs generally have standing when they can show actual or apprehended injury or damage to property or proprietary rights.[395]

A person having a statutory or common law right to be heard before a decision is made may have standing to commence proceedings to require the observance of relevant provisions.[396] Legislation may specify the basis for standing and identify the

394 This preferred forum need not be a court – see, for example, the jurisdiction conferred upon the Administrative Appeals Tribunal.

395 Eg *NSW Fish Authority v Phillips* (1970) 1 NSWR 725.

396 *Vanderwolf v Warringah Shire Council* (1975) 2 NSWLR 272, 274-275.

court or tribunal vested with jurisdiction for matters arising under an Act.[397] Such provisions may authorise, for example, the grant of a 'public interest injunction' without first seeking the fiat of the Commonwealth Attorney-General.[398] By contrast, proceedings concerning the crimes of genocide, crimes against humanity and war crimes may first require the Attorney-General's written consent so that offences are prosecuted in his or her name.[399]

A person not affected in their private rights may not be able to sue for declaratory relief, cannot attack or enforce legislation generally, must have an adversely-affected personal interest or demonstrate that he or she is more particularly affected than others.[400] Ordinary members of the public having no interest other than upholding the law typically have no standing to sue to prevent the violation of public rights or to enforce the performance or proper exercise of public duties.[401] Thus incorporated NGOs do not have standing to challenge decisions which may produce direct or indirect consequences adverse to the environment.[402] However, express statutory provisions may disclose a legislative intent to give such groups standing. There is 'little doubt that the present law of standing is far from coherent' and 'is in need of rationalisation and unification'.[403] It has accordingly been proposed that any person should be able to commence public law proceedings unless the legislation clearly indicates a contrary intention or where it would not be in the public interest to proceed because it unreasonably interferes with the ability of persons having private interests to deal with it differently or not at all.[404]

The question of standing to seek injunctive and other relief under s 75(v) of the Constitution to compel observance of Australian law might in an appropriate case attract the grant of special leave to the High Court. The same is true of questions concerning executive or prerogative power and the validity of Commonwealth

397 Eg s.475(1), *Environment Protection and Biodiversity Conservation Act 1989* (Cth).

398 See further *ICI Australia Operations Pty Ltd v TPC* (1992) 38 FCR 248, 256.

399 Section 268.121, Criminal Code, scheduled to the *Criminal Code Act 1995* (Cth); *The International Criminal Court (Consequential Amendments) Act 2002* (Cth).

400 Cf *Robinson v Western Australian Museum* (1977) 138 CLR 283, 292-293 (Barwick CJ), 301-303 (Gibbs J), 315 (Stephen J), 327-328 (Mason J), 340 (Jacobs J) & 344 (Murphy J); *Anderson v The Commonwealth* (1932) 47 CLR 50, 51-52 (Gavan Duffy CJ, Starke & Evatt JJ).

401 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, [12] (Gibbs CJ).

402 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, [5] (Mason J).

403 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 279-80 (McHugh J).

404 See generally, Australian Law Reform Commission, Standing in Public Interest Litigation, Report No 27, 1985. On the question of costs, see Australian Law Reform Commission, Costs Shifting - Who Pays for Litigation, 1995, Ch 13.

legislation.[405] Whether an applicant is entitled to seek injunctive or other equitable relief depends upon whether proceedings should be dismissed because the plaintiff's right or interest was insufficient to support a justiciable controversy or should be stayed as otherwise oppressive, vexatious or an abuse of process.[406]

The Commonwealth Solicitor-General typically conducts litigation on behalf of the Commonwealth. The Commonwealth is a party to proceedings on the same footing as other litigants. Accordingly, in any proceedings to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same.[407]

Leave must generally be sought from the court to appear as an amicus curiae ('friend of the court').[408] Australian courts may permit such an appearance to assist it on points of law which may not otherwise have been brought to its attention.[409] An amicus may only appear where there is good cause and the court considers it proper.[410] A 'friend of the court' is not bound by the outcome. Practitioners should confirm whether an amicus may file pleadings, introduce evidence, examine witnesses and make written and/or oral submissions with the court's leave.[411] The fact that one party is unrepresented may be relevant, although an amicus need not make the same arguments.[412] It appears that a friend of the court cannot recover their costs.[413] Amici ordinarily participate at their own risk and expense. However, they may be necessary participants in proceedings, assisting the court to crystallise competing contentions and making submissions that transcend the interests of private litigants.[414]

In some circumstances a person may be able to intervene in proceedings to protect their interests, either as of right or with the court's leave. For example, the Attorney-General may intervene in any civil proceedings that may affect the Crown's

405 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; High Court of Australia Transcript, *Vadarlis v MIMA*, M93/2001 (27 November 2001).

406 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 263 (Gaudron, Gummow & Kirby JJ).

407 Section 64, *Judiciary Act 1903* (Cth); *British American Tobacco Australia Ltd v Western Australia* (2003) 200 ALR 403. Note also s. 75(iii), Australian Constitution.

408 *Wentworth v NSW Bar Association* [1992] HCA 24, [6] (Brennan J).

409 *Bropho v Tickner* (1993) 40 FCR 165, 172.

410 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 82.

411 See *United States Tobacco Co v Minister for Consumer Affairs* (1988) 82 ALR 509 (per Einfeld J) & (1988) 83 ALR 82 (Full Court) for appointing a friend in proceedings under the *Administrative Decision (Judicial Review) Act 1977* (Cth) (*ADJR Act*).

412 *Minogue v HREOC* [1999] FCA 85, [9]-[10], [30] & [32] (Sackville, North & Kenny JJ).

413 *Blackwood Foodland Pty Ltd v Milne* [1971] SASR 403, 411 (Bray CJ).

414 *Attorney-General (WA) v Marquet* [2003] HCA 67, [218]-[219] (Kirby J).

prerogatives.[415] Although Australian courts generally have no inherent power to permit third party intervention, specific statutes or rules of court may permit them to do so.[416] Where leave to intervene is at the court's discretion, an intervener must generally demonstrate a legitimate concern in making submissions concerning the issues raised.[417] An intervener must also demonstrate an interest in the subject matter of the litigation greater than a mere desire to have the law declared in particular terms.[418] Furthermore, there must not be any practical considerations justifying the denial of leave. Submissions should be limited to points of legal principle, the parties and the Court must have received adequate notice of both the intention to seek leave to appear and of written submissions, the submissions must avoid repeating matters adequately canvassed by the parties and the intervener's involvement must not significantly lengthen proceedings. Submissions must 'assist the Court in a way in which the Court would not otherwise have been assisted' in reaching a correct determination.[419] Unlike an amicus curiae, an intervener 'becomes a party to the proceedings with the benefits and burdens of that status'.[420] This includes in relation to appeal, evidence and submissions.[421] An intervener may seek or be subject to costs orders. In the absence of special circumstances, interveners are generally not ordered to pay more than the additional costs incurred by the parties as a result of the intervention.[422] For example, during proceedings where the Victorian Council for Civil Liberties appeared as an applicant, leave was granted to Amnesty International Limited and the-then Human Rights and Equal Opportunities Commission to intervene, which was limited to the right to file written submissions and be present in court represented by counsel to supplement those submissions where necessary.[423]

7.1.2. Jurisdiction

Practitioners should ensure that proceedings are commenced in courts of competent jurisdiction.[424] The High Court of Australia has original jurisdiction concerning

415 *Adams v Adams* [1971] P 188.

416 Interveners may participate in proceedings pursuant to, for example, s.12, *ADJR Act*, O.6, r.8(1), Federal Court Rules and s.78A, *Judiciary Act 1903* (Cth).

417 *Australian Railways Union v Victorian Railways Commission* (1930) 44 CLR 319, 331 (Dixon J).

418 *Kruger v Commonwealth of Australia* (1996) 3 Leg Rep 14 (Brennan CJ).

419 *Levy v State of Victoria* (1997) 189 CLR 579, 603-604 (Brennan CJ).

420 *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

421 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391.

422 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 310.

423 *Victorian Council for Civil Liberties Incorporated v MIMA* [2001] FCA 1297.

424 Eg the jurisdiction of the Federal Court includes s.39B, *Judiciary Act 1903* (Cth).

matters arising under the Constitution or involving its interpretation.[425] Notice of constitutional issues may have to be served on the Commonwealth and State Attorneys-General. The High Court also enjoys original jurisdiction in all matters:[426]

(i) 'arising under any treaty'. This includes alleged violations of treaties to which Australia is a party. However, a treaty that has not been implemented and does not give rise to rights or obligations enforceable under Australian law cannot give rise to a 'matter' that constitutes a 'justiciable controversy' arising under that treaty.[427] Accordingly that treaty cannot support the making of an order or declaration.[428] Where Australian legislation implementing the treaty exists, then it may provide for an exclusive regime whereby aggrieved persons may obtain a remedy in the event of contravention.

(ii) affecting consuls or other representatives of other States;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of mandamus (to compel performance of a duty), prohibition (to prevent an excess of power or jurisdiction) or an injunction (to restrain unlawful behaviour) is sought against a Commonwealth officer.[429]

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425 Section 76(i), Australian Constitution; s.30(a), *Judiciary Act 1903* (Cth).

426 Section 75, Australian Constitution.

427 *Re East; Ex parte Quoc Phu Nguyen* (1998) 159 ALR 108, 112-113 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ) (citing *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265). Kirby J at [71] preferred a broad construction of s.75(i). The view has also been expressed that where the terms of a treaty have by legislation been made part of Australian law, it is in a very real sense the treaty which is being interpreted and thus the matter in question 'arises under the treaty': *Bluett v Fadden* (1956) 56 SR (NSW) 254, 261 (McLelland J). For a contrary perspective, see *R v Donyadideh* (1993) 115 ACTR 1, 6 (Miles CJ). For the view that the treaties referred to in s.75 must include treaties entered into by Australia, see *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417, 470 (Murphy J).

428 *Minogue v HREOC* [1999] FCA 85, [36] (Sackville, North & Kenny JJ). See generally Leeming, M., 'Federal Treaty Jurisdiction' (1999) 10 *Public L R* 173. For another perspective, see Jones O., 'Federal Treaty Jurisdiction: a Belated Reply to Mark Leeming SC' (2007) 18(2) *Public L R* 94.

429 *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, [5] (Gleeson CJ). There are differences of view as to whether the High Court has power in an appropriate case to grant ancillary relief in the form of certiorari: see, for example, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-91 and *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, [121] (Callinan J).

Additional legislation provides that the High Court has exclusive jurisdiction in 'matters arising directly under any treaty'.[430] The Commonwealth Attorney-General can intervene in proceedings.[431]

7.1.3. Accessing and Using Information

Government departments, agencies and other institutions may be relevant information sources. A client's entitlement to access personal files where it exists should not be overlooked. Practitioners should also be familiar with the relevant Commonwealth, State and Territory legislation concerning freedom of information and privacy legislation. Under the Commonwealth regime, for example, a document is exempt if 'disclosure under the Act' could reasonably be expected to damage the security, defence or 'international relations'[432] of the Commonwealth or 'would' divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation.[433] A claim for an exemption may be supported by a conclusive certificate pertaining to all or part of a document and may, if necessary, be drafted in terms which neither confirm nor deny that document's existence.[434] It may be insufficient that a foreign government has expressed concerns about disclosure.[435]

Australian courts may take judicial notice of 'the course of open and notorious international events of a public nature'.[436] Alternatively, they may seek from the executive a statement upon the precise matter necessary to be known – for example, where the status of a government was uncertain - and information furnished by the appropriate Minister in response to the court's request may be regarded as conclusive.[437]

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430 Section 38(a), *Judiciary Act 1903* (Cth).

431 Section 78A(1), *Judiciary Act 1903* (Cth).

432 On the meaning of 'international relations', see *Re Maher and Attorney-General's Department* (1985) 7 ALD 731, 742 (AAT).

433 Section 33(1), *Freedom of Information Act 1982* (Cth).

434 Subsections 33(3)-33(7), *Freedom of Information Act 1982* (Cth). On the exemption for confidential information communicated by an international organisation and the public interest test, see Australian Law Reform Commission, Open Government: A Review of the Federal *Freedom of Information Act 1982*, Report No 77, Canberra, 1995, [9.4]. Compare s.29, *Freedom of Information Act 1982* (Vic).

435 On the factors relevant to an expectation that disclosure could damage Australia's foreign relations, see *Re O'Donovan and Attorney-General's Department* (1985) 8 ALD 528, 534 (AAT).

436 *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1, 196.

437 *Bradley v Commonwealth* [1973] HCA 34, [3] (Barwick CJ & Gibbs J).

Practitioners should also adhere to any specific requirements concerning the use of national security information during proceedings.[438]

7.1.4. Drafting Applications involving International Legal Questions

Like other applications or statements of claim, those involving international legal questions must disclose a reasonably arguable cause of action to support the relief claimed. Practitioners must set out the ultimate facts sought to be established by appropriate evidence. Practitioners must also establish that they have a reasonable basis upon which to commence proceedings, for example, that there is a basis for judicial review.[439] A party may obtain summary judgment where proceedings have no reasonable prospect of success.[440] Applications to strike out, summarily dismiss or permanently stay proceedings are reserved to clear cases and courts should err on the side of allowing claims to proceed.[441] An action will be struck out for an improper purpose, amounting to an abuse of process, where the purpose of commencing proceedings is to obtain some advantage for which they are not designed or some collateral advantage beyond what the law offers.[442]

7.1.5. Unincorporated Treaties and Administrative Decision-making

The discretion conferred by legislation upon decision-makers may permit consideration of Australia's treaty obligations.[443] It was initially doubted that treaty obligations were a relevant factor when exercising an administrative discretion.[444] However, 'one does not need to incorporate international conventions directly into domestic law to give them effect'.[445] Treaty ratification may create a legitimate expectation of compliance by the executive and administrative agencies. It has been suggested that, in the absence of legislative or executive indications to the contrary, 'if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected

438 Attorney General's Department, Practitioners Guide to the National Security Information, 2008.
439 Eg s.5, *Administrative Decisions (Judicial Review) Act 1977* (Cth).
440 Eg s.31A, *Federal Court Act 1976* (Cth).
441 *Thorpe v Commonwealth* [No 3] (1997) 71 ALJR 767, 774-775 (Kirby J).
442 *Williams v. Spautz* (1992) 174 CLR 509.
443 *Gunaleela v MIEA* (1987) 15 FCR 543, 559.
444 *Simsek v McPhee* (1982) 40 ALR 61, [20] (Stephen J).
445 Basten J, 'International Conventions and Administrative Law', Paper presented at NSW Young Lawyers September 2008 CLE Seminar Series, p.1.

should be given notice and an adequate opportunity of presenting a case against the taking of such a course.'[446] A legitimate expectation that decision-makers will act in a particular way does not necessarily compel them to act in that way as would a binding legal rule. It is considered unnecessary for individuals to demonstrate that they were aware of treaty ratification because the question is assessed objectively: what expectation might reasonably be engendered by any undertaking that the agency has given or by the government of which it is a part? The executive has subsequently declared that 'entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into Australian domestic law'.[447] However, since the effect of this statement is uncertain, practitioners may wish to consider comparable developments in other jurisdictions.[448]

446 *MIEA v Ah Hin Teoh* (1995) 183 CLR 273, 291-2 (Mason CJ & Deane J), 301 (Toohey J) & 305 (Gaudron J). On confining this proposition to procedural fairness, see *Minogue v HREOC* [1999] FCA 85, [37] (Sackville, North & Kenny JJ). Contrary executive indications includes statements made by Australia at the time the treaty was entered into: *DIEA v Ram* (1996) 69 FCR 431, 434 (Hill J). Further, 'it would be necessary for the statement to say something to the effect that decision-makers will not act, or are directed not to act, in accordance with particular provisions or particular conventions or treaties': *Tien v MIMA* (1998) 53 ALD 32, 56 (Goldberg J). A legislative provision and a Ministerial Direction was sufficient to displace a legitimate expectation in *Baldini v MIMA* (2000) 115 A Crim R 307, 316 (Drummond J).

447 Minister for Foreign Affairs/Attorney-General, Joint Statement of 10 May 1995, 'International Treaties and the High Court Decision in *Teoh*', No M44, reprinted in (1996) 17 *AYBIL* 552-3; Joint Statement by the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, 'The Effect of Treaties in Administrative Decision-Making' (25 February 1997). It was unnecessary to consider the effect of the first statement in *Wu Yu Fang v MIMA* (1996) 64 FCR 245 (Carr J) and in *Davey Browne v MIMA* (1998) 27 AAR 353 it was unnecessary to consider the effect of the second. Legislative attempts to reverse *Teoh* include *Administrative Decisions (Effect of International Instruments) Bill* 1995, 1997 & 1999 (Cth). See Senate Legal and Constitutional Legislation Committee, Report on the Administrative Decisions (Effect of International Instruments) Bill 1995 (1995). The doctrine of legitimate expectations has attracted criticism: *MIEA v Ah Hin Teoh* (1995) 183 CLR 273, [38]-[39] (McHugh J); *Re MIMA ex-parte Lam* [2003] HCA 6, [94]-[102] (McHugh & Gummow JJ), [122] (Hayne J) and [147] (Callinan J). See further *Chai v MIMIA* [2005] FCA 1460; *Vaitaiki v MIEA* (1998) 26 AAR 227, 233 (Burchett J). For further consideration, see *Tien v MIMA* (1998) 89 FCR 80, 105 (Goldberg J); *Tavita v Minister for Immigration* [1994] 2 NZLR 257, 266 (NZ CA).

448 See, for example, from the United Kingdom: *R (Hurst) v Coroner for Northern District London* [2007] 2 AC 189 (unincorporated treaties cannot amount to a relevant consideration when exercising a statutory discretion); *R (Corner House Research) v Director of Serious Fraud Office* [2008] 3 WLR 568 (regard by decision-makers to unincorporated treaties may in limited circumstances render reference to that treaty reviewable for ordinary error of law).

7.1.6. The Applicant's Perspective

International law offers materials and arguments which can be used to resolve questions of Australian law. It has been suggested that identifying the relevant international legal context can be the 'first step in reasoning' which could control, or certainly affect, the ascertainment of legal rules applicable in Australian courts.[449] The 'proper' approach 'uses such statements of international law as a source of filling a lacuna in the common law of Australia or for guiding the court to a proper construction of the legislative provision in question.'[450] For example, it has been argued that 'immigration detention' ceases to be such when the conditions of detention are inhuman or intolerable under international human rights law.[451] Practitioners could consider applications made by other plaintiffs for useful guidance.[452] Aside from constitutional questions, international legal arguments are typically subsidiary arguments used to fortify suggested constructions of Australian law. The influence of international law upon the development of Australian common law lags behind that of other jurisdictions. However, international law can be a useful complement in the practitioner's armoury. Australian courts are particularly receptive to international legal arguments for topics in which international law has traditionally been authoritative or clearly engages Australia's national interests on the international plane (for example, asserting sovereignty over the territorial sea or the continental shelf, defence and diplomacy).

449 *Blunden v Commonwealth of Australia* [2003] HCA 73, [76] (Kirby J).

450 *Cachia v Hanes* (1991) 23 NSWLR 304 (CA) per Kirby P.

451 *Behrooz v Secretary of the DIMIA* [2004] HCA 36.

452 For a habeas corpus application framed along administrative law lines, see *Hicks v Ruddock* [2007] FCA 299. On environmental impact assessments, see *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. For a statement of claim concerning anti-whaling under the *Environment Protection and Biodiversity Conservation Act 1989* (Cth), see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, [29]. For a declaration that rights under the ICCPR have been violated, see *Minogue v HREOC* [1999] FCA 85. For the submission that Australian common law should develop consistently with the ICCPR and Australia's accession to the First Optional Protocol, see *Dietrich v R* [1992] HCA 57, [23] (Toohey J). For a judicial review application including an injunction around the principle of the inviolability of diplomatic missions, see *Minister for Foreign Affairs and Trade & Ors v Magno & Anor* (1992) 29 ALD 119. On the questions of non-justiciability, standing and the constitutional validity of legislation, irrespective of the treaty upon which it is based, being void or invalid under international law, see *Horta v Commonwealth* [1994] HCA 32, [5] & [6]. For an application for a declaration of invalidity on the basis that listing by the World Heritage Committee does not enliven the Commonwealth's legislative power to prescribe a regime for controlling the conservation of property, see *Queensland v Commonwealth* [1989] HCA 36.

For example, plaintiffs have advanced submissions concerning alleged inconsistencies arising between legislative provisions purporting to implement treaties to which Australia is a party and the treaty provisions themselves.[453] Comparisons may be made as to whether the legislative language finds textual support within the treaty.[454] Where there is 'material disconformity' between the legislative provision and the conventional obligation, it may be necessary to consider whether those provisions which were not implementing the treaty may be supported as an appropriate legislative means for performing an international obligation dehors that convention (that is, under customary international law).[455]

Finding relevant international law represents a major challenge for practitioners and 'calculating their use will require imagination and courage'.[456] While applications can be framed with reasonable creativity, submissions should be appropriately sensitive (for example, to accommodate the separation of powers), non-speculative (eg avoiding judicial review of matters best left to the executive), informed (eg mindful of act of state or non-justiciability concerns) and tailored.[457] Proceedings may clarify, affirm and extend executive authority. Pursuing realistic outcomes, cloaked with imperatives such as adherence to international standards where consistent with distinctive Australian values and aspirations, are more likely to prevail. To assist a court, patient, lucid and accurate legal explanation is required given the complexity of the subject matter, the sheer volume of evidentiary material required to establish customary international legal rules and the difficulty of securing antiquated volumes of the travaux preparatoires.

7.1.7. The Commonwealth's Perspective

The arguments made by the Commonwealth as respondent may to some extent be anticipated.[458] Familiar submissions include that:

453 *Chu Kheng Lim v MILGEA* [1992] HCA 64, [41] (Brennan, Deane & Dawson JJ) & [51] (McHugh J).

454 *Gerhardy v Brown* [1985] HCA 11, [23]-[24] & [28] (Gibbs CJ). Whether regulations carried out and gave effect to a treaty was considered in *R v Burgess* [1936] HCA 52.

455 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [16]-[17] (Brennan J).

456 S. Churches, 'Treaties and their Impact on the Practitioner', Paper for Conference on the Impact of International Law on Australian Law, 28 November 1997, Sydney University Law School, p.9.

457 Eg 'Nothing before this Court on the pleadings or in argument calls, or has called, into question the conduct of the Japanese Government': *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510, [65] (Allsop J).

458 Appendix 2 to the judgment of Beaumont J in *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3 contains an analysis of the principal UK and Australian authorities relied upon by the Commonwealth in that case.

(i) a claim requires for its determination the adjudication of the validity, meaning and effect of public acts, laws and transactions of a foreign State committed within its own territory ('acts of state');

(ii) a claim requires for its determination the adjudication on the validity, meaning and effect of the transactions of foreign sovereign states. Further, the Commonwealth may submit that a court is bound to accept the conclusions stated within a certificate from the Attorney-General.

(iii) a claim requires adjudicating 'acts of State' arising out of transactions or relations between the Commonwealth and a foreign State;

(iv) a claim requires adjudicating acts done against aliens outside Australia by or on behalf of the Crown in right of the Commonwealth pursuant to executive or prerogative power;

(v) a claim is non-justiciable (because it involves 'matters' which are not capable of judicial determination) or enforceable;

(vi) a claim does not give rise to a 'matter' within the Court's jurisdiction, including because it depends upon the exercise by the executive of the prerogative in relation to the conduct of foreign affairs;

(vii) the Court should not, as a matter of judicial restraint, adjudicate upon a claim since it involves matters affecting Australia's international relations.[459]

7.1.8. Costs Orders

An award of costs typically lies at the discretion of the Court and is ordered in accordance with the usual rules. It has been suggested that there may be no order for costs made, for example, where proceedings raise novel and important legal questions concerning the alleged deprivation of an individual's liberty, the Commonwealth's executive power or Australia's international obligations and contribute to subsequent legislation.[460] It has been proposed that public interest costs orders be made where courts are satisfied that proceedings will determine, enforce or clarify important rights or obligations affecting the community or a

459 For example, in *Queensland v Commonwealth* [1989] HCA 36, the Commonwealth argued that world heritage listing established an international duty to conserve property and that prescription of a particular regime was within the Commonwealth's legislative power, supported by s.51(xxix) of the Constitution.

460 *Ruddock v Vadarlis* [2001] FCA 1926, [6] & [29] (Black CJ & French J).

significant sector thereof, will develop the law generally, reduce litigation or have the character of a public interest or test case.[461]

7.1.9. Remedies

Practitioners should carefully consider the relief sought in light of relevant rules of court and legislation.[462] Frequently-sought options include interlocutory injunctions[463] and orders for mandamus. Declarations have also been sought that the entirety of a particular Act is invalid.[464] Applications for relief may also be in the nature of habeas corpus directed to a specific individual causing him or her to release the applicant from detention.[465] Individuals only acquire personal rights under a treaty amenable to a judicial remedy such as declaratory or injunctive relief against the Commonwealth and securing the performance of an international obligation undertaken by Australia where and to the extent that international obligation has been incorporated into Australian law by legislation.[466]

7.2. International Commercial Arbitration

Most commercial disputes between parties from different countries are resolved by arbitration. Arbitration by its very nature, must be pursuant to an agreement between the parties. An arbitration agreement can either be contained in the contract under which the dispute arises or made between parties after a dispute has arisen. There are a variety of reasons for parties to choose arbitration:

(i) to avoid national courts either because of perceived bias or delay in litigating claims;

(ii) to aid enforcement against assets located outside the jurisdiction of any particular court or courts;

461 Australian Law Reform Commission, Costs Shifting - Who Pays for Litigation, 1995, Recommendation 45.

462 Eg ss.18, 19, 21, 22 & 23, *Federal Court of Australia Act 1975* (Cth); s 39B, *Judiciary Act 1903* (Cth).

463 On the requirements for the grant of an interlocutory injunction, see *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153 (Mason CJ).

464 Eg *Koowarta v Bjelke-Petersen* [1982] HCA 27.

465 On the limitations on the power of detention, see *MIMIA v Al Masri* (2003) 197 ALR 241, [135]-[136]. See further *Chu Kheng Lim v MILGEA* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ); *Re Bolton & Another; Ex parte Beane* (1987) 162 CLR 514, 520-2 (Brennan J); *Agha v MIMIA* [2004] FCA 164 (Jacobson J); *Cabal v United Mexican States (No 6)* (2000) 174 ALR 747, [22] (Goldberg J).

466 *Simsek v MacPhee* (1982) 148 CLR 636 (per Stephen J).

(iii) to resolve disputes confidentially;

(iv) to choose the person(s) who will decide the dispute; or

(v) because of the flexibility and potential for efficiency and speed.

The arbitration agreement will define the scope of disputes to be arbitrated. Usually parties choose broad arbitration agreements covering all disputes 'arising under', 'relating to' or 'in connection with' a contract. Such clauses will cover all claims based on breach of contract and also claims based on no valid contract ever existing. The ability to arbitrate the existence of the contract in which the arbitration clause is found (for example, in a dispute that no valid contract ever existed because of fraud) is based on the legal fiction that the agreement to arbitrate is a separate and independent contract from the main contract.

An arbitration agreement will nearly always state the place of arbitration, also known as the 'seat'. The arbitral law which governs the conduct of the arbitration will be the arbitral law of the seat. The most common form of arbitral law is that based on the UNCITRAL Model Law which was developed in 1985. Australia has adopted the Model Law through the *International Arbitration Act* 1974 (IAA). The IAA was updated in 2010 to implement the 2006 version of the Model Law. The IAA applies to all international arbitrations where the seat is in Australia. An arbitration with a seat in Australia will be an international arbitration if at least one of the parties has a place of business outside Australia or if a substantial part of the obligations of the commercial relationship or the place most closely connected to the subject-matter of the dispute is in another country or the parties have expressly agreed that the arbitration agreement relates to more than one country.

Arbitration agreements commonly state the procedural rules that will govern any arbitration. Parties may choose to have arbitrations administered by an arbitral institution such as the Australian Centre for International Commercial Arbitration (ACICA), the Singapore International Arbitration Centre (SIAC), the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC) or Hong Kong International Arbitration Centre (HKIAC). In such cases, they will usually state that the institution's procedural rules will apply.

Alternatively, parties may choose their own procedure or other well-known procedural rules (such as the UNCITRAL Rules) or in the absence of agreement, leave procedural issues to the relevant arbitral law or the arbitration tribunal. If an arbitration is not administered by an arbitral institution, it is called an '*ad hoc*' arbitration.

One of the most important procedural issues is the number of arbitrators and the method of their appointment. This is usually stated in the arbitration agreement or the procedural rules chosen by the parties. Otherwise parties will attempt to agree on the tribunal or procedure for appointment. The most common form of appointment

procedure in institutional rules and the default procedure under the Model Law is for each party to appoint an arbitrator and for those two arbitrators to appoint the third arbitrator (who is usually the Chairperson of the tribunal).

If you are drafting an arbitration clause, you should consider the arbitral law of the seat. These usually contain specific rules about various procedural issues such as interests on awards and the awarding of costs. Also there may be procedural defaults. For example, the IAA's confidentiality provisions only apply where parties have expressly opted-in (e.g. by selecting procedural rules of arbitral institutions providing for confidentiality). Arbitral institutions have good model clauses applying their procedural rules which they publish online.

7.2.1. Enforcement of foreign awards and agreements to arbitrate in foreign countries

By far the most important factor behind the growth and popularity of international commercial arbitration is the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958, commonly referred to as the 'New York Convention'. The New York Convention is one of the most widely adopted conventions with 152 signatories (Convention countries) covering nearly every advanced and developing country. The IAA implements the New York Convention.

Under section 7 of the IAA, where the seat of arbitration is in a Convention country or where a party is domiciled or resident in a Convention country, an Australian court is required to stay the proceedings and refer the parties to arbitration.

Section 8 of the IAA, implementing Article 3 of the New York Convention, requires Australian courts to recognise arbitral awards made in another Convention country. A foreign award made in a non-Convention country will be enforced in Australia where the person seeking to enforce the award is ordinarily resident in Australia or another Convention country.

An Australian court will not enforce a foreign award where:

(i) a party was under some incapacity at the time the arbitration agreement was made;

(ii) the arbitration agreement is invalid under the law which governs it;

(iii) a party was not given proper notice of appointment of the arbitration tribunal or the arbitration proceedings or otherwise not able to present his or her case;

(iv) the award deals with dispute not contemplated by or falling outside the terms of the arbitration agreement;

(v) the arbitration tribunal was not appointed properly;

(vi) the award has not yet become binding or been set aside in the country in which it was made;

(vii) the dispute is one not capable of settlement by arbitration under Australian law; or

(viii) enforcement of the award is contrary to public policy, meaning the award was induced by fraud or corruption or there was a breach of the rules of natural justice.

7.2.2. Recognition of agreements to arbitrate in Australia and awards made in Australia

Article 8 of the Model Law, as implemented by the IAA, requires an Australian court to stay proceedings where the dispute is covered by an agreement to arbitrate in Australia and refer the parties to arbitration.

International arbitration awards made in Australia will be enforced by an Australian court unless one of the grounds for not enforcing a foreign award (see above) exists.

7.2.3. Court intervention in the arbitration process

A court will only intervene in an international commercial arbitration (where the seat is in Australia) in circumstances set out in the Model Law, namely:

(i) the appointment process fails (Article 11);

(ii) an arbitrator is challenged for bias or lack of qualifications (Article 13);

(iii) an arbitrator is unable or unwilling to act (Article 14);

(iv) a party challenges the tribunal's decision on its own jurisdiction (Article 16); and

(v) a party seeks to set aside the award.

7.2.4. Interim relief and other procedural issues

Unless the parties otherwise agree in an international commercial arbitration in Australia, the tribunal can order interim measures. Interim measures are similar to interlocutory injunctions and are intended to maintain the status quo pending determination of the dispute, prevent current or imminent harm to the arbitral process itself, preserve assets to meet any award or preserve evidence.

An Australian court will enforce interim measures made by an arbitration tribunal except on limited grounds, even where the seat is outside Australia.

Unless the parties agree otherwise, in an international arbitration in Australia:

(i) parties may obtain subpoenas from an Australian court with the consent of the arbitral tribunal;

(ii) the tribunal may order security for costs;

(iii) the award can include pre-award interest and provide for post-award interest; and

(iv) the tribunal may award costs.

Procedures for confidentiality are usually contained in institutional rules (if applicable). Otherwise, the IAA contains confidentiality provisions which will apply if the parties agree that they apply.

7.2.5. Enforcement of Australian awards overseas

If you are seeking to enforce an award overseas, you should determine whether the overseas country is a signatory to the New York Convention. You should consider also the track record of courts in that country in enforcing foreign awards. The exact procedures for enforcement of an Australian award overseas will depend on the arbitration laws in the relevant country of enforcement.

Chapter 8

Public International Law

8.1. Participation within the United Nations System

Actors other than States, such as individuals, non-governmental organisations and corporations, can participate on specified terms within the international legal system. Such actors participate in the United Nations (UN) system on a different and lesser basis than governments and intergovernmental organisations.[467]

The modalities for participation include:

(i) securing accreditation to attend UN conferences, summits and other events.[468]

(ii) establishing working relations with UN Departments, Programmes or Specialized Agencies based on common interests.[469] These relationships are defined by the UN Charter, the constituent instrument of the organisation, its procedural rules, decisions from the governing body and secretariat practices. Practitioners should be familiar with the relevant procedural rules

467 See generally Guide to the UN System for NGOs (2003) (http://www.un-ngls.org/ngo_guide.htm). Practitioners should also contact the UN Human Rights Centre NGO Unit, the UN NGOs Unit and the UN Department of Public Information.

468 See further UN, Reference document on the participation of civil society in United Nations conferences and special sessions of the General Assembly during the 1990s, 2001 (http://www.un.org/ga/president/55/speech/civilsociety1.htm).

469 For a list of NGO Focal points throughout the UN System, see http://www.un.org/dpi/ngosection/listun.htm.

underpinning the modalities for participation.[470] Many UN Agencies have their own accreditation programmes for non-government organisations (NGOs) relevant to their area of work. NGOs can undertake a number of informal and formal activities at international and national levels including information dissemination, awareness raising, education, policy advocacy, joint operational projects and providing technical expertise.

(iii) obtaining consultative status with the UN Economic and Social Council (ECOSOC). Non-governmental, non-profit public or voluntary organizations can participate in the UN system on the basis of consultative status.[471] This permits attendance at meetings of ECOSOC and its subsidiary bodies, making oral interventions[472] and submitting written statements on some agenda items. They may also be invited to attend intergovernmental conferences under UN auspices, General Assembly special sessions, and those of other intergovernmental bodies as determined by the applicable procedural rules.

Consultative status may be 'General' (concerned with most UN activities), 'Special' (having a special competence in only a few fields of activity) and 'Roster' (can make occasional and useful contributions). The rights and responsibilities (including quadrennial reporting) vary according to classification.[473] Consultative status does not entitle NGOs to special

470 See, for example, UN General Assembly Rules of Procedure, UN Doc A/520/Rev.15 (1985); UN Security Council Provisional Rules of Procedure, UN Doc S/96/Rev.7 (1983); World Health Organisation, Resolution 40.25 on Principles Governing Relations Between the WHO and NGOs (1987); World Intellectual Property Organisation General Rules of Procedure, WIPO Doc. 399 (FE) Rev. 3 (1998); International Labour Organisation Tripartite Consultation (International Labour Standards) Convention No. 144 (1976) and Tripartite Consultation (Activities of the International Labour Organization) Recommendation No. 152 (1976); UN Conference on Trade and Development, Decision 43 (VII) of the Trade and Development Board, Arrangements for the Participation of NGOs in the Activities of UNCTAD (1968); UN Environmental Programme, Rules of Procedure, Rule 69, Governing Council Decision 21/19 on the Role of Civil Society (2001), Decision 18/4 on the role of NGOs in UNEP (1995) & Decision 16/7 on Volunteers for the Environment (1991); World Trade Organisation, Guidelines for Arrangements on Relations with NGOs, WTO Doc WT/L/162 (1996), [4] & [6].

471 Article 71, UN Charter [1945] ATS 1; ECOSOC Res. 1996/31 (1996) on Consultative Relationship between the UN and NGOs. See further http://www.un.org/esa/coordination/ngo/.

472 Oral interventions should be relevant to the specific treaty, respect applicable procedural rules including time limits, preferably be coordinated through small delegations rather than large single-issue groups, omit abusive or offensive language and conform to secretariat instructions or guidelines.

473 Eg UN Guidelines for Submission of Quadrennial Reports for NGOs in General and Special Consultative Status with ECOSOC (2004).

privileges (including using the UN logo without prior authorization). UN consultative status is one method by which Australian NGOs can directly contribute to activities within the UN system.

Interested organizations should contact the NGO Section of the UN Department of Economic and Social Affairs in writing, signed by the president and accompanied by a completed questionnaire and supporting documentation.[474] Applications are considered by ECOSOC's Committee on NGOs. Among other requirements, the NGO's activities must be relevant to ECOSOC's work, employ democratic decision-making, have existed for at least two years and be financed through member contributions.

(iv) disseminating information about the UN through association with the UN Department of Public Information.[475] Publicly-available information is accessible through UN Information Centres and the UN's website (www.un.org).

The UN Non-Governmental Liaison Service (UN-NGLS, http://www.un-ngls.org/index.html) provides information, advice, consulting and support services to NGOs for the purposes of establishing partnerships. Interested NGOs may subscribe to several electronic newsletters including the Civil Society Observer, the Go Between and Roundups.[476]

8.2. Participation within the International Labour Organisation

Participation within the International Labour Organisation (ILO) is of interest to individuals and organisations concerned with the protection and promotion of labour standards and their implementation in Australia. There are various avenues for participation, particularly through the ILO's tripartite governance structure which envisages trade union and employer representation. Individuals, NGOs and others may be able to articulate their concerns to the various ILO Committees. For example, in 2005 the ILO Committee on Freedom of Association found that Australian legislation concerning industrial relations within the building industry was inconsistent with Australia's commitment to freedom of association.[477] The Commonwealth was recommended to take 'the necessary steps' to promote

474 See further UN Department of Economic and Social Affairs, Guidelines concerning Association between the U.N. and NGOs 5 (2004).

475 See further http://www.un.org/dpi/ngosection/index.asp.

476 See further the NGLS Handbook: http://www.un-ngls.org/ngls_handbook.htm.

477 *Building and Construction Industry Improvement Bill 2003* (Cth).

collective bargaining.[478] Similarly, the ILO's Committee on the Application of Standards determined that the Commonwealth was not meeting its obligations to protect the rights of workers to collective bargaining.[479]

8.3. Participation within the UN Human Rights System

The UN's human rights committees are composed of independent experts and are responsible for monitoring implementation of human rights treaties to which Australia is a party. They do this by:

(i) reviewing the implementation reports periodically submitted by States.[480] In addition to implementing substantive treaty provisions, Australia is obliged to submit regular reports and identify any difficulties encountered. The relevant committee considers all information, including that provided by NGOs and national human rights institutions, and by issuing oral and written questions to Australia. The committees also typically prepare a list of issues and questions for Australia after receiving its report. Finally, Committees adopt 'concluding observations' or 'views' which identify positive aspects of treaty implementation by Australia and recommend action.

This process is intended to reflect a constructive dialogue in order to assist Australia in its efforts to fully and effectively implement the treaty. UN human rights committees are not judicial bodies but provide advice. Recent reform initiatives allow States to submit a single report outlining implementation of all treaties to which they are a party (an expanded core document) and seek to harmonise working methods and procedures. Practitioners should determine when Australia's next report falls due, giving particular attention to the efforts made by it to implement recommendations made.

(ii) receiving complaints or communications from individuals or groups of individuals alleging that their rights have been violated, provided that

478 338th Report of the Committee on Freedom of Association (November 2005), available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/gb-7-1.pdf.

479 Provisional Record, Report of the Committee on the Application of Standards, International Labour Conference, Ninety-third Session, Geneva, 2005: http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/pr-22-2.pdf.

480 See further UN, Report on the working methods of the human rights treaty bodies relating the State party reporting process, UN Doc HRI/MC/2005/4 (2005).

Australia has specifically recognized the competence of the committee to receive these complaints.[481] Committees may be able to adopt interim measures in urgent cases to preserve a situation until a final decision is made. The exercise of a right of petition depends upon fulfilling eligibility criteria (considered below).

(iii) initiating inquiries in response to reliable information concerning well-founded indications of serious, grave or systematic violations within a State Party, unless the Committee's competence has been expressly excluded.[482] Inquiry procedures are confidential and require the cooperation of the State concerned.

(iv) taking early warning measures and urgent action.[483]

(v) considering inter-State complaints.

(vi) adopting 'General Comments' or 'General Recommendations' which interpret specific treaty provisions and provide guidance to States on implementing the convention. These non-binding materials indicate a Committee's understanding of a treaty provision and suggest the likely interpretation to be adopted in the context of complaints mechanisms.

(vii) convening thematic days of discussions on particular subjects.

Although the machinery for the enforcement of human rights could be said to be 'imperfect and the rights and freedoms protected are not clearly defined', the obligation for States to protect human rights and fundamental freedoms is nonetheless of a legal character.[484]

8.3.1. The Human Rights Committee

Australia is party to the International Covenant on Civil and Political Rights (ICCPR).[485] NGOs may submit written information to the Committee's secretariat at any time. However, the preferred time is two weeks before the session at which Australia's report is being examined and six weeks before the Committee's task

481 The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women (individuals or groups of individuals) and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.

482 The Committee against Torture and the Committee on the Elimination of Discrimination against Women.

483 The Committee on the Elimination of Racial Discrimination.

484 *Koowarta v Bjelke-Petersen* [1982] HCA 27, [117] (Gibbs CJ).

485 International Covenant on Civil and Political Rights [1980] ATS 23 reproduced in *Human Rights and Equal Opportunity Commission Act 1986* (Cth), Sch 2.

force identifies the list of issues to be addressed. NGOs may attend Committee meetings as observers after requesting the secretariat for accreditation. The Committee may also provide an opportunity for NGO representatives to orally brief the Committee in closed meetings on the first day of the session at which Australia's report is considered.

'If it is not afforded by Australian courts, in a proper case, where a breach of Australia's obligations under the ICCPR can be shown, persons affected have the right to communicate their complaint to the Human Rights Committee of the United Nations and to seek redress there'.[486] Australia is a party to the complaints mechanism established under the First Optional Protocol to the ICCPR.[487] This Protocol does not apply retroactively: the Committee is precluded from examining events occurring before its entry into force for Australia unless those acts or omissions continued or had effects after that date and constituted violations of the Covenant. Individuals claiming to be 'victims' of a violation of the rights set forth in the ICCPR may bring a 'communication' against Australia before the UN Human Rights Committee. Submissions must be in writing, made by individuals subject to Australian jurisdiction and demonstrating that all adequate and effective domestic remedies have been exhausted. The Committee will not consider communications which are anonymous, abuse the right of submission, are incompatible with ICCPR provisions or where another procedure of international investigation or settlement is considering the matter. Communications are forwarded to Australia for a written explanation or statement within six months. Both Australia and the individual have the opportunity to submit further statements and, after considering all written information, the Committee will forward its views to both. The remedies offered by the Committee are limited to a declaration that a violation of the ICCPR has occurred, continuous reporting to the Committee and calls to rectify the circumstance, including through legislation.

8.3.2. The Committee on Economic, Social and Cultural Rights

Australia is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia has taken no specific steps to legislatively implement

486 *Re East; Ex parte Nguyen* [1998] HCA 73, [81] (Kirby J).

487 First Optional Protocol to the International Covenant on Civil and Political Rights [1991] ATS 39.

the Convention in its entirety.[488] The Committee on Economic, Social and Cultural Rights assesses compliance through State Party reports. States must demonstrate that they have taken the necessary and feasible steps in good faith towards realizing ICESCR rights. The Committee depends upon the quality of reports submitted by States and NGO contributions. NGOs can participate in the Committee's work in several ways.[489] NGOs may submit written information to the Committee's secretariat at any time. Those NGOs with ECOSOC consultative status may also submit statements to the secretariat for publication in the Committee's working languages. These statements must be specific to ICESCR articles, focus on pressing issues and suggest specific questions that the Committee's pre-sessional working group could include in the list of issues with respect to Australia. Any written information submitted to the Committee by NGOs concerning consideration of Australia's report is made available to Australia. A complaints mechanism for ICESCR rights has recently been adopted by the UN General Assembly.[490]

8.3.3. The Committee on the Elimination of Racial Discrimination

Australia is a party to the International Convention on the Elimination of all forms of Racial Discrimination (CERD).[491] Compliance with the CERD is monitored by the Committee on the Elimination of Racial Discrimination.[492] In the context of the reporting process under CERD, NGOs may submit written information to the Committee's secretariat, preferably two months before the Committee's session to allow sufficient preparation. NGOs may attend Committee meetings as observers after securing accreditation from the secretariat. The Committee does not convene sessions with NGOs during its formal meetings, but NGOs can organize informal lunchtime briefings on the first day when Australia's report is under consideration.

488 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) [1976] ATS 5.

489 ECOSOC, Non-governmental organization participation in the activities of the Committee on Economic, Social and Cultural Rights, E/2001/22-E/C.12/2000/21 (2001), Annex V.

490 UN General Assembly Resolution adopting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008).

491 International Convention on the Elimination of all forms of Racial Discrimination (CERD) (1966) [1975] ATS 40. reproduced in *Racial Discrimination Act 1975* (Cth), Sch.

492 CERD, Overview of the methods of work of the Committee, UN Doc A/51/18 (2001).

8.3.4. The Committee on the Elimination of Discrimination against Women

Australia is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[493] The Committee on the Elimination of Discrimination against Women monitors progress made in implementing the Convention.[494] NGOs may submit written information to the Committee's secretariat, preferably two weeks before the pre-sessional meeting or three months before the Committee's session. Advice and assistance can be obtained from IWRAW–Asia Pacific, a specialized NGO which transmits information to and from the Committee (http://iwraw.igc.org). NGOs can also make oral presentations to the Committee's pre-sessional working group which meets at the end of the session prior to the one at which Australia's report will be reviewed.

Australia is a party to the Optional Protocol to CEDAW.[495] The Protocol envisages a communications procedure (where individuals and groups of individuals may complain to the Committee concerning Convention violations) and an inquiry procedure (enabling the Committee to inquire into serious and systematic abuses of women's human rights within a State party).

8.3.5. UN Committee on the Rights of the Child

Australia is a party to the Convention on the Rights of the Child (CROC).[496] The Committee on the Rights of the Child is empowered to monitor compliance with the Convention. The Committee, in cooperation with the NGO Group for the Committee on the Rights of the Child, encourages NGOs to submit information so as to have a comprehensive picture of how the Convention is being implemented within States. NGOs may request that submissions be kept confidential. NGOs are invited to attend the pre-sessional working group as an opportunity to

493 Convention on the Elimination of All Forms of Discrimination against Women (1979) [1983] ATS 9 reproduced in *Sex Discrimination Act 1984* (Cth), Schedule.

494 CEDAW, Overview of the working methods of the Committee on the Elimination of Discrimination against Women, UN Doc CEDAW/C/2007/I/4/Add.1 (2006).

495 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, General Assembly Resolution 54/4 (1999), UN Doc A/54/49 (Vol. I) (2000) (entry into force 22 December 2000); Rules of procedure for the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc A/56/38 (2001), Part 3.

496 Convention on the Rights of the Child (1989) [1991] ATS 4.

provide information. They should send requests to participate to the Committee's secretariat at least two months before the meeting of the relevant pre-sessional working group and, based on their written submissions, the Committee will invite selected NGOs whose information is particularly relevant to consideration of the State's report. NGOs may also attend Committee sessions as observers. NGOs can also contact the NGO Group for the CROC, a coalition of international NGOs seeking to facilitate implementation of the Convention.

There are two Optional Protocols to CROC: the first Protocol addresses the issue of children in armed conflicts[497] and the second Protocol aims to eliminate the sale of children, child prostitution and child pornography.[498] Australia has ratified both Optional Protocols.

8.3.6. The Committee against Torture

Australia is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[499]The Committee against Torture monitors compliance with the CAT.

Australia has accepted the Committee's competence to consider communications submitted from individuals pursuant to the Convention. There must be substantial grounds for believing that the author of the communication has a personal and present danger of being subjected to torture as defined under Article 1. Authors must also establish a prima facie case for the purposes of admissibility. Additional considerations include whether domestic remedies have been exhausted, resort to other procedures of international investigation or settlement, whether the communication has the minimum substantiation rendering it compatible with the Convention and whether the author has provided substantial and reliable elements. During the merits phase, authors must present an arguable case that the risk of torture goes beyond mere theory or suspicion but need not be highly probable. The

497 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, General Assembly Resolution 54/263 (2000) (entry into force generally on 12 February 2002), signed by Australia on 21 October 2002, ratified on 26 September 2006 and entering into force 26 October 2006: [2006] ATS 12.

498 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, General Assembly Resolution 54/263 (25 May 2000) (entry into force generally on 18 January 2002), signed by Australia on 18 December 2001, ratified on 8 January 2007 and entering into force 8 February 2007: [2007] ATS 6.

499 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) [1989] ATS 21, reproduced in *Crimes (Torture) Act 1988* (Cth), Schedule.

presence or absence of a consistent pattern of gross, flagrant or mass human rights violations is not determinative. The objective is to determine whether an individual faces a foreseeable, real or substantial and personal risk of being tortured given their specific circumstances if returned. The Committee attaches weight to factual findings made by State organs but is not bound by them.

The Optional Protocol to the CAT seeks to prevent torture by establishing a system of regular visits to places where people are deprived of their liberty. Australia signed the Optional Protocol on 19 May 2009.

NGOs may submit information to the Committee's secretariat at any time, preferably six weeks before the Committee's session. Contributions to the list of issues should be submitted three months before the list is to be finalized. Any information submitted in relation to consideration of Australia's report is made available to Australia. NGOs may also orally brief the Committee during the session which focuses upon consideration of Australia's report.

8.3.7. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families envisages organisations, including NGOs, submitting information to the Committee on matters dealt with under the Convention and falling within the scope of their activities. The Committee engages in dialogue with NGOs to benefit from their expertise and invites contributions from them in preparation for the consideration of reports submitted by State parties. NGOs can contact the International NGO Platform for the Migrant Workers Convention, a coalition of international NGOs seeking to facilitate the promotion, implementation and monitoring of the Convention.

8.3.8. The Committee on the Rights of Persons with Disabilities

States party to the Convention on the Rights of Persons with Disabilities may recognize the Committee's competence to receive and consider communications from or on behalf of individuals or groups subject to their jurisdiction and claiming to be victims of a Convention violation by that State.[500] Communications

500 Optional Protocol to the Convention on the Rights of Persons with Disabilities, UN General Assembly Resolution 61/106 (2006).

are inadmissible if anonymous, abuse the right of submission, are incompatible with the Convention, have already been examined by the Committee or another procedure of international investigation or settlement, domestic remedies have not been exhausted, are manifestly ill-founded or insufficiently substantiated or raise facts occurring prior to the entry into force of the Protocol for the State concerned unless continuing after that date.

8.3.9. NGO Participatory Modalities

NGOs occupy an influential role within the UN human rights system, providing support, information, analysis and expertise.[501] Any NGO working within the field of the human rights specified within each treaty can interact with these treaty bodies and consultative status with ECOSOC is generally not required.

Australian NGOs can contribute to the implementation of human rights in Australia by promoting the ratification of a treaty, monitoring compliance with Australia's reporting obligations, submitting written information, participating in sessions as observers, making oral submissions where permitted by the applicable procedural rules, engaging informally with Committees, following-up on concluding observations, submitting complaints and making submissions to the annual meeting of chairpersons of the Committees.

Practitioners should be familiar with and conduct themselves in accordance with the relevant procedural rules.[502] The modalities for NGO interaction vary from one treaty body to another and may be summarised as follows:[503]

501 See Working with OHCHR: A Handbook for NGOs, http://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook.pdf.

502 UN Human Rights Committee, Rules of procedure, UN Doc CCPR/C/3/Rev.8 (2005); Committee on Economic, Social and Cultural Rights, Rules of Procedure, UN Doc E/C.12/1990/4/Rev.1 (1993); Committee on the Elimination of Racial Discrimination, Rules of Procedure, UN Docs CERD/C/35/Rev.3 (1989) & HRI/GEN/3/Rev.2 (2008); Committee on the Elimination of all Forms of Discrimination against Women, Rules of Procedure, UN Doc. CEDAW/C/ROP (2001); Committee on the Rights of the Child, Provisional Rules of Procedure, UN Doc CRC/C/4/Rev.1 (2005). See also Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/3/Rev.1 (2003).

503 Extracted from OHCHR, Working with OHCHR: A Handbook for NGOs, p.67.

Modalities for Participation in the Human Rights Treaty Bodies

	Written submission	Oral submission during pre-sessional period	Oral submission during session	Participation in sessions as observers	Individual complaints (petitions)	Confidential inquiries	Early warning and urgent action procedures
Human Rights Committee	✓		✓	✓	✓		
Committee on Economic. Social and Cultural Rights	✓	✓	✓	✓			
Committee on the Elimination of Racial Discrimination	✓			✓	✓		✓
Committee on the Elimination of Discrimination against Women	✓	✓	✓	✓	✓	✓	
Committee against Torture	✓		✓	✓	✓	✓	
Committee on the Rights of the Child	✓	✓		✓			
Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families	✓		✓	✓	✓		

8.3.10. Other Human Rights Bodies

(i) The UN Human Rights Council. The Council replaces and assumes the functions and responsibilities previously entrusted to the UN Commission on Human Rights.[504] NGOs can act as observers to the Council based on

504 General Assembly Resolution 60/251 (2006).

the arrangements and practices previously observed by the Commission. ECOSOC consultative status is required and the Council will develop its own procedural rules.[505] A recent innovation permits NGOs to make short submissions which may be included in compiling stakeholder submissions as one of the documents upon which a national review is based.[506]

(ii) The UN Office of the High Commissioner for Human Rights (OHCHR). The OHCHR has primary responsibility for promoting and protecting the enjoyment and realization, by all people, of all rights established under the UN Charter and international human rights law. Its mandate includes preventing human rights violations, securing respect for human rights, promoting international cooperation and coordinating activities through the UN system. The OHCHR provides secretariat support for the human rights treaty bodies, special procedures and complaints mechanisms.[507] It also publishes fact sheets providing information on specific human rights topics;[508] special issue papers on selected issues and training or educational material including guides, manuals and handbooks.

NGO collaboration with the OHCHR is not preconditioned by ECOSOC consultative status. NGOs can provide information to the OHCHR, work as partners in training and education programmes and follow-up on recommendations or observations. NGOs should contact the NGO Liaison Officer at the OHCHR for assistance.

(iii) Special Mandate Holders. The Working Groups and Special Rapporteurs of the UN system address thematic issues of importance to the continued protection and promotion of human rights. They collect and disseminate information arising from country-level investigations, including on-site visits involving discussions with governments, NGOs and victims

505 ECOSOC Resolution 1996/31 (1996).

506 See further http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.

507 The Committee on the Elimination of Discrimination against Women can be contacted through the United Nations Division for the Advancement of Women. All other Committees can be contacted through the OHCHR.

508 These include the Rights of the Child (No. 10 (Rev.1)); the Committee on the Elimination of Racial Discrimination (No. 12); Civil and Political Rights: The Human Rights Committee (No. 15 (Rev.1)); the Committee on Economic, Social and Cultural Rights (No. 16 (Rev.1)); the Committee against Torture (No. 17); Discrimination against Women: The Convention and the Committee (No. 22); the International Convention on Migrant Workers and its Committee (No. 24 (Rev.1)); the United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies (No. 30) and Complaint Procedures (No. 7 (Rev.1)).

of human rights violations. UN Special Rapporteurs have a specific mandate.[509] They typically complete annual reports and recommend measures to be adopted by States at national, regional and international levels. Special Rapporteurs can act on information regarding alleged human rights violations by sending urgent appeals and communications to States to clarify and/or bring to their attention these cases. They also conduct country visits or fact-finding missions upon the invitation of States in order to examine the conditions for human rights protection.

The current Special Rapporteurs are mandated to consider:[510]

(a) adequate housing as a component of the right to an adequate standard of living;
(b) the sale of children, child prostitution and child pornography;
(c) the right to education;
(d) extrajudicial, summary or arbitrary executions;
(e) the right to food;
(f) the promotion and protection of the right to freedom of opinion and expression;
(g) freedom of religion or belief;
(h) the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
(i) the independence of judges and lawyers;
(j) the situation of human rights and fundamental freedoms of indigenous people;
(k) the human rights of migrants;
(l) contemporary forms of racism, racial discrimination, xenophobia and related intolerance;
(m) the promotion and protection of human rights while countering terrorism;
(n) torture and other cruel, inhuman or degrading treatment or punishment;
(o) the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights;
(p) the human rights aspects of trafficking in persons, especially in women and children;

509 OHCHR, Fact Sheet No 27: Seventeen Frequently asked questions about UN Special Rapporteurs, 2001.

510 Practitioners should check the current list on the OHCHR website: http://www.ohchr.org.

(q) violence against women, its causes and consequences.

Another UN human rights mechanism, the Working Groups of Experts, are established to consider:

(a) people of African descent;
(b) arbitrary detention;
(c) enforced or involuntary disappearances;
(d) the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

Independent experts have also been appointed to address:

(a) human rights and extreme poverty;
(b) minority issues;
(c) human rights and international solidarity;
(d) the effects of structural adjustment policies and foreign debt.

Finally, there are Special Representatives of the UN Secretary-General mandated to consider:

(a) the situation of human rights defenders;
(b) the human rights of internally displaced persons;
(c) human rights and transnational corporations and other business enterprises.

Australia has extended a standing invitation to UN human rights experts, working groups and UN Special Rapporteurs to visit Australia in certain circumstances.[511]

8.3.11. Using Human Rights Complaints Mechanisms

Practitioners should identify which complaints mechanism is most appropriate to their client's circumstances. They should also be familiar with the strengths, requirements and limitations of each procedure and any possible contributions made by NGOs active in the field. Regard must also be had to the different remedies generally available for human rights violations.[512] It may also be possible to use

511 Attorney-General & Minister for Foreign Affairs, Joint Media Release, 7 August 2008.

512 UN Commission on Human Rights Resolution 2005/35, Annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law. See generally Shelton D., *Remedies in International Human Rights Law*, Oxford University Press, 2005. Practitioners are referred to the extensive resources available through http://www.bayefsky.com/ including a section entitled 'How to Complain About Human Rights Treaty Violations'.

more than one procedure simultaneously. Human rights complaints mechanisms may be differentiated as follows:

(i) *Petitions to Human Rights Bodies*

Individual complaints mechanisms are envisaged, for example, under the First Optional Protocol to the ICCPR, Article 22 of the CAT, the Optional Protocol to CEDAW, Article 14 of CERD and Article 77 of the Migrant Workers Convention. Complaints are formally listed (registered) for consideration by the relevant committee. The case is transmitted to Australia for comment, complainants may comment on Australia's reply and finally the Committee issues a decision which is simultaneously transmitted to the complainant and Australia. Review processes generally involve an 'admissibility' stage before the 'merits' stage and deliberations occur in closed session.

Advantages of the petitions mechanism include:

(a) Australia is bound to comply with its treaty obligations including providing an effective remedy in the event of breach;

(b) Committees have the opportunity to authoritatively determine whether a violation has occurred, in which case Australia is obliged to give effect to its finding;

(c) Committees may be empowered to issue interim measures in urgent cases to preserve situations and prevent irreparable harm until a decision is made (eg death sentences, deportation). Requests for interim measures should be stated explicitly. Committees can be requested to suppress a victim's name in their decision where there are sensitive matters of a private or personal nature;

(d) Committee decisions have implications beyond the circumstances of an individual case by providing instructions to prevent similar violations occurring in future.

Specific Requirements include:

(a) A case has to fall within the scope of application of the particular treaty and that of its complaints procedures. Communications should be framed in light of treaty provisions, the Committee's prior jurisprudence, any relevant General Comments and any information derived from the Committee's prior consideration of State party reports.

(b) Australia must be a party to the particular treaty, the relevant Optional Protocol or otherwise accepted the Committee's competence to accept complaints (eg by making the necessary declaration).

(c) The applicable procedural requirements must be satisfied. Individual complaints can be submitted by third parties, including NGOs, on behalf of individuals claiming to be victims of human rights violations. However, they should first obtain the individual's consent (eg an authority to act) and ensure that individuals are informed of the procedural implications of submitting complaints (for example, disclosing their identity to others or having the details of specific cases described in public reports). ECOSOC consultative status is not a precondition.

As for the required format for submissions, any form of correspondence containing the relevant information is sufficient, provided it employs the Committee's working languages. Complainants are encouraged to use the model complaint forms.[513] Complainants should provide a thorough factual account in chronological order, describing steps taken to exhaust all available domestic remedies, indicating why the facts amount to a violation of a human right contained in the treaty provisions invoked and relevant documents including national legislation. Communications should be respectful and not contain abusive language. Multiple electronic copies should be submitted since secretariats typically lack the capacity for reproduction. Early submission allows sufficient time for treaty monitoring bodies to take information into account during deliberations.

As far as time limits are concerned, only CERD specifies a formal deadline for filing complaints (within six months after a final decision by a national authority). Complaints should be made as soon as possible after the alleged violation. Delay may make it difficult for States to respond properly and evaluate the factual background. Complaints concerning violations occurring prior to the entry into force of the particular complaints mechanism will not be considered unless they have a continuous effect. Complainants must have first exhausted all available and effective domestic remedies. That is, a case must have gone through the Australian judicial system or any administrative processes capable of providing a remedy within a reasonable time period.

Disadvantages include:

(a) a final decision made on a complaint may take several years.

(b) complaints must generally arise from a specific instance in relation to particular individuals and cannot concern widespread patterns of human rights violations.

513 See further OHCHR, Working with OHCHR: A Handbook for NGOs, UN Doc HR/PUB/06/10.

(c) complaints generally cannot be considered by a UN human rights committee if a case has been or is currently under consideration by the adjudicative mechanisms of other UN bodies.

(ii) *Communications under Special Procedures*

'Special procedures' mechanisms consider allegations concerning individual cases or more general patterns of human rights abuses. They are established to examine, monitor, advise and publicly report on human rights situations in specific States (country mandates) or on major phenomena of human rights violations worldwide (thematic mandates). The 'special procedures mandate-holders' include UN special rapporteurs, UN special representatives, independent experts and UN working groups.

The Special Procedures mechanisms interact daily with actual and potential victims of human rights violations. They also directly communicate with States through fact-finding missions and issue public reports containing recommendations. Country visits follow a request for invitation from the mandate-holder to the State or in response to a 'standing invitation'. Mandate-holders assess the human rights situation and specific institutional, legal, judicial and administrative situation in States. They also raise public awareness by meeting with national authorities, NGOs, victims of human rights violations, academics, the diplomatic community and the media. Mandate holders also prepare thematic studies guiding the development of norms and standards.

When a mandate-holder receives credible information alleging human rights violations, they can send a communication, transmitted through the OHCHR, to the State requesting clarification, information and comments and that preventive or investigatory action be undertaken. Communications are either 'urgent appeals' bringing to the State's attention information about a violation that is allegedly ongoing or about to occur or 'letters of allegation' which communicate information and request clarification concerning violations that have already occurred.

The advantages of using a communication under special procedures include:

(a) contemplating preventive action for urgent cases ('urgent appeals');

(b) cases can be brought by Australian NGOs against States other than Australia and irrespective of ratification by them of the relevant treaty;

(c) domestic remedies need not be first exhausted;

(d) communications need not be made by victims if information sources are reliable;

(e) communications are usually confidential and remain so until the mandate-holder's report becomes public.

The limitations of communications under special procedures mechanisms include:

(a) a special procedure must be in place addressing that specific human rights issue or State;

(b) special procedures are not legally-binding mechanisms and it is therefore at each State's discretion whether to comply with the recommendations made;

(c) procedures vary with the mandate.

Individuals or NGOs, on the individual's behalf, can submit cases to the special procedures mandate-holders where envisaged under the mandate. Organisations acting on behalf of victims of human rights violations should ensure that victims are informed that their case is being transmitted to a special procedures mechanism and that their name is communicated to national authorities and will be disclosed in public reports. NGOs should verify that there is a country or thematic mandate addressing their case and familiarise themselves with the requirements to submit communications. Complainants should provide identifying information and describe the circumstances in which alleged violations occurred. Communications should be clear, concise and omit abusive language. The decision to intervene is at the discretion of the mandate-holder who typically consider the reliability of the source, the credibility of information, the detail provided and scope of the mandate.

Australian NGOs can collaborate with special procedures mechanisms in other ways and UN accreditation is not required. Activities include providing information and analysis on specific human rights concerns; proposing and providing support for country visits; working in Australia to publicise, disseminate, follow-up and implement the work of special procedures; monitoring Australia's steps taken to meet recommendations; keeping mandate-holders informed; participating in the meetings of the mandate-holders; and inviting mandate-holders to participate in NGO initiatives.

(iii) The Complaints Procedure under the Human Rights Council

The UN Human Rights Council has recently introduced a novel Complaints Procedure.[514] It replaces a procedure which was formerly known as the '1503 procedure'. The '1503 procedure' was a universal complaint procedure covering all human rights in all States. Communications were not tied to acceptance of treaty obligations by the State concerned. The former Commission on Human Rights could examine consistent patterns of gross and reliably-attested human rights violations in any State. Any individual or group claiming to be the victim of such a violation, or any

514 See further http://www2.ohchr.org/english/bodies/chr/complaints.htm.

other person or group with direct and reliable knowledge, could submit a complaint. However, the procedure did not compensate victims or seek remedies for individual cases. The procedure was also confidential with authors of communications not informed of the outcome.

The operation of the 1503 procedure was recently reviewed by the UN Human Rights Council.[515] The advantages of such a procedure were that:

(a) any human rights violation could be addressed, with States not needing to be a party to the relevant treaty for complaints to be submitted;
(b) complaints could be made against any State;
(c) complaints could be submitted by victims or anyone acting on their behalf and did not necessarily require their prior authorization;
(d) the admissibility criteria were generally less strict than for other mechanisms.

The limitations of the procedure included:

(a) the procedure could take a considerable period of time as the complaint proceeds through several stages;
(b) urgent interim measures of protection were not contemplated;
(c) communications had to refer to human rights violations affecting large numbers of people rather than individual cases;
(d) the authors of communications were not informed of decisions made during the process;
(e) the procedure, being confidential, would not publicise human rights violations in a given State.

8.3.12. Contributing to Australia's National Reports

NGOs can provide information on treaty implementation directly to their home State for inclusion within the official national report. In Australia, interested parties may be invited to submit written views on Australia's compliance with a particular treaty in the period shortly before Australia's report falls due for consideration. Notices to this effect with applicable deadlines can appear on DFAT's website. It should be clear whether submissions are provided on behalf of an individual or organization. These submissions are considered when preparing Australia's report. Submissions should be short and focused to ensure compliance with applicable

515 ECOSOC Resolution 1503 (1970); ECOSOC Resolution 2000/3 (2000); Human Rights Council Decision 2006/102.

UN guidelines. The Attorney-General's Department also calls for submissions on proposed action to be taken by Australia.

8.3.13. The Preparation and Submission of 'Shadow' Reports

NGOs have an important function of encouraging home States to meet their reporting obligations when their national reports fall due for consideration. UN human rights bodies generally welcome additional information on all areas covered by the relevant treaty in order to effectively monitor implementation. By ratifying a human rights treaty, Australia undertakes to periodically submit reports on the measures adopted to give effect to the rights contained therein. Australian NGOs may accordingly submit information in a report 'shadowing' the official one lodged by Australia. Shadow reports provide alternative perspectives concerning Australia's compliance with its international obligations which may not be reflected in the official report.

NGOs wishing to submit a shadow report should seek to provide a systematic country-specific analysis of the extent to which Australian law, policy and practice complies with treaty standards, highlighting implementation problems and suggesting concrete recommendations to improve the situation. NGOs should aim to provide useful, accurate and objective legal, statistical and other information. Relevant and current material concerning Australian conditions which may be unavailable to international bodies should be collected, analysed and submitted as the basis for comparison against prevailing international standards. Reports should also contain supporting documentation with direct reference made to specific treaty articles and their generally-accepted interpretation. NGOs should first confirm whether Australia has ratified or acceded to the relevant treaty, when Australia's report falls due and the relevant bodies, their mandates and principal issues arising for consideration. NGOs should also be guided by the required form and content of State party reports[516] as well as Australia's common core and treaty-specific documents.[517] Collaboration with other like-minded NGOs in preparing a joint shadow report enhances effectiveness, minimises duplication, reduces unnecessary work for the recipient and increases the weight to be attached to the report. Any information submitted is generally

516 See further Compilation of Guidelines on the form and content of reports to be submitted by States Parties, UN Doc HRI/GEN/2/Rev.1 (2001).

517 Commonwealth of Australia, Common Core Document (incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights), AGPS, 2007. See also Australia's National Framework for Human Rights: National Action Plan, 2004; Department of Foreign Affairs and Trade, Human Rights Manual, Canberra, AGPS, 3rd ed, 2004.

considered to be public and shadow reports do not generally become official UN documents. Since they are not edited or translated, NGOs should consider in which language(s) their information will appear.

8.4. Participation before International Courts and Tribunals

When participating within international litigation, practitioners should consider the fora, the basis for jurisdiction, any issues of standing, relevant procedural requirements, substantive arguments for the merits, remedies sought and enforcement prospects. Submissions should be logical, relevant, plausible, persuasive, reasonable and objective. They should also comply with applicable procedural and formatting requirements. For example, submissions may follow a familiar format of introduction, question presented, short answer, long answer (factual and legal background; argument presented with propositions supported by authority), other relevant considerations, conclusion, remedies sought and any annexes (including table of authorities). Important arguments should be made first, with propositions clearly and succinctly presented with short sentences, evidencing unity of thought and reflecting the reader's needs. Examples can replicated where available.[518]

8.4.1. The International Court of Justice

Only States can be parties to contentious proceedings before the International Court of Justice (ICJ).[519] The ICJ has no jurisdiction to deal with applications from individuals, NGOs, corporations or any other private entity. However, the Court has permitted written submissions from amicus when exercising its advisory jurisdiction, including from an entity having observer status in the UN General Assembly.[520]

518 For example, Australia's submissions in proceedings before the International Court of Justice to which it has been a party are available at www.icj-cij.org.

519 Article 34, Statute of the International Court of Justice. Australia was an applicant in the *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253 and in the *Whaling in the Antarctic* Case (*Australia v Japan: New Zealand Intervening*), 31 March 2014. Australia was a respondent in the *East Timor (Portugal v Australia) Case* [1995] ICJ Rep 90 and the *Certain Phosphate Lands in Nauru (Nauru v Australia) Case* [1992] ICJ Rep 240.

520 International Court of Justice, *Advisory Opinion on the International Status of South West Africa* [1950] ICJ Pleadings II, 324 & 327 (International League of the Rights of Man). However, no documents were forthcoming. The League was refused permission during the *Asylum Case* [1950] ICJ Rep 266 (contentious proceedings) and in the 1970 *Advisory Opinion concerning Namibia*. More recently, see International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 (participation by the Palestinian Liberation Organisation).

International proceedings address questions involving the responsibility of States by reference to the Articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission and adopted by the UN General Assembly. Australia considers that these Articles 'have proven their worth as a persuasive source of guidance for both governments and courts' and '[i]t is evident that there is a growing body of practice on utilising the Articles'.[521]

8.4.2. International Criminal Courts and Tribunals

International criminal courts and tribunals, including the International Criminal Court to which Australia is a party,[522] prosecute individuals for the commission of crimes arising under international criminal law. Interested individuals and groups may participate in these prosecutions on specified terms as amicus curiae.[523]

Practitioners should also note the important role for Australian courts when individuals are sought to be prosecuted for crimes under international law, particularly with respect to procedural questions such as extradition and mutual legal assistance.

8.4.3. WTO Dispute Settlement

Only States Members of the World Trade Organisation (WTO) and party to disputes or possessing a third-party interest have a right to participate in WTO

521 Statement by A. Rose, First Secretary and Legal Adviser, Permanent Mission of Australia to the United Nations, 'The Responsibility of States for Internationally Wrongful Acts', 23 October 2007.

522 Rome Statute for an International Criminal Court [2002] ATS 15, ratified by Australia on 29 June 2002 and entering into force for Australia on 1 September 2002. See further *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

523 Rules 103-4, International Criminal Court, Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000); Article 18, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704, 36, Annex (1993) & S/25704/Add.1 (1993), adopted by Security Council Resolution 827, UN Doc S/RES/827 (1993); Rule 74, International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc ITR/3/REV.1 (1995).

Panel or Appellate Body proceedings.[524] Practitioners should have particular regard to WTO proceedings where Australia acted as complainant[525] or respondent.[526]

NGO views can only be expressed through submissions as a 'friend of the court'. Whether WTO Panels and the Appellate Body may accept and consider unsolicited amicus curiae briefs has proved controversial. The Dispute Settlement Understanding (DSU) and Working Procedures for Appellate Review do not specifically address this issue. The ability of WTO Panels to seek information from any relevant source (Article 13 of the DSU) and to add or depart from the Working Procedures of the DSU (Article 12(1) of the DSU) may afford them the discretion

524 Articles 2 & 10, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU Agreement), Annex 2, GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Doc. MTN/FA, Annex 1A.

525 Australia has acted as a complainant in *Hungary - Export Subsidies in respect of Agricultural Products* (Complainants: Argentina; Australia; Canada; New Zealand; Thailand; United States), 27 March 1996 (DS35); *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (Complainant: Australia), 16 July 1997 (DS91); *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (Complainant: Australia), 13 April 1999 (DS169); *US - Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia* (Complainant: Australia), 23 July 1999 (DS178); *US - Continued Dumping and Subsidy Offset Act of 2000* (Complainants: Australia; Brazil; Chile; European Communities; India; Indonesia; Japan; Korea; Thailand), 21 December 2000 (DS217); *EC - Export Subsidies on Sugar* (Complainant: Australia), 27 September 2002 (DS265); *EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complainant: Australia), 17 April 2003 (DS290).

526 Australia has acted as a respondent in *Australia - Measures Affecting Importation of Salmon* (Complainant: Canada), 5 October 1995 (DS18); *Australia - Measures Affecting the Importation of Salmonids* (Complainant: US), 20 November 1995 (DS21); *Australia - Textile, Clothing and Footwear Import Credit Scheme* (Complainant: US), 7 October 1996 (DS57); *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* (Complainant: US), 10 November 1997 (DS106); *Australia - Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets* (Complainant: Switzerland), 20 February 1998 (DS119); *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* (Complainant: US), 4 May 1998 (DS126); *Australia - Certain Measures Affecting the Importation of Fresh Fruit and Vegetables* (Complainant: Philippines), 18 October 2002 (DS270); *Australia - Certain Measures Affecting the Importation of Fresh Pineapple* (Complainant: Philippines), 18 October 2002 (DS271); *Australia - Quarantine Regime for Imports* (Complainant: European Communities), 3 April 2003 (DS287); *Australia - Measures Affecting the Importation of Apples from New Zealand* (Complainant: New Zealand), 31 August 2007 (DS367).

to accept and consider unsolicited amicus briefs.[527] However, some WTO Member States consider that WTO panels do not possess this ability on the basis that NGOs cannot participate within an inter-State dispute settlement system.[528]

Amicus curiae submissions have also been filed in Appellate Body proceedings. They may form an integral part of submissions made by the parties to a dispute when attached as an exhibit.[529] The Appellate Body considers that it may accept and consider any information it considers pertinent and useful in deciding an appeal, including unsolicited amicus curiae submissions, arising from its authority to adopt procedural rules which do not conflict with the DSU or the covered agreements (Article 17(9) of the DSU).[530] The Appellate Body has adopted additional procedures pursuant to Rule 16(1) of the Working Procedures[531] to receive and consider amicus curiae briefs (even if it ultimately refused leave to amici to file briefs).[532] An application for leave for natural or legal persons to submit amicus briefs has to disclose their nature, their interest in the proceedings, whether they are financed or supported by the parties to proceedings and how their submission would assist deliberations through material which did not repeat existing information.[533] However, a majority of WTO Members considered such a measure unacceptable.[534] The Appellate Body also considers that it may accept amicus curiae submissions from WTO Members not party to a particular dispute and not merely briefs from private individuals or organizations.[535] In practice, the WTO Appellate Body has

527 WTO Appellate Body Report, *US - Import Prohibition on Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1998) *(US - Shrimp)*, [105]-[108].

528 WTO General Council, Minutes of the Meeting of 22 November 2000, WTO Doc WT/GC/M/60.

529 WTO Appellate Body Report, *US - Shrimp*, [89] & [91].

530 WTO Appellate Body Report, *US - Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, WTO Doc WT/DS138/AB/R (2000), [40]-[41] & [43].

531 Rule 16(1) of the Working Procedures for Appellate Review provide that, to ensure fairness and orderly conduct, a Division may adopt procedures for resolving procedural questions where consistent with the DSU, covered agreements and other working procedures.

532 WTO, *EC - Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R, [50] & [55]–[57] (2001).

533 WTO, Communication from the Appellate Body, EC-Measures Affecting Asbestos and Asbestos-Containing Products, Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review, WTO Doc. WT/DS135/9 (2000).

534 General Council, Minutes of the Meeting of 22 November 2000, WTO Doc WT/GC/M/60.

535 WTO Appellate Body Report, *EC - Trade Description of Sardines*, WTO Doc WT/DS231/AB/R (2002) [164] & [167].

never considered any unsolicited submission to be pertinent or useful to the dispute at hand. Factors relevant to whether amicus submissions will be considered include the degree of consistency with party submissions, the extent to which they are adopted by disputants, relevance, the timing of submissions and any suggestion of inappropriate conduct by amici (such as disclosing confidential information) which may disqualify their submission.

The issues concerning amicus briefs are the subject of ongoing negotiations in the context of amending the DSU.[536]

536 On proposed amendments to the DSU concerning Amicus Curiae Submissions, see WTO, Contribution of the EC and its Member States to the Improvement of the WTO Dispute Settlement Understanding, WTO Doc. TN/DS/W/1 (2002).

Chapter 9

International Criminal Law

BY MANUEL J. VENTURA, JUSTEN SING, ANNALISE HAIGH AND MARTY BERNHAUT

9.1. What is International Criminal Law?

International Criminal Law (ICL) is a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression and terrorism) and to make those persons who engage in such conduct criminally liable.[537]

ICL provides both enforcement and regulation at a State and international level. At a State level, ICL authorises or imposes an obligation upon States to prosecute and punish such criminal conduct.[538] At an international level, ICL regulates international proceedings before international courts and tribunals that prosecute persons accused of such crimes.[539]

9.1.1. Principles and Features of International Criminal Law

As a branch of public international law, the rules that make up ICL originate from the sources of international law discussed below including treaties, customary international law and general principles of law. Hence they are subject, among other things, to the principles of interpretation proper to that law.

537 A. Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), at p. 3.

538 N. Boister, 'Transnational Criminal Law?' 14(5) *European Journal of International Law* 953-976 (2003) at 967-977.

539 B. Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003) at pp. 44-51.

The applicable rules in international criminal proceedings were first laid down in the Statutes of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE), then in those of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and more recently in the Rome Statute of the International Criminal Court (ICC). It is important to note that they only pertain to the specific criminal court for which they have been adopted, that is they have no general scope.

General principles of international criminal law include principles specific to criminal law, such as the principles of legality (*nullum crimen sine lege*), of specificity, the presumption of innocence, equality of arms, *ne bis in idem* and individual criminal responsibility. Although these principles are now firmly entrenched in the international system, their application and execution at the international level has occurred as a result of the gradual interchange over time from national legal systems on to the international legal fora.

Legality of Crimes (*nullum crimen sine lege*) – postulates that a person may only be held criminally liable and punished if at the moment when he/she performed a certain act, the act was regarded as a criminal offence by the relevant legal order, or under the applicable law.[540]

Specificity – refers to the need for both the objective element (*actus reus*) and the subjective element (*mens rea*) of a crime to be as specific and detailed as possible so as to indicate that the relevant conduct is prohibited.

Presumption of innocence – is the fundamental principle that any accused person is presumed innocent until proven guilty.[541]

Equality of arms – refers to the right of both parties in a criminal prosecution to be afforded a reasonable opportunity to fairly present their case in circumstances where no undue advantage is given to either side. With respect to the defence, this includes, among others, the right to know full particulars specifying the charges preferred against an accused in an indictment, the right to examine the evidence gathered by

540 This principle can be traced back to Article 39 of *Magna Carta Libertatum* (Magna Carta) of 1215. See also *Prosecutor v. Delalić et al.*, Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 402.

541 See Article 21(3), Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Article 20(3), Statute of the International Criminal Tribunal for Rwanda (ICTR); Article 17(3), Statute of the Special Court for Sierra Leone (SCSL); Article 35 new, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (ECCC); Article 16(3)(a), Statute of the Special Tribunal for Lebanon (STL); Article 66(1), Rome Statute of the International Criminal Court (ICC).

the prosecution in support of the charges in the timeliest manner, the right to appoint one or more defence counsel, the right to call witnesses and to cross-examine any witnesses called by the prosecution.[542]

Ne bis in idem – no person may be tried more than once for the same criminal conduct (double jeopardy).[543]

Individual criminal responsibility – refers to the fundamental notion that criminal liability attaches only to individuals as a result of their conduct and not to any State or abstract entity. This is particularly important in the context of international criminal law, since in many instances crimes are committed either under the cloak of governmental authority or with their acquiescence or tacit support.[544]

9.1.2. The Content of International Criminal Law

ICL comprises of two limbs. The first limb is made up of *substantive* international criminal law. Professor Cassese refers to it as "the set of rules indicating what acts are prohibited, with the consequence that their authors are criminally accountable for their commission; they also set out the subjective elements required for such acts to be regarded as criminalised, the possible circumstances under which persons accused of such crimes may nevertheless not be held criminally liable, and also the conditions on which states may or must, under international rules, prosecute or bring to trial persons accused of one of those crimes."[545]

The second limb of ICL is made up of *procedural* international criminal law. This serves to regulate criminal proceedings before international criminal courts and tribunals, to govern the actions of prosecuting authorities and the various stages of international trials.[546] For the purposes of this book we will be focusing on the substantive law of ICL.

542 See Article 16, Charter of the International Military Tribunal ('IMT'); Article 9, Charter of the International Military Tribunal for the Far East ('IMTFE'); Article 21(4), ICTY Statute; Article 20(4), ICTR Statute; Article 17(4), SCSL Statute; Article 35 new, ECCC Law; Article 16(4), STL Statute; Article 67(1), ICC Statute.

543 See Article 10, ICTY Statute; Article 9, ICTR Statute; Article 9, SCSL Statute; Article 5, STL Statute; Article 20, ICC Statute.

544 See Article 6, IMT Charter; Article 5, IMTFE Charter; Article 7(1), ICTY Statute; Article 6(1), ICTR Statute; Article 6(1), SCSL Statute; Article 29, ECCC Law; Article 3(1), STL Statute; Article 25(2), ICC Statute. But see Article 9, IMT Charter; Article 25(4) ICC Statute.

545 A. Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), at p. 3.

546 *Ibid*.

9.2. Sources of International Criminal Law

Given that international criminal law is a subset of public international law, the rules that constitute this body of law emanate from the authoritative list of sources of international law in Article 38(1) of the Statute of the International Court of Justice (ICJ)[547] and should be employed in the order contained therein. One should first look for treaty rules or rules enumerated by binding international instruments. Reference should next be made to customary law, followed by the general principles of international criminal law (which may be deduced from treaty/convention provisions, the rules of customary international law or from the practice of States). Finally, if one still cannot identify the applicable rule, reference is permitted to judicial decisions and the opinions of eminent scholars.

9.2.1. Treaties/Conventions

The Statute of the International Criminal Court (ICC) (1998) identifies both a list of crimes subject to the jurisdiction of that Court and outlines some general principles of international criminal law.[548] Other treaties assist in defining the scope of international criminal law by codifying international humanitarian law. These include the Regulations annexed to the Fourth Hague Convention of 1907, the four Geneva Conventions of 1949, the two Additional Protocols to the Geneva Conventions of 1977 and various treaties prohibiting the use of certain weapons. In addition, other treaties have been established which deal specifically with international criminal conduct, such as the Convention on the Prevention and Punishment of Genocide (1948) and the Convention Against Torture (1984). When seeking to interpret such treaties, resort must be had to the rules of interpretation as stated in Articles 31-33 of the Vienna Convention on the Law of Treaties (1969). Furthermore, it is important for practitioners to remember that although States are only bound by treaties and conventions that they have signed and ratified, in certain instances they merely serve to codify what is already customary international law and binds all States. Conversely, what might have originally been contained in treaties and conventions can ultimately become customary international law provided that a sufficient level of state practice and *opinio juris* exists.

547 This list of sources is also reflected in Article 21, ICC Statute.

548 There are also other international instruments which establish and regulate international criminal tribunals, including the resolutions passed respectively in 1993 (Resolution 827) and 1994 (Resolution 955) by the UN Security Council that adopted the ICTY and the ICTR Statutes.

9.2.2. Customary International Law

Given that international criminal law is a relatively young field, with its content slowly becoming codified in treaties and conventions, there has been a heavy reliance upon customary rules to clarify that content.[549] However, such custom can only emanate from the practice of States and corresponding *opinio juris* (the belief that such practice is legally binding). Most customary rules of international criminal law have thus evolved primarily from domestic case law and State conduct relating to international crimes. Over time, the principles emanating from such judicial decisions and State conduct have permeated through to international law. Given that each State tends to apply its own domestic notions of criminal law even when deciding a matter of international law, it will often be difficult for practitioners to identify a uniform set of views with regard to the alleged existence of an international crime or the treatment thereof. Thus, proving the "crystallisation" of an offence under international law, other than an act already clearly established as criminal under international law (such as war crimes), or that customary international law demands particular outcomes with respect to international crimes, will therefore often be a fraught process.

9.2.3. General Principles of Law

Notwithstanding reliance on treaties and conventions together with customary international law, there may still nonetheless be instances where neither of these two sources provides an adequate solution or answer, particularly in the area of international criminal procedure. In such cases, in order to avoid a *lacuna* or a *non liquet* situation, resort may be had to "general principles of law". When operating within this prism, one looks for evidence that the major legal systems of the world (common law, civil law and perhaps Islamic law) recognise and apply the legal principle at issue or approach the legal matter in question in a particular manner. Similarly, one may look to the practice of the various international criminal courts and tribunals to discern the general practice of international law with respect to the issue. Complete uniformity is not required, rather the crux of the principle or legal issue should be identifiable across the legal systems of the world or the various international criminal courts and tribunals; it is substance and not form that is determinative. In particular, the general principles of domestic States should be capable of being transposed into international criminal law by taking into account the distinct

549 A. Cassese, *International Criminal Law*, 2nd Edition (Oxford: Oxford University Press, 2008), at pp. 4-5.

features and particular considerations that exist when dealing with crimes under international law. In other words, general principles applied in domestic cases should be compatible with the needs and objectives of international criminal cases.

9.2.4. Eminent Jurists and Judicial Decisions

Given that there is no strict doctrine of precedent under international law, judicial decisions (even of the same court) do not, *per se*, constitute a binding source of international criminal law. As identified in Article 38(1)(d) of the Statute of the ICJ, judicial decisions may only amount to a "subsidiary means for the determination of [international] rules of law." An international court or tribunal may therefore depart from a previous decision if it has forceful reasons for doing so. However, as identified earlier, given the developing nature of this body of international law and the consequent difficulty in ascertaining its scope and content, judicial decisions undoubtedly prove invaluable in identifying not only whether a customary rule has evolved, but also as a means of determining the most appropriate interpretation to be placed on a treaty rule. Indeed, all international courts and tribunals consistently refer to previous international case law when supporting their conclusions.[550] It would therefore seem that although a preceding decision of an international court may not be strictly binding, it is nevertheless persuasive authority for a later court.

In addition, the writings of the most highly qualified legal scholars and jurists may also be employed in the process of identifying the relevant law. However, this should not be interpreted as referring to *all* jurists or scholars, but those who are the most prominent in their academic fields. In international criminal law, this would refer to scholars such as Professors Antonio Cassese, M. Cherif Bassiouni, Yoram Dinstein and William A. Schabas. Such sources will, however, obviously carry less influence than the other aforementioned sources.

9.3. Prosecutions in National Courts

9.3.1. Jurisdiction

It is widely accepted that there are five general principles upon which criminal jurisdiction can be claimed. These are:

550 Further, Article 21(2) ICC Statute specifically allows the International Criminal Court to 'apply the principles and rules as interpreted in its previous decisions'.

1. the territorial principle – determining jurisdiction by reference to the territory on which the offence is committed or by reference to the territory on which a crime takes effect where the offence is perpetrated beyond the territory's borders (objective territorial principle);
2. the active personality/nationality principle – determining jurisdiction by reference to the nationality or national character of the person committing the offence;
3. the passive personality principle – determining jurisdiction by reference to the nationality or national character of the person injured by the offence.
4. the protective principle – determining jurisdiction by reference to the national interest injured by the offence; and
5. the universality principle – determining jurisdiction by reference to the character of the offence committed as being a crime against all nations, punishable by any State.

The first and second principles are universally accepted, although interpretation varies depending on the State. The *Lotus Case*,[551] considered both of these principles. In that case, a Turkish (the *Boz-Kourt*) and French ship (the *Lotus*) collided on the high seas, which resulted in the death of a number of Turkish sailors and passengers on the *Boz-Kourt*. On arrival at Constantinople (modern-day Istanbul), criminal proceedings were commenced under Turkish law against the *Lotus*' officer of the watch at the time of the collision (a French national). France disputed Turkey's right to commence proceedings claiming that it had no jurisdiction. The Permanent Court of International Justice (the precursor to the ICJ), applying the objective territorial principle, held that Turkey did have a right to bring proceedings under its laws as the Turkish vessel was considered, for the purposes of jurisdiction, Turkish territory.

The protective and universality principle are generally accepted by all States, however there are misgivings, as State sovereignty issues often arise. The protective principle relates to the notion that States may punish acts which threaten or injure their national interest or security, even when committed outside the state by non-nationals. In this context, issues arise where certain conduct is a crime in one State but not in another. The universality principle (also known as "universal jurisdiction") refers to the prosecution of crimes which are *jus cogens.* Because of their character,

551 *S.S. Lotus (France v. Turkey)*, Judgment, Permanent Court of International Justice, 7 September 1927, PCIJ Reports (1927), Series A, No. 10, p. 2.

such crimes are crimes against the whole of humanity and can be tried by any State, irrespective of where the crime was committed and against whom. Notwithstanding, for the prosecution of crimes under this jurisdiction many nations require some form of connection with the State. The key cases which consider these principles are the *Eichmann Case*[552] and the *Arrest Warrant Case*.[553] The universality principle is also considered in the *Rwandan Genocide Case*,[554] the *Pinochet Case*[555] and the *Guatemalan Genocide Case.*[556]

The passive personality principle is not widely accepted, however some States such as the United States, Spain and France have invoked the principle in some circumstances, particularly where it involves the disappearance, killing and/or torture of its citizens: *US v Yunis (No. 2)*[557] (involving the killing of two U.S. citizens in the hijacking of a plane); *Re Pinochet*[558] (involving the disappearance and murder of, *inter alia*, Spanish citizens by the Pinochet regime in Chile); *Re Astiz*[559] (involving the disappearance and torture of two French nuns by the military regime in Argentina).

9.3.2. National Prosecution of International Crimes

Australia has traditionally relied upon the territorial principle when invoking jurisdiction for international crimes, although the other principles, notably universal jurisdiction, are also evident within the Australian system. This is reflected in a number of Acts which enable the prosecution of international crimes. The table below provides an overview of the relevant Acts and the jurisdictional limits.

552 *Attorney-General of the Government of Israel v. Eichmann*, District Court of Jerusalem, 12 December 1961, 36 International Law Reports 5; *Attorney-General of the Government of Israel v. Eichmann*, Supreme Court of Israel, 29 May 1962, 36 International Law Reports 277.

553 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, International Court of Justice, 14 February 2002, ICJ Reports (2002), p.3.

554 *Prosecutor v. Ntezimana et al.*, Assize Court of the Administrative District of Brussels, 8 June 2001.

555 *R v. Bow Street Magistrates; Ex Parte Pinochet Ugarte (No. 3)*, House of Lords, 24 March 1999, [2000] 1 AC 147.

556 Sentencia del Tribunal Supremo sobre el caso Guatemala por genocidio, Appeal No. 327/2003, 25 February 2003, available at http://www.derechos.org/nizkor/guatemala/doc/gtmsent.html (accessed 30 September 2011).

557 (1988) 82 International Law Reports 344.

558 Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, Appeal No. 173/98, Criminal Investigation No. 1/98, 5 November 1998, available at http://www.derechos.org/nizkor/chile/juicio/audi.html (accessed 30 September 2011).

559 Judgment of the *Court D'Assises de Paris*, Case No. 1893/89, 16 March 1990.

Act (Cth)	Purpose of Act	Jurisdiction	Scope
War Crimes Act 1945	Prosecution of war crimes committed during World War II.	Section 11	Only Australian citizens or residents can be prosecuted.
Geneva Conventions Act 1957	Implemented the 1949 Geneva Conventions.	Section 7	Allowed the prosecution of all persons regardless of nationality. However, these provisions were repealed by the *International Criminal Court Act 2002.*
International Criminal Court Act 2002	Creates the offences of genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court.	Section 3	Provides that jurisdiction will be covered by the *Criminal Code Act 1995*.
Criminal Code	Provides for the prosecution of core ICC crimes, including genocide, crimes against humanity, and war crimes.	Sections 268.117, 15.4 and 16.1	Allows for the prosecution of conduct constituting an international crime committed outside of Australia and which does not directly affect Australia, subject to the Commonwealth Attorney General's consent ("conditional" universal jurisdiction).
Crimes (Torture) Act 1988	Implements the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1988).	Section 7	Allows for the prosecution of an Australian citizen or a person present in Australia.

(*Continued*)

Act (Cth)	Purpose of Act	Jurisdiction	Scope
International War Crimes Tribunals Act 1995	Provides for co-operation in the investigation and prosecution of persons accused of committing *ad hoc* Tribunal offences (Former Yugoslavia and Rwanda Tribunal).	Section 7 and section 16	Allows the arrest and extradition of a person in Australia.

Although Australia has a fairly wide range of legislative instruments to prosecute international crimes, they are not in wide use. Since the immediate post-World War II period, the High Court decision of *Polyukhovich v Commonwealth*[560] is the only case that involved the prosecution of war crimes in Australia in modern times.[561] Polyukhovich was ultimately acquitted of crimes arising out of World War II under the *War Crimes Act 1945* (as amended), but the court did consider the concept of universal jurisdiction for war crimes in an Australian context. Justices Toohey and Brennan in their respective opinions dismissed the assertion that Australia is obliged under customary international law to try and punish foreign perpetrators of war crimes and crimes against humanity. Justice Brennan did however find that Australia had a right "to exercise [its] jurisdiction to try and to punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order."[562]

However, any domestic prosecution in Australia of international crimes is conditional on their domestic criminalisation, otherwise such conduct is not a crime under Australian law. Thus, in *Nulyarimma v Thompson* the Full Court of the Federal Court of Australia determined that genocide was not a crime under Australian law (at that time) in the absence of legislation criminalising it, even in spite of its *jus cogens* status.[563] However, with the ratification of the Rome Statute of the International

560 (1991) 172 CLR 501.

561 Between 1946-1951 Australia tried 807 Japanese defendants for war crimes, leading to 579 convictions. See G. Boas, 'War Crimes Prosecutions in Australia and Other Common Law Countries: Some Observations', 21(2) *Criminal Law Forum* 313-330 (2010).

562 *Polyukhovich v. Commonwealth* (1991) 172 CLR 501, 563 (per Brennan J).

563 *Nulyarimma v. Thompson* [1999] FCA 1192, paras 32, 57; but see the separate opinion of Merkel J., para. 186. This is also the position in the United Kingdom: *R v. Jones*, House of Lords, 29 March 2006, [2006] UKHL 16. In that case, the House of Lords (as it then was) held that although aggression is a crime under customary international law, in the absence of its domestic criminalisation, acts seeking to prevent its occurrence were not lawfully justified on the basis that they were committed in order to prevent a crime – the invasion of Iraq – from taking place.

Criminal Court and the inclusion of international crimes within the *Criminal Code* (Cth), Australia not only has the legislative instruments available for the domestic prosecution of international crimes, but Australian courts now also have jurisdiction over such crimes. In particular, Australian law permits the prosecution of international crimes whose commission and effects take place wholly outside of Australia even by non-citizens, provided that the Commonwealth Attorney-General consents to such prosecutions ("conditional" universal jurisdiction).[564] Lastly, practitioners should keep in mind that international human rights law specifically permits the retroactive domestic prosecution of international crimes, so long as the conduct was criminal under international law at the time of the commission of the offence.[565]

9.3.3. Inter-State Cooperation with respect to National Proceedings

Strictly speaking, Australia is not obliged to cooperate with respect to proceedings outside its borders unless it has entered into an agreement or treaty with the relevant State. However, due to their nature, international crimes lend themselves to such inter-State assistance. Thus, most international criminal law-related treaties include mutual assistance and/or extradition provisions and in some cases oblige States to either prosecute persons on their territory for international crimes or extradite them to a country that will (*aut dedere aut judicare*).[566] Thus, it may be

564 See Sections 268.117, 15.4, 16.1, *Criminal Code* (Cth).

565 Article 15(2), International Covenant on Civil and Political Rights (1966). See *Polyukhovich v. Commonwealth* (1991) 172 CLR 501, 572-576 (finding that the retroactive application of the *War Crimes Act 1945* (Cth) was consistent with international law); *Kolk and Kislyiy v. Estonia (Admissibility)*, European Court of Human Rights, 17 January 2006, *Reports of Judgments and Decisions* 2006-I (interpreting Article 7(2) of the European Convention on Human Rights which provides for the same exception as Article 15(2) of the ICCPR); *R v. Finta*, Supreme Court of Canada, 24 March 1994, [1994] 1 SCR 701, para. 343 (interpreting section 11(g) of the Canadian Constitution which provides for the same exception as Article 15(2) of the ICCPR).

566 Examples of both include: Article VII, Convention on the Prevention and Punishment of Genocide (1948), 78 UN Treaty Series 277; Article 88, Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977), 1125 UN Treaty Series 3; Article 7, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Series 112; Article 7, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971), 974 UN Treaty Series 177; Article 49, First Geneva Convention (1949), 75 UN Treaty Series 31; Article 50, Second Geneva Convention (1949), 75 UN Treaty Series 85; Article 129, Third Geneva Convention (1949), 75 UN Treaty Series 135; Article 146, Fourth Geneva Convention (1949), 75 UN Treaty Series 287; Article 11(1), International Convention for the Protection of All Persons from Enforced Disappearance (2006); Article 10(1), International Convention for the Suppression of the Financing of Terrorism (1999), 2178 UN Treaty Series 197; Article 8(1), International Convention for the Suppression of Terrorist Bombings (1997), 2149 UN Treaty Series 256.

that, at a minimum, inter-State cooperation with respect to international crimes is in the process of crystallising into a rule of customary international law.

In Australia cooperation in the extradition field is codified into national law through the *Extradition Act 1988* (Cth) which enables the extradition of persons from and to Australia with "extradition countries", that is, countries with whom Australia has concluded an extradition treaty and are declared as such in the Act's regulations pertaining to that country.[567] Part II of the act provides for the extradition of persons from Australia while Part IV relates to the extradition of persons to Australia.

Such extradition is governed by the provisions of the Act together with the terms of the extradition treaty with the relevant country. Generally speaking, extradition is only available for offences that are crimes both in Australia and the relevant country (dual criminality), were criminalised as such at the time of their alleged commission (non-retroactivity) and for which the relevant individual has not already been previously prosecuted (double jeopardy). Extradition from Australia to another country may be refused on grounds that the accused person will likely be subjected to torture or the death penalty upon conviction (unless the requesting state provides a undertaking to the contrary), is sought for a political offence, is to be prosecuted or punished on account of his or her race, religious, nationality or political opinions or where a trial would be prejudiced because of such considerations.[568] These limitations are generally reflected in the text of the treaty between Australia and the relevant state.

Australia is fairly active within the extradition sphere. A recent example is the High Court case of *Republic of Croatia v Snedden*,[569] where the court considered an extradition request from Croatia in relation to an Australian citizen who had been accused of war crimes against prisoners of war and civilians in Croatia between 1991 and 1993. Snedden, who was at the time of the alleged offences a Serbian paramilitary commander, objected to his extradition under section 7(c) of the *Extradition Act 1988* (Cth), claiming that his political opinions at the time meant that his punishment would be harsher than what it would be if he had not held such political opinions. The court rejected this as being insufficient to satisfy an objection under section 7(c), as it did not show a sufficient connection with the crime.

More recently, the High Court explored non-retroactivity in extradition law in an international criminal context in *Minister for Home Affairs of the Commonwealth v.*

567 Section 5, *Extradition Act 1988* (Cth). The text of the extradition treaty between Australia and the relevant country are usually included as a schedule to the specific applicable regulation.

568 Section 7, 22(3) *Extradition Act 1988* (Cth).

569 (2010) 241 CLR 461.

Zentai.[570] That case concerned an extradition request from Hungary for an Australian citizen (Zentai) who was alleged to have committed war crimes (murder) in 1944 during World War II, an offence that only came into existence under Hungarian law in 1945. Notwithstanding the international human rights compatibility of the retroactive domestic prosecution of international crimes, the High Court held that the terms of the Australian-Hungarian extradition treaty only permitted the extradition of accused persons for crimes that were criminal according to the law of the requesting state at the time of their commission. Since war crimes were not criminalised under Hungarian law at the time of the allegations at issue, Australia was not permitted to extradite the accused for war crimes as such.

9.4. International Prosecutions

9.4.1. History of International Criminal Prosecutions: The Nuremburg and Tokyo Tribunals

International Military Tribunal (Nuremberg Tribunal)

Amidst the final stages of World War II and Nazi Germany, and after it had become clear that atrocities on a massive and systematic scale had taken place, the International Military Tribunal (IMT) at Nuremberg was established via the London Agreement (1945) negotiated and concluded by the United Kingdom, France, the United States of America and the (then) Union of Soviet Socialist Republics (USSR). Annexed to the Agreement was the Charter of the IMT that declared its mandate: "the just and prompt trial and punishment of the major war criminals of the European Axis."[571] Pursuant to this mandate the IMT was given jurisdiction over three crimes: crimes against peace (aggression), war crimes and crimes against humanity.[572] Subsequently, 24 persons[573] were indicted representing different facets of the German Nazi regime – military, media, industry, politics, economics and ideology – on four counts of conspiracy or common plan to

570 [2012] HCA 28, but see the dissenting opinion of Heydon J.

571 Article 1, IMT Charter.

572 Article 6, IMT Charter.

573 The indictees were Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley (committed suicide before the start of the trial), Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach (subsequently declared medically unfit for trial), Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann (tried *in absentia*), Franz von Papen, Arthur Seyss-Inquart, Albert Speer, Constantin von Neurath and Hans Fritzsche.

commit crimes against peace, crimes against peace, war crimes and crimes against humanity. The proceedings lasted from 20 November 1945 until 1 October 1956 in Nuremberg, Germany and gave birth to what we now identify as international criminal law.

The IMT was a ground-breaking and novel attempt to hold senior public officials and military officers accountable for their actions before an international court. It marked the first time in history that such a joint endeavour has been undertaken and by nations that did not necessarily share legal systems or traditions. The IMT's bench was composed of judges of the common law tradition (United Kingdom and the United States of America), civil law (France) and socialist law (the USSR). The court sat without a jury, with the judges being the arbiters of law and the finders of fact. The Prosecution was composed of these same nations, with the four charges levelled against the accused divided amongst them – the United States prosecuted the conspiracy or common plan count, France and the USSR jointly prosecuted the crimes against humanity count and the United Kingdom prosecuted the count of crimes against peace. The Defendants were represented by German counsel. In the end, the trial resulted in 19 convictions with penalties ranging from 10 years imprisonment to death by hanging as well as 3 acquittals.[574] The IMT did not provide for a right to appeal but did allow a review of sentence.[575]

In addition and subsequent to the IMT, another 12 war crimes trials[576] in post-World War II Germany were undertaken pursuant to Control Council Law No. 10 with the United States taking the lead, however these were separate and independent from the IMT.

International Military Tribunal for the Far East (Tokyo Tribunal)

Just after the IMT was established, a similar process was envisaged and implemented for those who committed crimes under the banner of Imperial Japan in Asia. However, unlike the IMT, the International Military Tribunal for the Far East (IMTFE) was created by a proclamation of General Douglas MacArthur in his capacity as the

574 Acquittals were entered for Hjalmar Schacht, Franz von Papen and Hans Fritzsche.

575 Article 29, IMT Charter.

576 The were: the Medical Case (*United States v. Brandt et al.*), the Milch Case (*United States v. Milch*), the Justice Case (*United States v. Altstötter et al.*), the Einsatzgruppen Case (*United States v. Ohlendorf et al.*), the RuShA Case (*United States v. Greifelt et al.*), the Pohl Case (*United States v. Pohl et al.*), the Flick Case (*United States v. Flick et al.*), the I.G. Farben Case (*United States v. Krauch et al.*), the Krupp Case (*United States v. Krupp et al.*), the High Command Case (*United States v. von Leeb et al.*), the Hostage Case (*United States v. List et al.*) and the Ministries Case (*United States v. von Weizsäcker et al.*).

Supreme Commander of the Allied Powers on 19 January 1946. Under the Charter of the IMTFE its establishment was "for the just and prompt trial and punishment of the major war criminals in the Far East"[577] and was given jurisdiction over crimes against peace (aggression), war crimes and crimes against humanity.[578] The composition of the IMTFE was more diverse than that of the IMT, with a bench of 11 judges from a broader number of Allied nations including the United States of America, Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the United Kingdom and the USSR. The Prosecution team was composed of the same nations, but in contrast to the IMT, the Defence was composed of three-quarters Japanese and one-quarter Americans.

Pursuant to its mandate, the IMTFE indicted 28 persons[579] representative of the highest echelons of the Japanese civilian authority and military (classified as "Class A" war criminals) with 55 counts of war crimes, crimes against humanity and crimes against peace (aggression). The proceedings lasted from 29 April 1946 until 12 November 1948 in Tokyo, Japan and resulted in 25 convictions and no acquittals with sentences that ranged from 7 years imprisonment to death by hanging. Like the IMT, there was no provision for an appeals process but rather a review of sentence.[580]

Following the trial of the Class A war criminals, a number of other trials took place for those deemed to bear lower responsibility for atrocities committed by Imperial Japan during World War II; these persons were classified as "Class B" or "Class C" war criminals.

9.4.2. The *ad hoc* International Criminal Tribunals

International Criminal Tribunal for the former Yugoslavia (ICTY)

From the time of the IMT and the IMTFE until the creation of the ICTY in 1993, international criminal law lay relatively dormant; it remained a topic of academic interest but lacked substantive international enforcement. However, this began

577 Article 1, IMTFE Charter.

578 Article 5, IMTFE Charter.

579 The indictees were Sadao Araki, Kenji Doihara, Kingorō Hashimoto, Shunroko Hata, Kiichirō Hiranuma, Kōki Hirota, Naoki Hoshino, Seishirō Itagaki, Okinori Kaya, Kōichi Kido, Heitarō Kimura, Kuniaki Koiso, Iwane Matsui, Yōsuke Matsuoka (died during the trial), Jirō Minami, Akira Muto, Osami Nagano (died during the trial), Takasumi Oka, Shūmei Ōkawa (subsequently declared medically unfit for trial), Hiroshi Ōshima, Kenryō Satō, Mamoru Shigemitsu, Shigetarō Shimada, Toshio Shiratori, Teiichi Suzuki, Shigenori Tōgō, Hideki Tōjō and Yoshijirō Umezu.

580 Article 17, IMTFE Charter.

to change with the armed conflict that resulted in the breakup of the former Yugoslavia in the early 1990s and the consistent reports and images that emerged of serious crimes being committed against civilian populations and captured combatants. As a result, the UN Security Council, acting pursuant to Chapter VII of the UN Charter, passed Resolution 827 (1993) on 25 May 1993 thereby bringing the ICTY into existence. Contrary to original expectations, the ICTY now sits at the very forefront of international criminal jurisprudence. Its cases have served to breathe new life and interest into an area of international law that had otherwise existed mostly in the abstract.

According to its Statute, the ICTY has the power "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[581] and sits in The Hague, The Netherlands. With regard to substantive crimes, it has jurisdiction to prosecute war crimes, crimes against humanity and genocide.[582] In terms of organisational structure, it is composed of three independent but interrelated organs: the Registry, Office of the Prosecutor and Chambers, the latter being composed of three Trial Chambers and one Appeals Chamber. The international nature of the ICTY means that it also represents a mix of civil law and common law with staff and judges hailing from both traditions. Thus, trials are conducted in an adversarial setting with judges applying the law, making factual findings and being able to actively participate in the proceedings (for example, by directly questioning and calling witnesses).

Pursuant to its mandate, the ICTY has indicted a total of 161 persons, all of which have either been brought to trial at the ICTY, transferred to a jurisdiction in the former Yugoslavia to stand trial or have had proceedings terminated due to ill-health, death or the indictment being withdrawn. Having almost completed its mandate, the ICTY is currently undergoing the process of closing down. Its latest Completion Strategy Report (19 November 2012)[583] envisages all of its remaining trials to conclude by 2016 and appeals proceedings by 2017. In addition, pursuant to UN Security Council Resolution 1966 (2010), the newly-established Mechanism for International Criminal Tribunals (MICT) covers functions inherited from the ICTY and commenced functioning on 1 July 2013 in order to complete its remaining and ongoing work.

581 Article 1, ICTY Statute.

582 Articles 2-5, ICTY Statute.

583 Letter dated 16 November 2012 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc. S/2012/847, 19 November 2012, Annex I.

International Criminal Tribunal for Rwanda (ICTR)

On 6 April 1994, a plane carrying the Rwandan President Juvénal Habyarimana was shot down over the capital Kigali, killing him and other senior members of his government. The fallout from this assassination led to mass slaughter in Rwanda with ethnic Hutu militias systematically and brutally killing the minority Tutsi and moderate Hutu in the area controlled by the government. Between April-July 1994 it is estimated that approximately 800,000 people were killed. These horrific events prompted the UN Security Council, upon the request of a subsequent Rwandan government, to create the ICTY's "sister tribunal", the ICTR. This took place on 8 November 1994 with Resolution 955 (1994) (to which the ICTR's Statute was annexed). Like in the case of the ICTY, Chapter VII powers were employed.

The ICTR is mandated "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994".[584] It has jurisdiction over the crimes of genocide, crimes against humanity and war crimes[585] and sits in Arusha, Tanzania. Modelled predominantly on the ICTY, the ICTR shares its features and structures. It is composed of the Registry, Office of the Prosecutor and Chambers (made up of three Trial Chambers and an Appeals Chamber) and represents the same mix of civil and common law traditions within an adversarial setting with staff and judges from both legal systems. The ICTR and the ICTY also effectively share the same Appeals Chamber, with the same judges simultaneously sitting on both benches.

Pursuant to its mandate, the ICTR has indicted a total of 92 persons of which, only nine remain at large.[586] Like the ICTY, the ICTR is also undergoing the process of closing down. Its latest Completion Strategy Report (14 November 2012)[587] expects the last of its appeals to conclude by 2014, having completed the last of its trials in December 2012. UN Security Council Resolution 1966 (2010) also applies to the

584 Article 1, ICTR Statute.

585 Articles 2-4, ICTR Statute.

586 Fugitives whose cases have been referred to Rwanda include Fulgence Kayishema, Pheneas Munyarugarama, Aloys Ndimbati, Ladislas Ntaganzwa, Charles Ryandikayo and Charles Sikubwabo. Fugitives who remain wanted by the Mechanism for International Criminal Tribunals (the ICTR's successor) include Augustin Bizimana, Félicien Kabuga and Protais Mpiranya.

587 Letter dated 14 November 2012 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, UN Doc. S/2012/836, 14 November 2012.

ICTR and thus the MICT began operation on 1 July 2012 and is progressively taking over its essential functions and ongoing work as its closure approaches.

9.4.3. The "Hybrid" International Tribunals

Special Court for Sierra Leone (SCSL)

From 1991-2002 the country of Sierra Leone was engulfed in a civil war between government forces and rebel groups. In August 2000, the President of Sierra Leone requested the United Nations' assistance in creating a special court so as to prosecute those responsible for atrocities during the war. This request and subsequent negotiations led to the creation of the SCSL via an agreement between the United Nations and the government of Sierra Leone signed on 16 January 2002, annexed to which was the SCSL's Statute. Its establishment marked the first of the "new wave" of international criminal tribunals known as "hybrid" international tribunals because of their incorporation of elements of domestic law, inclusion of national judges within an international(ised) court setting, and their statutes being negotiated between the relevant State and the United Nations.

The SCSL is mandated "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996".[588] It has jurisdiction over crimes against humanity, war crimes and crimes under Sierra Leonean law (specifically the abuse of girls and wanton destruction of property).[589] The SCSL would indict 13 individuals of which only one remains on the run (Johnny Paul Koroma). Those indicted included members of the Civil Defence Forces of Sierra Leone (including the Minister of the Interior) – a notable exercise of prosecutorial independence – and the (then) President of Liberia, Charles Taylor. The SCSL is unique in that juveniles aged 15 years and older can be brought to trial,[590] however no juvenile has ever been indicted.

The SCSL is structured and operates much like the ICTY and the ICTR. It is composed of the Registry, Office of the Prosecutor and Chambers (two Trial Chambers and one Appeals Chamber). Its judges are a mix of international and Sierra Leoneans with a majority being international judges.[591] The SCSL is considered to be an international court operating independently of the Sierra Leonean judicial system, but sitting in Freetown, Sierra Leone. Notwithstanding, the SCSL's final trial (*Prosecutor v. Taylor*)

588 Article 1, SCSL Statute.
589 Articles 2-5, SCSL Statute.
590 Article 7, SCSL Statute.
591 Article 12, SCSL Statute.

was moved to The Netherlands (first to The Hague and then to Leidschendam) because of domestic security concerns. As of the end of February 2013, all of the trials and appeals have been concluded with the exception of the *Taylor* case, where the final appeal judgment was handed down in September 2013.

Extraordinary Chambers in the Courts of Cambodia (ECCC)

In 1997, the government of Cambodia requested the United Nations' assistance in setting up a court to try those most responsible for the crimes committed during the time of the Khmer Rouge regime (1975-1979) when an estimated 1.8 million Cambodians were killed through starvation, torture, execution and forced work in labour camps. This initial request led to years of protracted negotiations, during which the Cambodian National Assembly passed "The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia" (2001) (ECCC Law) that would later become the governing document of the Extraordinary Chambers of the Courts of Cambodia (ECCC) (after it was amended in 2004). On 6 June 2003, the United Nations and Cambodia concluded an agreement that created the ECCC as an internationalised court operating independently within the Cambodian court structure and sitting in Phnom Penh.

The mandate of the ECCC is "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."[592] It has jurisdiction over genocide, crimes against humanity, war crimes, crimes under the Cambodian Penal Code (1956) (specifically homicide, torture and religious persecution), as well as crimes committed against internationally protected persons pursuant to the Vienna Convention on Diplomatic Relations (1961).[593] The ECCC has currently indicted five persons in two separate cases.[594] As of the end of February 2013, the trial and appeal of Case 001 has been completed whilst the trial of Case 002 is ongoing. Two additional cases (Cases 003 and 004) are undergoing investigative phases.

In terms of structure and operation, the ECCC is somewhat different from other modern tribunals. It is composed of the Office of the Co-Prosecutors (one Cambodian, one international), Co-Investigative Judges (one Cambodian, one international), Office of Administration (Registry), and Chambers. The latter

592 Article 1, ECCC Law.

593 Articles 3 new-8, ECCC Law.

594 The first (Case 001) involves Kaing Guek Eav and the second (Case 002) involves Nuon Chea, Khieu Samphan, Ieng Thirith and Ieng Sary.

consists of a Pre-Trial Chamber, Trial Chamber and a Supreme Court Chamber with Cambodian and international judges sitting on each bench, with a majority of them being Cambodian judges.[595] However, the voting procedure is unique in that although the majority are Cambodian, in order to make decisions a "super-majority" (majority plus one) is required rather than a simple majority.[596] In addition, the prosecutorial and investigative model resembles that of civil law: Co-Prosecutors request the initiation of an investigation to the Co-Investigative Judges who then carry out the actual investigation and subsequently indict the accused or dismiss the case. The ECCC also allows the direct participation of victims as Civil Parties in proceedings.

Special Tribunal for Lebanon (STL)

On 14 February 2005, in the midst of a wave of political assassinations and terrorist bombings in Lebanon, former Lebanese Prime Minister Rafiq Hariri and 22 others were killed in an explosion in a Beirut suburb. The fallout from the assassination led the Lebanese government to ask for the United Nations' assistance in investigating the killing and then to create a tribunal to prosecute those responsible. Like the SCSL and ECCC models, an agreement was negotiated between the government of Lebanon and the United Nations, however the Lebanese parliament did not convene so as to ratify it. As a means to overcome the deadlock, the UN Security Council, acting under Chapter VII, passed Resolution 1757 (2007), annexed to which was both the agreement between the United Nations and Lebanon and the Statute of the STL. The Resolution stipulated that if the agreement was not ratified by Lebanon by 10 June 2007 then it would enter into force at that time. The agreement was not ratified and thus the STL was born.

The STL's jurisdiction is "over persons responsible for the attack of 14 February 2005 resulting in the death of […] Rafiq Hariri and in the death or injury of other persons."[597] It also has potential jurisdiction over "other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, [which] are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005".[598] In contrast to other international tribunals,

595 Article 9 new, ECCC Law.

596 Article 14 new, ECCC Law.

597 Article 1, STL Statute.

598 Article 1, STL Statute. Pursuant to this provision, in August 2011 the Pre-Trial Judge ruled that three other bombings that had targeted prominent Lebanese politicians in 2004 and 2005 fell within the STL's jurisdiction and ordered the Lebanese authorities to defer their investigation and prosecution to the STL.

the STL's jurisdiction over substantive crimes are limited to those contained within the Lebanese Criminal Code relating to terrorism, offences against life and personal integrity, illicit associations and failure to report offences;[599] it has no jurisdiction over international crimes.

In terms of structure, the STL is composed of the Registry, Office of the Prosecutor, Defence Office and Chambers. The latter consists of a Pre-Trial Chamber, a Trial Chamber and an Appeals Chamber with its judges being a mix of international and Lebanese judges with a majority of international judges.[600] The STL is the first international tribunal to have a separate Defence Office as an official organ of the court on par with the others. Like the ECCC and the ICC, the STL provides for the participation of victims in proceedings and allows them to bring compensation claims to competent national bodies upon a judgment of the STL.[601] Significantly, for the first time since the IMT in Nuremberg, the STL allows trials to take place *in absentia*, provided that active steps have been taken to locate and inform the accused of the proceedings against them.[602] Thus, the STL's first trial for the killing of Rafiq Hariri commenced in January 2014 (*Prosecutor v. Ayyash et al.*) without the presence of the accused. The STL is situated in Leidschendam, The Netherlands.

9.4.4. The International Criminal Court

The creation of the permanent International Criminal Court (ICC) marked the culmination of a long progress that officially began in the 1940s and was revived 1989 when the International Law Commission (ILC) was asked by the UN General Assembly to consider the creation of such a court. This eventually led the ILC to be tasked with preparing a draft statute, after which numerous negotiations and preparatory meetings were held. This process culminated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy during June-July 1998. At the conference, countries (as well as non-governmental and inter-governmental organisations) came together to review and vote on the final version of what became the Rome Statute of the International Criminal Court (1998) (Rome/ICC Statute). In the end, the Statute was overwhelmingly approved and came into force on 1 July 2002 following the 60th State ratification.

599 Article 2(a), STL Statute.
600 Article 8, STL Statute.
601 Article 25, STL Statute.
602 Article 22, STL Statute.

The ICC model is that of an independent treaty-based court (not part of the UN) that is composed of four organs: the Presidency, Judicial Divisions (Pre-Trial, Trial and Appeals), the Office of the Prosecutor and the Registry. In addition, the ICC has an oversight/"legislative" body known as the Assembly of State Parties, composing of States that have signed and ratified (or acceded to) the Rome Statute as well as other States who can attend as observers.[603] This body is responsible for *inter alia*, the election of the ICC's judges, Prosecutor and Deputy-Prosecutor as well as its budget and the review of, and amendments to, the Rome Statute.[604] The seat of the ICC in is The Hague, The Netherlands however "[t]he Court may sit elsewhere, whenever it considers it desirable".[605]

The ICC is mandated "to exercise its jurisdiction over persons for the most serious crimes of international concern, […] and shall be complementary to national criminal jurisdictions."[606] This principle of complementarity lies at the very heart of the ICC; States are expected to take the lead with respect to investigating and prosecuting international crimes. Only if the relevant State is unwilling or unable to do so (or where there is state inaction), can the ICC potentially step in. It is a court of last – not first – resort. Pursuant to this mandate, the ICC has jurisdiction over genocide, crimes against humanity, war crimes[607] and, in due course, aggression.[608] However, it may only exercise jurisdiction after the entry into force of the Statute (1 July 2002) or after the date upon which the Rome Statute entered into force for the relevant State;[609] it cannot act retroactively.[610]

Importantly, the ICC is not a court endowed with universal jurisdiction. Its ability to investigate and prosecute international crimes is limited to a number of defined circumstances: 1) if they are committed on the territory of a State party,[611] 2) if they are committed by a national of a State party,[612] 3) if a State party refers a situation to

603 As of the end of February 2013, there are 122 State Parties to the International Criminal Court.
604 Articles 112, 121-123, ICC Statute.
605 Article 3(3), ICC Statute.
606 Article 1, ICC Statute.
607 Articles 6-8, ICC Statute
608 Article 5(2), ICC Statute stipulates that the ICC has jurisdiction over the crime of aggression when a definition and the conditions for the exercise of jurisdiction have been agreed. At the recent ICC Review Conference (2010) consensus on aggression was reached (see the discussion on the crime of aggression below).
609 Article 11, ICC Statute.
610 Article 124(1), ICC Statute.
611 Article 12(2)(a), ICC Statute.
612 Article 12(2)(b), ICC Statute.

the ICC;[613] 4) if a situation is referred to the ICC by the UN Security Council acting under Chapter VII of the UN Charter[614] or 5) if a State that is not a party to the Rome Statute declares its acceptance of the ICC's jurisdiction on an *ad hoc* basis.[615] Having no police force of its own, the ICC obliges State parties to cooperate with the Court in its investigative and prosecutorial endeavours, particularly in the arrest and surrender of suspects.[616]

Within this framework, the ICC has a number of interesting features. Of particular note is the Prosecutor's independent ability to commence investigations and prosecutions *proprio motu* (of his/her own accord) contingent upon prior authorisation being given by the Pre-Trial Chamber.[617] In addition, the Rome Statute calls for fair global and gender representation among the judges who sit on the ICC bench[618] and it allows the participation of victims through legal representatives[619] who are subsequently eligible for monetary reparations through the ICC Trust Fund.[620] The ICC also adds a layer of litigation between the issuance of an arrest warrant or a summons to appear and the trial proper; a Pre-Trial Chamber is required to determine whether there are "substantial grounds to believe" that the accused is responsible for the crime of which he/she is alleged before a trial can begin (this is known as the "confirmation of charges").[621] Once a trial commences, it takes place in an adversarial setting with judges being arbiters of fact and law.

As of the end of February 2013, the ICC is seized of eight situations: the Democratic Republic of the Congo, the Darfur region of Sudan, Kenya, Uganda, Libya, the Central African Republic, Côte d'Ivoire and Mali.[622] From these situations, the ICC has publicly charged 30 individuals: 10 have outstanding warrants of arrest,[623] 8 are standing trial

613 Article 14, ICC Statute. The relevant situation must fall within the existing jurisdiction of the ICC (Article 12(2)(a)-(b)).

614 Article 13(b), ICC Statute. The relevant situation need not fall within the ICC's existing jurisdiction (Article 12(2)(a)-(b)) – the situation in any country can be potentially referred to the ICC by the UN Security Council.

615 Article 12(3), ICC Statute.

616 Articles 86-102, ICC Statute.

617 Articles 15, 53, ICC Statute.

618 Article 36(8), ICC Statute.

619 Article 68(3), ICC Statute.

620 Article 79, ICC Statute.

621 Article 61, ICC Statute.

622 In addition, the ICC Pre-Trial Chamber is currently considering an application by the Office of the Prosecutor to open an investigation into the situation in Côte D'Ivoire.

623 Bosco Ntaganda, Sylvestre Mudacumura, Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Abdel Raheem Muhammad Hussein, Omar Hassan Ahmad Al Bashir.

or awaiting trial,[624] four have not had the charges against them confirmed,[625] three have yet to be transferred to the ICC,[626] two have had the charges withdrawn due to death (Raska Lukwiya and Muammar Mohammed Abu Minyar Gaddafi) and one is undergoing the confirmation of charges process (Laurent Gbagbo). In its first completed trial, the ICC entered a guilty verdict (*Prosecutor v. Lubanga Dyilo*) and in its second, an acquittal (*Prosecutor v. Ngudjolo Chui*).[627] Appeal proceedings in both cases are ongoing.

9.5. Substantive Law of International Crimes

Crimes which are regulated or created by international law are usually of concern to the international community as they threaten international interests or fundamental values. The ICC Statute uses the term "the most serious crimes of concern to the international community as a whole" and recognizes that such crimes "threaten the peace, security and well-being of the world."[628] The following are considered international crimes: genocide, crimes against humanity, war crimes, aggression, terrorism and torture.

9.5.1. Genocide

Genocide is the intentional destruction of a national, ethnic, racial or religious group of people as such. Genocide acquired autonomous significance as a specific crime in 1948 when the UN General Assembly adopted the Genocide Convention.[629] The Convention was instrumental as it:

(i) Sets out a careful definition of the crime;[630]

624 William Samoei Ruto, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, Germain Katanga, Jean-Pierre Bemba Gombo, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.

625 Bahar Idriss Abu Garda, Callixte Mbarushimana, Henry Kiprono Kosgey and Mohammed Hussein Ali.

626 Saif Al-Islam Gaddafi, Abdullah Al-Senussi and Simone Gbagbo.

627 *Prosecutor v. Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06-2842, 14 March 2012; *Prosecutor v. Ngudjolo Chui*, Jugement rendu en application de l'article 74 du Statut, Case No. ICC-01/04-02/12-3, 18 December 2012.

628 Preamble, paras 3, 4, ICC Statute.

629 However even prior to this UN General Assembly Resolution 96(I), 11 December 1946 had already affirmed that genocide was a crime under international law.

630 Article II, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277.

(ii) Punishes other acts connected with genocide (conspiracy, complicity, direct and public incitement and attempt);[631]

(iii) Prohibits genocide regardless of whether it is perpetrated in time of war or peace;[632]

(iv) Considers genocide both as a crime involving the criminal responsibility of the perpetrator (and other participants), and as an internationally wrongful act entailing the responsibility of the State which authorises, engages, otherwise participates or fails to prevent the commission of genocide.[633]

The crime of genocide can be committed (*actus reus*) by killing, causing serious harm (bodily or mentally), inflicting conditions of life calculated to bring about the whole or partial destruction of the above groups, by imposing measures intended to prevent births, or by forcibly transferring children from the group, with the intention of completely or partially destroying the targeted group of people as such.[634] Therefore, genocide is not simply confined to mass killings, but can encompass non-fatal acts, such as rape, so long as they are accompanied with the requisite *mens rea*.[635] It is in this *mens rea* that we perhaps find genocide's most distinctive feature: the requirement of a specific intent (*dolus specialis*). It is this *dolus specialis* that sets genocide apart from other international crimes.

For genocide to have occurred, the perpetrator is required to have acted with the specific intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This element has been subject to criticism, as groups can be specifically targeted for destruction and yet the perpetrators thereof cannot be prosecuted for genocide if the targeted groups do not fit within one or more of the above categories (for example the elimination of political or opposition groups by military regimes). Notwithstanding, the four protected groups are subject to interpretation. Thus the ICTR in *Akayesu* held that any stable and permanent

631 Article III, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277. It should be noted that genocide is unique in that it is the only international crime for which conspiracy to commit is punishable at international law.

632 Article I, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277.

633 Article IX, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Series 277. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, International Court of Justice, 26 February 2007, ICJ Reports (2007), p. 43.

634 Article II, Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 U.N. Treaty Series 277. This treaty definition also reflects customary international law.

635 *Prosecutor v. Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, paras 731-733.

group is a protected group for the purposes of the Genocide Convention.[636] On the other hand, some countries (particularly in South America) have opted for an expansive interpretation of "national" groups so as to include within it political and other groups.[637] However, this interpretation ignores the *travaux préparatoires* of the Genocide Convention whereby it is clear that political and other non-stable groups were specifically excluded from the definition of genocide.[638] One approach in resolving some of these problems has been to adopt a subjective approach to the protected groups. Thus, even though the group targeted for destruction may not objectively belong to any of the four protected groups, it is sufficient if the victims and the perpetrators *subjectively* believed that they so belonged. Thus, in Darfur, Sudan, the different targeted tribal groups share the same nationality, ethnicity, religion and race as their attackers, yet because they viewed themselves as a distinct group (as did their attackers), they can fall within the Genocide Convention's protected groups.[639] Over time, dual objective/subjective considerations have prevailed.[640]

In addition, it should be emphasised that the intent with respect to a protected group cannot be defined negatively. The relevant group must be targeted for

636 *Prosecutor v. Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 516. This interpretation has, however, proved controversial and has only been followed in two subsequent cases (*Prosecutor v. Rutaganda*, Trial Judgment and Sentence, Case No. ICTR-96-3-T, 6 December 1999, para. 57; *Prosecutor v. Musema*, Trial Judgment and Sentence, Case No. ICTR-96-13-T, 27 January 2000, para. 162).

637 See the Argentinian cases of *Etchecolatz* (Case No. 2251/06, 19 September 2006); *Von Wernich* (Case No. 2506/07, 1 November 2007) and *Dupuy et al.* (Case No. 2901/ 09, 24 November 2010), decided by the Federal Oral Criminal Tribunal N° 1 of La Plata. The Criminal Chamber of the National Court of Cassation has since upheld both the *Etchecolatz* (Case No. 7896, 18 May 2007) and *Von Wernich* (Case No. 9517, 27 March 2009) cases and left the findings on genocide undisturbed. Leave to appeal both cases to the Supreme Court of Justice of Argentina was denied; see *Etchecolatz* (Case No. E. 191. XLIII., 17 February 2009 and *Von Wernich* (Case No. V. 411. XLV., 19 May 2010). Litigation in the *Dupuy et al.* case is ongoing.

638 See UN Doc. E/AC.25/SR.4 (15 April 1948) per Azoul (Lebanon), Ruzinski (Poland); UN Doc. A/C.6/SR.69 (7 October 1948) per Amado (Brazil), Pérez Perozo (Venezuela), Wikborg (Norway).

639 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras 494-501, 508-512.

640 *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Trial Judgement, 12 September 2006, para. 484; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgement, 17 January 2005, para. 667; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at p. 124, para. 191.

who they are, not for who they are not.[641] For example, the intent must be to destroy Bosnian Muslims because they are Bosnian Muslims, not because they are not Bosnian Serbs. Practitioners should also keep in mind that genocide at international law denotes the *physical* or *biological* destruction of a protected group. That a perpetrator intended the *social* destruction of the protected group is not enough. Thus, "cultural genocide" – the destruction of a group as a social unit by ethnic cleansing, forcible removals and/or the destruction of structures of cultural significance – does not amount to genocide at international law[642] (although it may be considered as a war crime or a crime against humanity when committed together with the relevant contextual elements).

For its part, Australian law accurately reflects and criminalises the commonly accepted notion of genocide at international law by codifying the elements contained in the Genocide Convention (1949) in sections 268.1–268.7 of the *Criminal Code* (Cth). The prescribed penalty for genocide under the *Criminal Code* (Cth) is life imprisonment.

9.5.2. Crimes against Humanity

The essential characteristic that underlies crimes against humanity is the concept of humanity as the victim rather than just the individual person upon whom crimes have been committed.[643] Therefore, crimes against humanity as an international crime can be distinguished from a domestic crime on the basis that its breach is of concern to the whole of the international community and as a consequence invokes international jurisdiction.[644] They cover actions that share a set of common features:

641 *Prosecutor v. Stakić*, Appeal Judgment, Case No. IT-97-24-A, 22 March 2006, paras 20-28; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at pp. 124-126, paras 193-196.

642 *Prosecutor v. Krstić*, Appeal Judgment, Case No. IT-98-33-A, 19 April 2004, para. 25; but see Partial Dissenting Opinion of Judge Shahabuddeen, paras 45-54 and the *Jorgić* conviction for cultural genocide in Germany: *Jorgić*, Bundesverfassungsgericht (Federal Constitutional Court), 2 BvR 1290/99, Absatz- Nr. (1-49), 12 December 2000 (this was subsequently held not to violate the *nullum crimen sine lege* principle: *Jorgić v. Germany*, European Court of Human Rights, Application No. 74613/01, 12 July 2007).

643 *Prosecutor v. Erdemović*, Sentencing Judgement, Case No. IT-96-22-T, 29 November 1996, paras 27-28.

644 M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), at p. 8.

(i) They are particularly odious offences;

(ii) They are not isolated or sporadic events but are part of a widespread or systemic practice of attacks and atrocities (which can be pursuant to a State or organisational policy) [645] ("contextual element");

(iii) They may be punished regardless of whether they are committed in times of war or peace;[646]

(iv) The victims of the crime(s) may be *civilians* or in the case of crimes committed during armed conflict, persons who do not take part or no longer take part (*hors de combat*) in armed hostilities.[647]

These atrocities and attacks (*actus reus*) can take a number of forms, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial or religious grounds, enforced disappearances, apartheid or other inhumane acts.[648] However, they must be perpetrated as part of a widespread or systematic attack directed against a civilian population, with knowledge of the existence of such an attack and with knowledge that the acts committed constitute part of the attack.[649]

As originally stipulated in the Charter of the IMT (Nuremberg), crimes against humanity required a nexus or link to an armed conflict;[650] they could not take place in times of peace. This precluded, for example, instances where a State committed systematic attacks against its own people in the absence of war. Over time, this nexus requirement gradually faded and was definitely severed by the ICTY's seminal judgment in *Tadić*.[651] However, the exact historical date of this severance remains in academic dispute. Over time its significance will disappear, however it still continues to raise *nullum crimen* problems where persons are prosecuted for crimes against

645 As will be discussed below, the requirement of a "State or organisational policy" exists under the Rome Statute of the ICC but not under customary international law.

646 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, at para. 140; *Prosecutor v. Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, paras 251, 272.

647 *Prosecutor v. Martić*, Appeal Judgement, Case No. IT-95-11-A, 8 October 2008, para. 313; *Prosecutor v. Mrkšić and Šljivančanin*, Appeal Judgement, Case No. IT-95-13/1-A, 5 May 2009, paras 29-32.

648 Article 7(1)(a)-(k), ICC Statute.

649 *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 85.

650 Article 6(c), IMT Charter. See also Article 5(c), IMTFE Charter.

651 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras 140-141.

humanity that took place prior to *Tadić* but without a nexus to an armed conflict, such as in proceedings against former Khmer Rouge members at the ECCC.[652]

One of the notable features of crimes against humanity is that the list of proscribed 'acts' is explicitly (and purposefully) non-exhaustive with the inclusion of "other inhumane acts".[653] Thus, it remains open as to what underlying acts can constitute crimes against humanity, provided they meet the following criteria: i) they must cause serious mental or physical suffering or constitute a serious attack on human dignity, ii) they must be of a similar gravity as the existing enumerated acts that qualify as crimes against humanity and iii) they must be performed with intent.[654] Using this formula, numerous non-enumerated acts have been held to constitute crimes against humanity (as other inhumane acts) including forcible transfers,[655] forced marriages,[656] the use of human shields[657] and mutilation.[658]

With respect to the contextual element for crimes against humanity, practitioners should note that differences exist between customary international law and the Rome Statute of the ICC. In the former, the widespread or systematic attack need not be pursuant to a "State or organisational policy".[659] In contrast, the Rome Statute explicitly requires it.[660] Thus at custom, an individual person can theoretically commit murder as a crime against humanity if he/she detonates nuclear bombs in various cities, whereas under the Rome Statute the person must be acting pursuant to a State or organisational policy – he/she cannot act in isolation. However, in practice (excluding such creative examples) it would be very difficult to carry out a

652 In its first trial judgment, the ECCC held that the severance of the nexus between crimes against humanity and armed conflict took place by at least 1975. See Trial Judgement, Case No. 001/18-07-2007/ECCC/TC/E188, 26 July 2010, paras 291-294.

653 See Article 6(c), IMT Charter; Article 5(c), IMTFE Charter; Article 5(i), ICTY Statute; Article 3(i), ICTR Statute; Article 2(i), SCSL Statute; Article 5, ECCC Law; Article 7(1)(k), ICC Statute.

654 *Prosecutor v. Kordić and Čerkez*, Appeal Judgement, Case No. IT-95-14/2-A, 17 December 2004, para. 117.

655 *Prosecutor v. Blagojević and Jokić*, Trial Judgement, Case No. IT-02-60-T, 17 January 2005, paras 629-630.

656 *Prosecutor v. Brima et al.,* Appeal Judgment, Case No. SCSL-2004-16-A, 22 February 2008, paras 200-202.

657 *Prosecutor v. Naletilić and Martinović*, Trial Judgment, Case No. IT-98-34-T, 31 March 2003, para. 334.

658 *Prosecutor v. Kajelijeli*, Trial Judgment, Case No. ICTR-98-44A-T, 1 December 2003, paras 934-936.

659 *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, paras 98-101; but see M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), at pp. 25-28.

660 Article 7(2)(a), ICC Statute.

"widespread or systematic attack" without some form of governmental acquiescence or assistance or completely outside any organisational policy.

Australian law criminalises crimes against humanity in sections 268.8–268.23 of the *Criminal Code* (Cth). It should be pointed out that the great majority of the underlying acts as contained in the *Criminal Code* (Cth) do not explicitly contain a State or organisational policy element,[661] they merely require that they be committed as part of a "widespread or systematic attack directed against a civilian population." Australia has thus codified crimes against humanity at customary international law, not as set out in the Rome Statute of the ICC. The prescribed penalty under the *Criminal Code* (Cth) ranges from 17 years to life imprisonment, depending on the specific offence.

9.5.3. War Crimes

War crimes are serious violations of the laws of warfare/usages or customs of war (also referred to as "international humanitarian law") committed by military personnel, other persons actively engaging in hostilities or civilians.[662] They can be committed in either international (inter-state) or non-international (or intra-state) armed conflict. International humanitarian law itself consists of a vast body of rules comprising of what are traditionally called "the law of the Hague" and "the law of Geneva" (named after the relevant treaties listed below) much of which have become rules of customary international law.[663] The core applicable rules of international humanitarian law differ depending on the type of armed conflict, as set out below:

International armed conflicts	**Non-international armed conflicts**
• Hague Conventions (1899 and 1907) (relating to methods and means of warfare)	• Common Article 3 of the Geneva Conventions (1949) (relating to minimum protections afforded in non-international armed conflict)

661 With the possible exceptions of enforced disappearances (section 268.21) and apartheid (section 268.22).

662 At the onset, one should keep in mind that war crimes only refer to serious violations of the laws of war (*jus in bello*) committed during armed conflict and should be separated from the law concerning the initiation of war itself (*jus ad bellum*).

663 C. de Than and E. Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003), at pp. 117-123. For a full exposition of the rules of customary international humanitarian law see the definitive study of the International Committee of the Red Cross: J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge: Cambridge University Press, 2009).

International armed conflicts	Non-international armed conflicts
• First Geneva Convention (1949) (relating to wounded and sick members of armed forces on land) • Second Geneva Convention (1949) (relating to wounded, sick and shipwrecked members of armed forces at sea) • Third Geneva Convention (1949) (relating to the treatment of prisoners of war) • Fourth Geneva Convention (1949) (relating to the protection of civilians) • Additional Protocol I to the Geneva Conventions (1977) (relating to the protection of victims of international armed conflicts) • Customary international humanitarian law	• Additional Protocol II to the Geneva Conventions (1977) (relating to the protection of victims of non-international armed conflicts) • Customary international humanitarian law

While a full exposition of all the specific acts amounting to war crimes is beyond the scope of this chapter,[664] broadly speaking, they include criminal conduct relating to:

(i) Military weapons and tactics (e.g. use of expanding bullets, poisonous gases and weapons, human shields, perfidy);

(ii) Persons no longer engaged in hostilities (*hors de combat*) (e.g. denial of quarter, mistreatment and killing of prisoners of war);

(iii) Persons not engaged in hostilities (civilians, medical personnel, peacekeepers) (e.g. targeting of civilians, mistreatment and deportation of civilian populations, attacking peacekeepers); and

(iv) Religious and cultural sites, property and the environment (e.g. wanton destruction of property, pillaging, attacking civilian objects).

As the name implies, war crimes require the existence of an armed conflict. In determining whether an armed conflict exits, the test set out in *Tadić* is widely considered definitive: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities

664 A comprehensive list of the prohibited conduct in war can be found in Article 8, ICC Statute.

and organized armed groups or between such groups within a State."[665] This serves to distinguish armed conflict from sporadic and disorganised acts of violence against a State. Once armed conflict has broken out, international humanitarian law is applicable in all the territory of the opposing States, or the whole territory under the control of a party (in the case of non-international armed conflicts), irrespective of whether combat operations actually take place there.[666]

However, it is insufficient that prohibited conduct simply take place during an armed conflict for it to qualify as a war crime. Unless the conduct is linked to, or has a nexus with, the armed conflict, it is merely criminal conduct committed against the backdrop of armed conflict, punishable by the domestic criminal law of the relevant state. In order to demonstrate this nexus it is necessary for the conduct to be shaped by, or be dependent on, the armed conflict.[667] "The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[668]

It is also important to keep in mind that not all violations of the laws of war qualify as war crimes. For example, killing prisoners of war[669] and not allowing them to use tobacco[670] are both breaches of Fourth Geneva Convention (1949), but only the former amounts to a war crime. The distinguishing feature is that the conduct must amount to a *serious* or *grave* violation of the laws of war; "it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."[671] Although each of the major treaties relating to international armed

665 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70; *Prosecutor v. Boškoski and Tarčulovski*, Appeal Judgement, Case No. IT-04-82-A, 19 May 2010, para. 21. Note that the criterion of "protracted armed violence" has been interpreted as "referring more to the intensity of the armed violence than to its duration." *Prosecutor v. Haradinaj et al.*, Trial Judgement, Case No. IT-04-84-T, 3 April 2008, para. 49.

666 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 70.

667 *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 58.

668 *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 58.

669 Article 32, Fourth Geneva Convention (1949), 75 UN Treaty Series 287.

670 Article 89, Fourth Geneva Convention (1949), 75 UN Treaty Series 287.

671 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 94.

conflict outline what constitutes grave breaches in international armed conflict,[672] and Common Article 3 of the Geneva Conventions outlines certain prohibitions applicable in non-international armed conflict, "new" war crimes can emerge under customary international law (in either international or non-international armed conflict, or both) provided they meet the "serious/grave" criterion, infringes a rule of international humanitarian law and entails individual criminal responsibility (as shown by the requisite state practice and *opinio juris*).[673]. An example of a relatively "new" war crime can be found in the SCSL's decision on the recruitment and use of child soldiers.[674]

Lastly, there exist specific requirements (in addition to the general elements outlined above) with respect to the targeted property or persons of the underlying war crime(s) depending on the classification of the conflict and the relevant charges. In international armed conflicts (only under the grave breaches regime of the Geneva Conventions (1949)) the victim or property of the underlying war crime(s) must be 'protected' pursuant to the relevant Geneva Convention.[675] In non-international armed conflicts pursuant to Common Article 3, the victim must have not been actively participating in hostilities at the time of the relevant offence.[676]

Australian criminal law reflects the international/non-international divide under international humanitarian law discussed above. Thus, sections 268.24–268.68, 268.95–268.101 of the *Criminal Code* (Cth) apply to war crimes committed in international armed conflicts, whereas sections 268.69–268.94 apply to non-international armed

672 Article 50, First Geneva Convention (1949), 75 UN Treaty Series 31; Article 51, Second Geneva Convention (1949), 75 UN Treaty Series 85; Article 130, Third Geneva Convention (1949), 75 UN Treaty Series 135; Article 147, Fourth Geneva Convention (1949), 75 UN Treaty Series 287; Articles 11, 85, Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977), 1125 UN Treaty Series 3.

673 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 94.

674 *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 31 May 2004. The crime of recruiting and using child soldiers is now contained in Articles 8(2)(b)(xxvi), 8(2)(e)(vii), ICC Statute.

675 Protected persons and objects are found in Articles 13, 19, 24-26, 33-35, First Geneva Convention (1949), 75 UN Treaty Series 31; Articles 13, 22, 24-27, 36-37, Second Geneva Convention (1949), 75 UN Treaty Series 85; Article 4, Third Geneva Convention (1949), 75 UN Treaty Series 135; Articles 4 (but note *Tadić*'s "allegiance theory" which extends this article's protection: *Prosecutor v. Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, paras 164-166), 18, 20-23, 33, 53, 57, 59, Fourth Geneva Convention (1949), 75 UN Treaty Series 287.

676 Common Article 3(1), Geneva Conventions (1949); Article 4(1), Additional Protocol II to the Geneva Conventions of 12 August 1949 (1977), 1125 UN Treaty Series 609.

conflicts. The prescribed penalty for war crime offences ranges from 10 years to life imprisonment, depending on the specific crime.

9.5.4. Aggression

The origins of aggression (or "crimes against peace" as it was originally coined) can be found in the general prohibition of inter-state war pursuant to historical bilateral or multilateral treaties of alliance, the Covenant of the League of Nations and the Paris (Kellogg-Briand) Pact (1928). However, the breach of such treaties only resulted in an internationally wrongful act for which state responsibility ensued. The real turning point was the IMT at Nuremberg that held – for the first time – that such internationally wrongful acts also engaged *individual* criminal responsibility. As the IMT put it, "[aggression] is not only an international crime; it is the supreme international crime".[677]

Despite the fact that individuals were found guilty of crimes against peace (aggression) under the IMT and IMTFE Charters, no general agreement was reached in the world community on an exhaustive definition of aggression, despite many years of discussions and negotiations. UN General Assembly Resolution 3314 (XXIX) (1974) provided for a generic definition, but it has proven to be contentious and was in any event non-binding. As a result, since 1946 there have been instances in which states have in all likelihood engaged in acts of aggression but there have been no corresponding national or international trials for such acts. Nevertheless, this lack of definition did not preclude aggression from being a customary international crime, as was rightly held by the House of Lords (as it then was) in *R v Jones*.[678]

The issue of a definition of aggression resurfaced in the process leading up to the creation of the ICC. Despite widespread agreement on its criminal character, a comprehensive definition also eluded the drafters of the Rome Statute. However, instead of excluding the crime from the ICC Statute altogether, it was added but with a proviso: the ICC could not exercise jurisdiction over the crime of aggression until the Rome Statute was amended so as to define the crime and set out the conditions under which the ICC could exercise jurisdiction over it.[679] ICC State Parties returned to the issue in light of the first ICC Review Conference held in Kampala, Uganda in 2010. At that conference, a definition, applicable at the ICC, was finally agreed upon by consensus:

677 *United States of America et al. v. Göring et al.*, Judgment, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (Nuremberg: International Military Tribunal, 1947), at p. 186.

678 House of Lords, 29 March 2006, [2006] UKHL 16.

679 Articles 5(1)(d), 5(2), ICC Statute.

> [The] "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[680]

An "act of aggression" was defined as: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[681]

Since no person has ever been prosecuted for aggression since the Nuremberg and Tokyo trials and the ICC definition has yet to enter into force,[682] its contours and intricacies remain judicially unexplored. However, a number of basic features can be identified. First, aggression cannot be committed by mere foot soldiers (in contrast to other international crimes). At the ICC it is specifically restricted to person in high authority that have the capacity and ability to initiate and execute war.[683] Second, aggression can only be committed within the context of inter-state conflict; non-state actors are excluded. Lastly, it is important to distinguish the crime of aggression from the use of force. They are not synonymous. Although the use of force can amount to an "act of aggression", such acts will not amount to the *crime* of aggression unless they constitute a "manifest violation" of the UN Charter. The character, gravity and scale must be sufficient to satisfy this element: "[n]o one component can be significant enough to satisfy the manifest standard by itself."[684] Thus, not every instance of the use of force will automatically constitute the crime of aggression. For example, the firing of a single conventional missile across an international boundary would not in all likelihood pass the "manifest violation" criterion.

As of the end of 2013, Australia has yet to ratify the Rome Statute's amendment incorporating the definition of aggression (only thirteen states, Trinidad and Tobago,

680 ICC Assembly of States Parties, Resolution RC/Res.6 (11 June 2010), Annex I, para. 2 (the new Article 8(1) *bis*, ICC Statute).

681 ICC Assembly of States Parties, Resolution RC/Res.6 (11 June 2010), Annex I, para. 2 (the new Article 8(2) *bis*, ICC Statute). This article goes on to (non-exhaustively) list a number of acts that qualify as "acts of aggression".

682 Practitioners should be mindful to the fact the ICC cannot start exercising jurisdiction over the crime (as contained in the new Articles 8 *bis*, 15 *bis*, 15 *ter*, ICC Statute) until two conditions are met: one year must elapse after 30 states have ratified the amendment and the ICC Assembly of States Parties must decide to activate the ICC's jurisdiction over aggression after 1 January 2017.

683 However, under customary international law this may be different. See K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' 18(3) *European Journal of International Law* 477-497 (2007).

684 ICC Assembly of States Parties, Resolution RC/Res.6 (11 June 2010), Annex III, para. 7.

Luxembourg and Liechtenstein – have done so), thus the *Criminal Code* (Cth) does not presently contain the offence.

9.5.4. Other International Crimes: Torture and Terrorism

Terrorism and torture do not currently fall under the jurisdiction of any international criminal tribunal or court as autonomous international crimes. Consequently they are not usually regarded as being among the "core crimes" such as genocide, war crimes and crimes against humanity and aggression. The reasons for their exclusion (as autonomous crimes) differ for each class. With respect to torture, this is probably due to the fact that it is already explicitly provided for as a war crime, as a crime against humanity and can also constitute genocide. As for terrorism, the main issue has been the problem of a definition. However, this may soon be about to change since the STL handed down its landmark decision on the definition of terrorism under customary international law (discussed below).

Torture

There are four contexts in which torture is prohibited, each consisting of distinct elements:

(i) When it is committed with the specific intent to destroy in whole or in part a national, ethnical, racial or religious group as such (genocide);[685]

(ii) When it is part of a widespread or systematic attack directed against a civilian population (a crime against humanity);[686]

(iii) When it is perpetrated as a single act, outside any large-scale practice, in time of armed conflict (a war crime);[687]

(iv) When it is committed as a single act irrespective of whether in time of peace or in time of armed conflict (a discrete crime under international law).[688]

However, the differences come not from the underlying act of torture itself, but rather from the different contextual elements required so that it becomes a war crime

685 *Prosecutor v. Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 504; *Prosecutor v. Stakić*, Trial Judgement, Case No. IT-97-24-T, 31 July 2003, para. 516.

686 Article 5(f), ICTY Statute; Article 3(f), ICTR Statute; Article 2(f), SCSL Statute; Article 5, ECCC Law; Article 7(1)(f), ICC Statute.

687 Article 2(b), ICTY Statute; Article 4(a), ICTR Statute; Article 3(a), SCSL Statute; Article 6, ECCC Law; Articles 8(2)(a)(ii), 8(2)(c)(i), ICC Statute.

688 Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Series 112.

or a crime against humanity or the *dolus specialis* so that it qualifies as genocide. Aside from this, the underlying definition of torture is relatively uniform in all of the above contexts. This is derived from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984):

> "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[689]

This definition has been explored in some depth by the various international tribunals, from which we can draw some general features.

First, the requirement of "severe pain or suffering" does not denote a specific and/or rigid threshold – it is dependent on the specific facts of each case. It is to be considered in light of both the objective severity of the harm inflicted (including the nature, purpose and consistency of the acts committed) and subjective criteria (such as the physical and mental condition of the victim, the effects of the act committed, the victim's age, sex, state of health and position of inferiority).[690] The harm inflicted need not be permanent or even visible after the fact.[691]

Second, torture requires that it be committed in order to achieve a particular purpose or result ("prohibited purpose").[692] The list provided for in CAT (to obtain information or a confession, punish, intimidate, coerce or to discriminate) should not be viewed as exhaustive, merely illustrative.[693] Thus, humiliation has also been found to satisfy this element.[694] It should also be borne in mind that torture need not

689 Article 1(1), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Series 112.

690 *Prosecutor v. Brđanin*, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, paras 483-484.

691 *Prosecutor v. Kvočka*, Trial Judgement, Case No. IT-98-30/1-T, 2 November 2001, para. 148; *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 150.

692 Except for torture as a crime against humanity pursuant to the ICC Statute: *Prosecutor v. Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 195.

693 *Prosecutor v. Delalić et al.*, Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 470.

694 *Prosecutor v. Furundžija*, Trial Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 162; *Prosecutor v. Kvočka*, Trial Judgement, Case No. IT-98-30/1-T, 2 November 2001, paras 140-141

be carried out exclusively to achieve such prohibited purposes, but "must simply be part of the motivation behind the conduct".[695]

Lastly, the definition of torture as an autonomous international crime under CAT requires the consent or acquiescence of a public official or a person in an official capacity. However, it is not a requirement under customary international law.[696] Therefore when operating outside the context of CAT – when prosecuting torture as a war crime, crime against humanity or genocide – it need not be shown that torture was carried out "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The *Criminal Code* (Cth) prohibits torture in all the four forms noted above: as a discrete crime as per CAT in section 274.2; as a war crime in sections 268.25 (international armed conflict) and 268.73 (non-international armed conflict); as a crime against humanity in section 268.13; and as genocide in section 268.4. The prescribed penalty is between 20 years to life imprisonment.

Terrorism

Terrorism has been described as possessing 'chameleon-like' characteristics.[697] Like torture, terrorism can fall under a number of different categories of crimes: terror as a war crime, terrorism (as other inhumane acts) as a crime against humanity or terrorism as a discrete standalone international crime. Which of these best characterises the relevant terrorist acts at issue ultimately depends on the particular circumstances and context in which they are performed.

For its part, terror as a war crime finds its origin in Article 51(2) of Additional Protocol I to the Geneva Conventions (1977) and Article 13(2) of Additional Protocol II to the Geneva Conventions (1977), which provide that:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.[698]

Such conduct, "giv[es] rise to individual criminal responsibility pursuant to customary international law"[699] so long as it is committed in time of war. Although terror as a war

695 *Prosecutor v. Delalić et al.*, Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 470.

696 *Prosecutor v. Kunarac et al.*, Appeal Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, paras 146-148.

697 A. Roberts, 'Can We Define Terrorism?' 14(1) *Oxford Today* 18 (2002).

698 See also Article 4(d), ICTR Statute; Article 3(d), SCSL Statute.

699 *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 86; *Prosecutor v. Sesay et al.*, Appeal Judgment, Case No. SCSL-04-15-A, 26 October 2009, para. 889.

crime overlaps somewhat with unlawful attacks on civilians, the major difference is that it requires specific intent (*dolus specialis*), which is to "spread terror among the civilian population".[700] In addition, indiscriminate or disproportionate attacks not directly targeting civilians can also amount to the *actus reus* of the crime.[701] Further, the crime does not require civilians to be actually terrorised and it need not be the sole purpose for the acts or threats, but must be the primary or principal purpose.[702]

Outside of war, terrorism is problematic because unlike torture, there is no one treaty that provides for a universal definition of "terrorism". Instead, there is a plethora of terrorism-related treaties that fragment the crime into particularised contexts.[703] This in turn has given rise to the notion that terrorism is not defined at international law. However, after reviewing state practice and *opinio juris*, a recent landmark decision of the STL has held that terrorism has indeed "crystallised" into an autonomous international crime, at least in time of peace, under customary international law, requiring the following three key elements:

(i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;

(ii) the intent [*dolus specialis*] to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;

(iii) when the act involves a transnational element.[704]

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700 *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 104.

701 *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 102.

702 *Prosecutor v. Galić*, Appeal Judgement, Case No. IT-98-29-A, 30 November 2006, para. 104.

703 These include, among others: Convention for the Suppression of Unlawful Seizure of Aircraft (1970), 860 UN Treaty Series 105; International Convention Against the Taking of Hostages (1979), 1316 UN Treaty Series 205; International Convention for the Suppression of Terrorist Bombings (1997), 2149 UN Treaty Series 256; International Convention for the Suppression of the Financing of Terrorism (1999), 2178 UN Treaty Series 197; International Convention for the Suppression of Acts of Nuclear Terrorism (2005), 2445 UN Treaty Series 89.

704 *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon, Appeals Chamber, 16 February 2011, Case No. STL-11-01/I, para. 85. The English Court of Appeal has recently confirmed that terrorism in times of peace is an international crime: *R. Gul* [2012] EWCA Crim 280, paras 32-35 (currently on appeal to the UK Supreme Court). Nevertheless, this holding has been the subject of academic debate. See B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' 24(3) *Leiden Journal of International Law* 677-700 (2011) and M. J. Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?' 9(5) *Journal of International Criminal Justice* 1021-1042 (2011).

No person has yet been convicted of terrorism as an international crime pursuant to the above definition. Notwithstanding, it can be utilised in another context: defining terrorism as a crime against humanity. Although crimes against humanity does not include "terrorism" as an enumerated underlying act,[705] a series or wave of terrorist attacks of a sufficient gravity directed against a civilian population could amount to "other inhumane acts".[706] For example, an argument can be made that the terrorist attacks of 11 September 2001, because of their scale and magnitude, meet both the requisite contextual elements as well as the requirements for "other inhumane acts",[707] thus making it a crime against humanity. Practitioners should be mindful to the fact that while no prosecution of terrorism as a crime against humanity has ever been attempted, it nonetheless remains a theoretical possibility. In any event, it remains to be seen how the STL's definition of terrorism at customary international law will influence future terrorism prosecutions, both international and domestic.

The *Criminal Code* (Cth), like the ICC Statute, does not include terror as a war crime. Terrorism as a discrete offence, together with related offences, can be found in sections 72.3, 101.1–101.6 and 102.2–102.8 of the *Criminal Code* (Cth). The prescribed penalty is between 3 years to life imprisonment, depending on the specific offence. However, the Australian definition of terrorism differs from that under customary international law in that it requires a "political, religious or ideological" element,[708] but not a transnational element. Therefore, Australia can be understood as having criminalised terrorism as a domestic crime but not as an international crime.[709]

705 See Article 7(1)(a)-(k), ICC Statute.

706 Indeed, terrorism (as murder or other inhumane acts) as a crime against humanity was seriously considered for inclusion in the STL Statute, the STL being an internationalised tribunal created in response to a wave of terrorist bombings targeting and killing prominent Lebanese politicians. However, despite the fact that the events in Lebanon "could meet the prima facie definition of the crime", it was not included in the final text, but only because of a lack of political support from the UN Security Council. See *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, UN Doc. No. S/2006/893, 15 November 2006, paras 23-25.

707 See above discussion for the requirements of crimes against humanity.

708 Section 100.1(1), *Criminal Code* (Cth).

709 The STL has held that the distinguishing feature between terrorism as a domestic crime and terrorism as an international crime is that the latter requires a 'transnational' element. See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon, Appeals Chamber, 16 February 2011, Case No. STL-11-01/I, para. 89.

Chapter 10

International Environmental Law

BY ELAINE JOHNSON, NATALIE JOHNSTON, AMELIA THORPE AND AMY WARD

10.1. Introduction

Protection of the global and local environment has become a priority for many Australians, particularly in recent years. International environmental law deals with environmental issues at a global level, and provides the basis for many of our own environmental laws implemented at both national and State/Territory levels. The body of law that makes up international environmental law is vast – ranging from laws that seek to protect particular species, ecological communities and ecosystems, to laws relating to the atmosphere, outer space, and everything in between. As such, a comprehensive discussion of this body of law, and its relevance for Australian practitioners, is well beyond the scope of this publication.

There are several key texts and materials that deal comprehensively with international environmental laws, some of which are referred to below. The purpose of this chapter is to provide a brief introduction to some of those areas that may more commonly be relevant to Australian practitioners. Other areas of international environmental law that may be relevant to Australian practitioners, and which are outlined in more detail in publications such as the United Nations Environment Program's *Training Manual on International Environmental Law*,[710] include laws relating to:

710 Available at <www.unep.org> (accessed 14 October 2014).

- transboundary air pollution;
- ozone depletion;
- hazardous wastes;
- hazardous chemicals;
- migratory species;
- marine biodiversity;
- the marine environment and marine pollution;
- freshwater resources;
- desertification;
- the polar regions;
- forest and mountain ecosystems;
- environmental impact assessment;
- human rights and the environment;
- trade and the environment;
- human health and the environment;
- nuclear and renewable energy; and
- the regulation of transnational and multinational corporations.

10.2. Principles of International Environmental Law

Amelia Thorpe

10.2.1. State sovereignty over natural resources

State sovereignty is a general principle of international law, including the concept of sovereign equality whereby all States are treated equally as legal persons in international law.[711] States have the right to control the exploration, development

711 UN Doc. A/RES/2625 (XXV) (1970), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

and disposition of their natural resources,[712] including biological resources.[713] This extends to resources within a State's airspace[714] and waters 200 nautical miles from its coast.[715] The principle of permanent sovereignty supports the rights of colonized countries to enjoy benefits of resource exploitation in their jurisdiction, including the right to alter 'inequitable' legal arrangements granted to foreign investors.[716] The rights of sovereign States are increasingly limited as new principles emerge and established principles develop, though this relationship is still developing. With respect to natural and cultural heritage, for example, State sovereignty is expressly preserved.[717]

10.2.2. State responsibility for breaches of international environmental law

States are generally responsible for breaches of their obligations under international law,[718] including international environmental law. [719] The extent of this responsibility is not well-established, particularly with respect to actions by non-State actors and to liability for harm caused.[720] At the request of the

712 Declaration of the United Nations Conference on the Human Environment, Stockholm 1972 ('Stockholm Declaration'), Principle 21 (113 participating States, including Australia); Declaration of the United Nations Conference on Environment and Development, Rio1992 ('Rio Declaration'), Principle 2 (178 participating countries, including Australia).

713 Convention on Biological Diversity 1992, Art. 15 (entered into force 1993; 191 State parties, including Australia (1993)).

714 UN Doc. A/AC.105/C.2/7 (1970)

715 UN Convention on the Law of the Sea 1982, Part V, Art. 193 (157 State parties, including Australia (1994); entered into force in 1994).

716 Permanent sovereignty emerged in UN debates after World War Two, developing in a series of resolutions: A/RES/523 (1952), 'Integrated Economic Development and Commercial Agreements'; A/RES/626 (1952), 'Right to Exploit Freely Natural Wealth and Resources'; A/RES/1803 (1962), 'Permanent Sovereignty Over Natural Resources'; A/RES/2158 (1966), 'Permanent Sovereignty Over Natural Resources'. It is now an established principle of international law: see generally N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Responsibilities*, Cambridge University Press, 1997.

717 Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, Art. 6 (178 State parties, including Australia (1974); entered into force 1975).

718 International Court of Justice, *Corfu Channel* case (UK v Albania) (1948); Permanent Court of International Justice, *Chorzow Factory* case (Germany v Poland) (1928).

719 Stockholm Declaration, Principle 21; Rio Declaration, Principle 2; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001), Art. 19.

720 Hunter, Salzman and Zaelke, *International Environmental Law and Policy* 2007, pp. 498-502.

UN General Assembly, the International Law Commission (ILC) attempted to codify the extent of State responsibility with a set of Draft Articles.[721] The ILC's Articles have been commended by the UN General Assembly[722] and cited by the International Court of Justice (ICJ),[723] though the law continues to develop.[724] Several treaties establish their own liability regimes, or require State parties to cooperate to establish appropriate rules for liability and compensation.[725]

(iii) *Transboundary harm*

States are under a general obligation not to use or allow others to use their territory in a way that can harm the interests of another State. This includes the environment of other States as well as areas beyond the limits of national jurisdiction.[726] Building from the common law principle that one should not use one's property to harm another,[727] this principle is widely accepted, with statements in international agreements,[728] by the ICJ[729] and by international organizations.[730]

(iv) *Sustainable development*

This principle is concerned with the interdependence of all human activities. It requires that the environment be considered as part of all policies and activities, including those intended to promote economic development and peace.[731] The most widely-used definition of sustainable development is that of the Bruntland Commission: 'development that meets the needs of the present without compromising

721 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN Doc. A/56/10 (2001).

722 UN Doc A/RES/5683, [3] (2001).

723 The ICJ cited an earlier draft in the *Gabčíkovo-Nagyamaros* case (Hungary v Slovakia) (1997), at 7.

724 D. Bodansky and J. Crook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview' 96 AJIL 773.

725 *See e.g.,* The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, Art 12 (entered into force 1992, 170 State parties including Australia (1992)). The Basel Protocol on Liability and Compensation was adopted in 2006.

726 Stockholm Declaration, Art 21.

727 *Trail Smelter Arbitration (United States v Canada)* 1941 3 RIAA 1907.

728 Rio Declaration, Principle 2; Stockholm Declaration, Art 21; UN Convention on the Law of the Sea, Art 194(2).

729 International Court of Justice, *Corfu Channel case (UK v Albania)* (1949); *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996).

730 UNEP Environmental Law Guidelines and Principles on Shared Natural Resources (1978), Principle 3; IUCN Draft International Covenant on Environment and Development (2004), Art 11.

731 Rio Declaration, Principles 4 and 25.

the ability of future generations to meet their own needs."[732] The principle is noted in several environmental instruments.[733]

(v) *Cooperation*

The obligation for States to cooperate with their neighbours is well-established in international law.[734] With respect to international environmental law, it has been elaborated in principles relating to notification, consultation, assessment and consent.

(vi) *Prior notification and good faith consultation*

The duty of prior notification requires States planning potentially damaging activities to provide prior and timely notification to all potentially affected States. The duty to consult in good faith requires such States to give potentially affected States an opportunity to review and discuss proposed harmful activities, and to take affected States' interests into account. These duties are stated in numerous international declarations, guidelines and recommendations.[735] Neither duty requires acting States to obtain the consent of affected States, nor to conform to their wishes.

(vii) *Environmental impact assessment*

The duty to undertake environmental impact assessments (EIAs) in a transboundary context is included in many treaties and is probably now a requirement of customary

732 Bruntland Commission on Environment and Development, *Our Common Future* (1987).

733 Copenhagen Declaration on Social Development (1995); Johannesburg Declaration on Sustainable Development (2002), [5]; Millennium Development Goal 7; Millennium Declaration, [30]; World Trade Organisation Agreement 1994, Preamble; Convention on Biological Diversity; Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), Art 2 (in force 2005, 182 State parties including Australia (2008)).

734 Charter of the United Nations, Art. 1(3); UN Doc. A/RES/2625 (1970), Declaration of Principles on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations; Stockholm Declaration, Art 24; Rio Declaration, Principle 27.

735 Convention on Environmental Impact Assessment in a Transboundary Context (1991) (the Espoo Convention), Arts 3, 5, 8 (entered into force 1997, 46 State parties, not including Australia); ILC Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities (2001); Rio Declaration, Principle 19; OECD Council Recommendation on Principles Concerning Transfrontier Pollution; London Guidelines for the Exchange of Information on Chemicals in International Trade (1989); Montreal Rules of International Law Applicable to Transfrontier Pollution, Art. 8; UNEP Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States (1978), Principles 6 and 7.

international law.[736] International declarations also call for such assessments at a national level[737] and over 150 States require domestic EIAs, though these are probably not yet a requirement of international law.[738]

(viii) *Prior informed consent*

This duty requires that States planning to operate in the territory of another State must obtain the prior informed consent of the host State. This duty applies to the transport through or disposal of hazardous wastes in a State,[739] provision of emergency assistance after a nuclear accident,[740] exporting chemical substances banned in the export country[741] and accessing genetic resources.[742] The duty of prior informed consent can also require States to obtain free, prior informed consent from indigenous communities for activities affecting them. However, Australia is not a party to the two main instruments establishing this duty.[743]

(ix) *Polluter (and user) pays principle*

This principle seeks to ensure that the full environmental and social costs are reflected in the ultimate market price for goods and services. It has been incorporated

736 Hunter, Salzman and Zaelke, *International Environmental Law and Policy* (2007), p. 532; ILC Draft Articles on the Prevention of Transboundary Harm for Hazardous Activities (2001), Art. 7; UNEP Principles on Shared Natural Resources (1978), Principle 4. The 1991 Espoo Convention on EIA in a Transboundary Context specifies a State's obligations in relation to such assessment for the members of the UN Economic Commission for Europe (not including Australia).

737 Rio Declaration, Principle 17; UNEP GC 14/17 (1987), Annex III 'Goals and Principles of Environmental Impact Assessment'.

738 Hunter, Salzman and Zaelke, *International Environmental Law and Policy* (2007), p. 533.

739 The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), Art. 6 (entered into force 1992, 170 State parties including Australia (1992)).

740 Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency (1987), Art. 2 (entered into force 1987, 100 State parties including Australia (1987)).

741 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) (entered into force 2004; 126 State parties, including Australia (2004)).

742 Convention on Biological Diversity (1992), Art. 15(5) (entered into force 1993; 191 State parties, including Australia (1993)).

743 Australia voted against the UN Declaration on the Rights of Indigenous Peoples http://www2.ohchr.org/english/issues/indigenous/declaration.htm, and has not ratified ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries http://www.ilo.org/ilolex/english/convdisp1.htm.

in many international instruments[744] but remains controversial, particularly in developing States.

(x) *Precautionary principle*

This principle provides that scientific uncertainty may not be used as a reason to postpone measures to prevent environmental harm, where those measures are cost-effective. It is set out in many international instruments[745] and has been considered by courts in Australia.[746] The principle is controversial, with debates about its legal status[747] and the level of science required to trigger its application.

(xi) *Prevention*

The principle of prevention states that protection of the environment is better achieved than trying to remedy or compensate for such harm.[748] It is closely linked to the duty not to cause transboundary harm and to the precautionary principle, and the difference between these is not clear.[749] It is most developed with respect to the prevention of pollution.[750]

(xii) *Common but differentiated responsibilities*

This principle provides that all States have common responsibilities to protect the environment and promote sustainable development, but that the actions required from different States vary with their different social, economic and ecological situations.

744 Rio Declaration, Principle 16; Agenda 21, [30(3)]; OECD Council Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies (1972); OECD Council Recommendation on the Implementation of the Polluter-Pays Principle (1974).

745 Rio Declaration, Principle 15; World Charter for Nature, Principle 11, A/RES/37/7 (1982); Convention on Biological Diversity (1992), Preamble; UN Framework Convention on Climate Change (1992), Art 3(3) (entered into force 1994, 192 State parties, including Australia (1992)); Stockholm Convention on Persistent Organic Pollutants (2001), Arts. 1 and 8.

746 *Telstra v Hornsby Shire Council* [2006] NSWLEC 133; *Western Water v Rozen & Ors* [2008] VSC 382.

747 The EU claims that it is part of customary international law and it is law within the EU. The US claims that it is merely one approach that may be used: see Hunter, Salzman and Zaelke, *International Environmental Law and Policy* 2007, p. 513.

748 IUCN Draft International Covenant on Environment and Development (2004), Art 6.

749 Hunter, Salzman and Zaelke, *International Environmental Law and Policy* (2007), p. 507.

750 *See e.g.* Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991) (adopted by 51 African States); ILC, Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (2001); Stockholm Declaration (1972), Art 6.

It is stated in numerous international agreements[751] but remains controversial, as exemplified in the debates negotiating protocols to the UN Framework Convention on Climate Change regarding compliance requirements, technology transfer and financial assistance.

(xiii) *Common heritage of mankind*

This principle is concerned with the 'global commons', areas beyond national jurisdiction. Its application is limited to certain cultural and natural landmarks;[752] outer space, the moon and other celestial bodies;[753] the deep sea bed;[754] and Antarctica.[755] It has not been adopted in any global environmental agreement since 1991.[756] To the extent that it does apply, this principle sets out a common approach involving international management, sharing of benefits, reservation for peaceful purposes and non-appropriation of territorial sovereignty by any State.[757]

(xiv) *Common concern of humankind*

This principle is concerned with areas within national jurisdiction, recognizing the interconnection of all ecosystems and drawing parallels with other areas of common concern such as human rights, humanitarian relief and international labour relations.[758] It was first applied in the 1992 Climate Change and Biodiversity Conventions,[759] and has since been applied in other environmental instruments.[760]

751 Rio Declaration, Principle 7; UN Framework Convention on Climate Change (1992), Art. 3; Montreal Protocol on Substances that Deplete the Ozone Layer, Art. 5; Stockholm Convention on Persistent Organic Pollutants, Preamble.

752 Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), preamble, Art. 6 (178 State parties, including Australia (1974); entered into force 1975).

753 Treaty on the Principles Governing the Activities of States in the Exploration and use of Outer Space, Including the Moon and Other Celestial Bodies (1967) (101 State parties including Australia (1967)); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979) (13 State parties, including Australia).

754 UN Convention on the Law of the Sea (1982), Arts. 136, 137, 140 and 150 (157 State parties, including Australia (1994); entered into force 1994). Provisions regarding benefit sharing from deep sea mining were removed from the UN Convention on the Law of the Sea in an effort to encourage the US to join: Hunter, *infra*, p.485. Ratification continues to be debated in the US: *see, e.g.* 'Ocean Treaty Good for US', David Sandalow, *The Washington Times*, 16 May 2004 (available at: www.brook.edu/views/op-ed/fellows/sandalow20040516.htm).

755 Antarctic Treaty (1959) (45 State parties including Australia (1961)).

756 Hunter, Salzman and Zaelke, *International Environmental Law and Policy* (2007), p. 485.

757 Hunter, Salzman and Zaelke, *International Environmental Law and Policy* (2007), p. 485-6.

758 IUCN, Draft Covenant on Environment and Development (1995), Commentary at 32.

759 Convention on Biological Diversity (1992), Preamble; UN Framework Convention on Climate Change (1992), Preamble.

760 IUCN Draft Covenant on Environment and Development (1995), Art. 3.

(xv) *Intergenerational equity*

This principle highlights the need to consider, and minimize, the impact of activities on future generations. Sustainable resource use and avoiding irreversible environmental damage are thus required; modifications to EIA procedures and expanding concepts of judicial standing to include future generations may also be necessary. The principle is noted in several environmental instruments,[761] and has been applied in the Philippines Supreme Court and noted in a Canadian court.[762]

10.3. Biodiversity

Elaine Johnson

The key international instrument dealing with biodiversity is the Convention on Biological Diversity (*CBD*).[763] The Protocol on Biosafety to the Convention on Biological Diversity (*Cartagena Protocol*)[764] deals with living modified organisms (*LMOs*) resulting from biotechnology.

The CBD is primarily implemented in Australia through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*), while biosafety is dealt with under the *Gene Technology Act 2000* (Cth) (*Gene Technology Act*).

(i) *The Convention on Biological Diversity*

The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding (Art 1).

Key elements of the CBD include:

- conservation of biodiversity *in situ*, meaning measures to protect biodiversity in natural surroundings, whether within or outside of protected areas (Art 8);

761 UNFCCC, Art 3(1); Millennium Declaration, [6], [11] and [21]; Stockholm Declaration, Principles 1 and 2; Rio Declaration, Principle 3; UN A/RES/35/8 (1980), 'Historical Responsibility for States for the Protection of Nature for the Benefit of Present and Future Generations'.

762 *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 168; *Imperial Oil Ltd v Quebec (Minister for the Environment)* [2003] 2 SCR 624.

763 UN Doc DPI/130/7 (1992), reprinted in (1992) 31 ILM 818; see also www.cbd.int.

764 See www.cbd.int/biosafety/ for text of the Cartagena Protocol and related information.

- conservation of biodiversity *ex situ*, such as within zoos or botanical gardens, predominantly for the purpose of complementing *in situ* measures (Art 9);
- protection of customary use of biological resources (Art 10); and
- environmental impact assessment for projects that are likely to have significant adverse effects on biodiversity, including public participation where appropriate (Art 14).

(ii) *The Cartagena Protocol*

The objective of the Cartagena Protocol is to contribute to ensuring an adequate level of protection for the safe transfer, handling and use of LMOs that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and focusing on transboundary movements (Art 1). This objective is to be achieved in accordance with the precautionary principle.

The Protocol establishes an 'advance informed agreement' procedure to ensure that countries can make informed decisions about the importation of LMOs into their territory. It also establishes a Biosafety Clearing-House for the exchange of information on LMOs.

This Convention is administered by its Secretariat. The Secretariat of the CBD is a neutral organisation institutionally linked to the United Nations Environment Program (*UNEP*). To make a complaint or enquiry regarding potential breaches of this Convention, you could write to UNEP or to:

Secretariat of the Convention of Biological Diversity

413 Saint Jacques Road, suite 800

Montreal, QC H2Y 1N9, CANADA

Telephone: +1 514 288 2220

Fax: +1 514 288 6588

Email: secretariat@cbd.int

Web address: www.cbd.int

(iii) *Implementation in Australia*

(a) *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

The EPBC Act gives effect to the CBD in Australia. The objects of the EPBC Act include the promotion of ecologically sustainable development and the conservation of biodiversity, as well as 'to assist in the co-operative implementation of Australia's international environmental responsibilities' (s.3). The courts have previously taken the view that the legislation should be given a wide interpretation, and that as far as

its language permits, a construction that is in conformity and not in conflict with Australia's international obligations should be favoured.[765]

The EPBC Act deals with *in situ* conservation of biodiversity, including through the following:

- environmental assessment and approval procedures for actions that are likely to have a significant impact on matters of national environmental significance (*NES*) (which include listed threatened species and ecological communities, migratory species protected under international agreements, wetlands of international importance, Commonwealth marine areas, and world and nationally listed heritage sites);
- listing of threatened species, threatened ecological communities, migratory species and marine species, as well as certain protected areas;
- establishing a register of critical habitats;
- listing of key threatening processes (i.e processes that threaten the survival, abundance or evolutionary development of native species or ecological communities);
- preparation of bioregional plans to be taken into account in decision-making.

If approval is required under the EPBC Act for a particular activity, but not obtained, civil and criminal penalties may apply. The Act also extends standing to public interest litigants to seek judicial review of government decisions made under the Act (s.487).

The EPBC Act creates offences relating to the damaging of registered critical habitat and the harming or taking of listed threatened species, listed threatened ecological communities, listed migratory species and listed marine species. It also provides for a permit system to authorise such actions without committing an offence.

The Act also establishes the Australian Whale Sanctuary, and creates offences relating to the harming or taking of cetaceans that are listed threatened species within the sanctuary.

Provisions under the EPBC Act relating to heritage-listed sites, which also protect biodiversity, are discussed further in the section on World Heritage in this chapter.

765 *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729, [301] (Marshall J), adopting the approach taken in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). See generally Lyster, Lipman, Franklin, Wiffen and Pearson, *Environmental & Planning Law in New South Wales*, The Federation Press, 2007, p.142.

(b) *Gene Technology Act 2000* (Cth)

The Gene Technology Act addresses the assessment and mitigation of risks to biodiversity associated with genetically modified organisms (*GMOs*). It prohibits 'dealings' with GMOs unless such dealings are exempt, are 'notifiable low risk' dealings' (ie do not involve the intentional release of the GMO into the environment), are licensed, are on the Register of GMOs maintained under the Act, or are specified in an 'emergency dealing determination'.

Decisions on applications for licences under the Gene Technology Act are made by the Gene Technology Regulator. The public may comment on the risk assessment and a risk management plan prepared by the Regulator in relation to the dealings proposed to be authorised by the licence (s.52). There are no third party appeals under the Act. Standing for judicial review includes States, but does not extend to public interest litigants (s.183A).

10.4. Wetlands of International Importance

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat[766] (*Ramsar Convention*) provides for the conservation and 'wise use' of wetlands. It was the first global habitat treaty. It is implemented in Australia through the EPBC Act.

(i) *The Ramsar Convention*

The Ramsar Convention sets up an international framework for the conservation and 'wise use' of wetlands that are listed under the Convention. The parties to the Convention also agree to promote the conservation of wetlands generally (whether listed or not) through the creation of nature reserves (Art 4).

The 3rd Meeting of the Conference of the Contracting Parties in Regina, Canada, adopted the following definition of 'wise use of wetlands':[767] '[t]he wise use of wetlands is their sustainable utilisation for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem'. 'Sustainable utilisation' is defined as 'human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and

766 TIAS No. 11084, 996 UNTS 245. See also www.ramsar.org.

767 Recommendation 3.3. See also *Guidelines for the Implementation of the Wise Use Concept*, first adopted as an annex to Recommendation 4.10 of the 4th Meeting of the Conference of the Contracting Parties (Montreux, Switzerland, 1990).

aspirations of future generations'. 'Natural properties of the ecosystem' are defined as 'those physical, biological or chemical components, such as soil, water, plants, animals and nutrients, and the interactions between them'.

This Convention is administered by its Secretariat. Their office is housed within the International Union for Conservation of Nature (*IUCN*) in Gland, Switzerland. Although the Ramsar Secretariat is an independent body, there is close cooperation between Ramsar and the IUCN. The Ramsar Convention is not part of the United Nations or UNEP system of environmental treaties, although Ramsar has established collaborative agreements with many of those secretariats. In particular there is an MOU between Ramsar and the World Heritage Convention. To make a complaint or enquiry regarding potential breaches of this Convention, you could write to IUCN or to:

The Ramsar Convention Secretariat

Rue Mauverney 28

CH-1196 Gland, SWITZERLAND

Telephone: +41 22 999 0170

Fax: +41 22 999 0169

Email: ramsar@ramsar.org

Web address: www.ramsar.org

(ii) *Implementation in Australia*

Australia designates wetlands within its territory to be added to the List of Wetlands of International Importance under Art 2 of the Ramsar Convention.

The Ramsar Convention is implemented in Australia through the EPBC Act. Wetlands of international importance are a matter of NES under the EPBC Act. Actions that are likely to have a significant impact on the ecological character of a declared Ramsar wetland must be referred to the Minister for environmental assessment and approval.

A 'declared Ramsar wetland' is a site that is either:

- designated by the Commonwealth under Art 2 of the Ramsar Convention; or
- declared by the Minister for the Environment to be a declared Ramsar wetland by notice in the Commonwealth *Government Gazette*.

If approval is required under the EPBC Act, but not obtained, civil and criminal penalties may apply (ss.16, 17B). The Act also extends standing to public interest litigants to seek judicial review of government decisions made under the Act (s.487).

10.5. International Trade in Endangered Species

The Convention on International Trade in Endangered Species of Wild Fauna and Flora[768] (*CITES*) regulates the international trade in endangered species, or parts or derivatives of species. It is implemented in Australia through the EBPC Act.

(i) *The Convention*

CITES relates to trade of endangered species (or specimens) outside of national borders. Therefore, CITES does not regulate trade within States, nor the international trade in non-threatened species. It establishes permit systems for different types of species listed in three appendices to the Convention:

- *Appendix I* includes species threatened with extinction which are or may be affected by trade;
- *Appendix II* includes species which may become threatened if trade is not subject to strict regulation to avoid utilisation incompatible with their survival; and
- *Appendix III* includes species identified by a country as being subject to national regulation for the purpose of preventing or restricting exploitation, and as needing the cooperation of other countries in the control of trade.

Depending upon which Appendix a species is listed on different Government permits must be obtained in order to trade in the listed species. The Convention provides that each State must establish a Management Authority (to issue permits) and Scientific Authority (to advise on import/export issues).

This Convention is administered by its Secretariat within UNEP. To make a complaint or enquiry regarding potential breaches of this Convention, you could write to UNEP or to:

CITES Secretariat
International Environment House
11 Chemin des Anémones
CH-1219 Châtelaine, Geneva
SWITZERLAND
Telephone: +41-(0)22-917-81-39/40
Fax: +41-(0)22-797-34-17
Email: info@cites.org
Web address: www.cites.org

768 27 UST 1087, TIAS No. 8249 (1973). See also www.cites.org.

(ii) *Implementation in Australia*

CITES is implemented in Australia through Part 13A of the EPBC Act, which sets up a permit system for regulating trade in different types of wildlife, namely:

- the import or export of 'CITES specimens' (specimens of a species included in Appendix I, II or III to CITES);
- the export of a 'regulated native specimen' (specimens of certain native species); and
- the import of a 'regulated live specimen' (specimens of certain other species).

If a permit for trade in such species or specimens is required under the EPBC Act, but not obtained, criminal penalties may apply. It is also an offence to possess a specimen imported in breach of Part 13A. The Act extends standing to public interest litigants to seek judicial review of government decisions made under the Act (s.487).

The Commonwealth Minister for the Environment is the 'Management Authority' under CITES, meaning he or she is responsible for authorising and issuing permits and certificates of approval, communicating information to other CITES Parties and the Secretariat, and reporting on compliance matters and contributing to CITES Annual Reports.

Enforcement of Part 13A is coordinated by the International Wildlife Trade Section of the Commonwealth Department of the Environment, Water, Heritage and the Arts. Investigations are undertaken by the Australian Customs Service or the Australian Federal Police.

10.6. Migratory Species

The key international instrument dealing with the protection of migratory species (ie species which regularly migrate across national borders) is the Convention on the Conservation of Migratory Species of Wild Animals[769] (*CMS* or *Bonn Convention*). This is a broad treaty which aims to conserve terrestrial, marine and avian migratory species throughout their range. Australia has also entered into agreements with China[770] and Japan[771] for the protection of migratory species.

769 See also www.cms.int for the text of the Bonn Convention and related documents.

770 Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds in Danger of Extinction and their Environment (1986).

771 Agreement between the Government of Japan and the Government of Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment (1974).

Australia's international obligations relating to migratory species are found in the EPBC Act.

(i) *The Bonn Convention*

The Bonn Convention establishes two lists of migratory species in its appendices:

- *Appendix I* includes migratory species threatened with extinction; and
- *Appendix II* includes migratory species that need or would significantly benefit from international cooperation.

The Convention places obligations on Parties to protect migratory species listed in Appendix I by conserving the species, restoring habitat and prohibiting the taking. It encourages Parties to enter into separate agreements for the protection of species listed in Appendix II. These agreements may include non-Party range States.

This Convention is administered by its secretariat through UNEP. To make a complaint or enquiry regarding potential breaches of this Convention, you could write to UNEP or to:

CMS Secretariat
United Nations Premises
Hermann-Ehlers-Str. 10
53113 Bonn, GERMANY
Telephone: +49 228 815 2426
Fax: +49 228 815 2449
E-mail: secretariat@cms.int
Web address: www.cms.int

(ii) *Implementation in Australia*

The Bonn Convention and the regional agreements entered into by Australia with China and Japan are implemented in Australia through the EPBC Act.

Migratory species listed in those three agreements are matters of NES under the EPBC Act. Actions that are likely to have a significant impact on listed migratory species must be referred to the Minister for environmental assessment and approval.

If approval is required under the EPBC Act, but not obtained, civil and criminal penalties may apply (ss.20, 20A). The Act also extends standing to public interest litigants to seek judicial review of government decisions made under the Act (s.487).

The EBPC Act creates offences specifically relating to the harming or taking of listed migratory species (ss. 211-211E). It also provides for a permit system to authorise such actions without committing an offence.

10.7. World Heritage

Amy Ward

The 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (*the Convention*) provides for the listing of natural and cultural heritage sites of outstanding universal value. Australia's international obligations as a State Party to the Convention are adopted in the EPBC Act.

(i) *What is 'world heritage'?*

The United Nations Educational, Scientific and Cultural Organization (UNESCO) describes heritage as 'our legacy from the past, what we live with today, and what we pass on to future generations.'[772]

The Convention provides for the listing of sites on the World Heritage List. The sites inscribed on the 'World Heritage List' are sites of 'cultural' and/or 'natural' significance (Articles 1 and 2).

For a site to be considered a 'world heritage' site that is protected by the Convention, it must be a site of such 'outstanding universal value',[773] that its significance extends beyond national boundaries and notions of national sovereignty and ownership and 'belongs' equally to 'all the peoples of the world'.[774] The Convention provides that these sites belong to all parties to the Convention (essentially the entire international community, given the near-universal ratification of the Convention).[775]

(ii) *The Convention*

The Convention is an agreement to ensure the cooperation of the international community in the identification, protection and maintenance of sites inscribed on the 'World Heritage List' and the 'List of World Heritage in Danger', both maintained under Article 11 of the Convention. The Convention recognizes that due to the significant challenges involved in achieving these objectives, international cooperation (in terms of shared financial and technical resources) is essential to the preservation of these sites for current and future generations, and creates an obligation for Parties to cooperate in achieving this end.

772 UNESCO World Heritage Centre, *World Heritage Information Kit*, (June 2008), p.5.

773 UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage (*1972) 11 ILM 1358 (the Convention), Arts 1 and 2.

774 UNESCO World Heritage Centre, *World Heritage Information Kit*, (June 2008), p.5.

775 UNESCO provides that as at 30 November 2007, there were 185 States Parties to the Convention, from http://whc.unesco.org/pg.cfm?cid=246 .

Briefly, the Convention provides for:[776]

- the types of natural or cultural sites that are eligible to be included on the World Heritage List;[777]
- the duties of States Parties to identify, nominate and protect World Heritage sites located within their territory and raise public awareness of World Heritage sites;[778]
- the duties of States Parties to cooperate in providing assistance to other States Parties to ensure the preservation of World Heritage sites outside their own territory;[779]
- the duties of States Parties to regularly report to the World Heritage Committee on the state of preservation of all World Heritage sites located within their territory;[780] and
- the functioning of the World Heritage Committee and affiliated advisory bodies that are responsible for assessing nominations for inclusion of sites on the World Heritage List, implementing the Convention and managing the Fund and related requests for assistance in protecting sites 'in danger'.[781]

The World Heritage Committee implements and administers this Convention within the United Nations Educational, Scientific and Cultural Organisation (*UNESCO*). To make a complaint or enquiry regarding potential breaches of this Convention, you could write to UNESCO at:

The World Heritage Centre

United Nations Educational, Scientific and Cultural Organisation

7, place de Fontenoy

75352 Paris 07 SP, FRANCE

Telephone: +33-(0)1-45 68 15 71 / +33-(0)1-45 68 18 76

Fax: +33-(0)1-45 68 55 70

Email: wh-info@unesco.org

Web address: www.whc.unesco.org

776 The full text is available at http://whc.unesco.org/archive/convention-en.pdf.
777 Convention, Arts 1 and 2.
778 Ibid., Arts 3, 4, 5 and 27.
779 Ibid., Art. 6.
780 Ibid., Art. 29.
781 Ibid., including Arts 8, 15, 21 and 26.

(iii) *Implementation in Australia*

Australia's international obligations under the Convention are adopted into Australian law under the EPBC Act.[782] The EPBC Act provides for the creation and management of certain types of protected areas within Australian territory by the Commonwealth Government, including World Heritage listed properties.[783]

In relation to World Heritage sites, under the EPBC Act the Commonwealth Government:

- may identify and nominate (Commonwealth, State or private) properties located within Australian territory for inclusion on the World Heritage List; and
- must protect 'declared World Heritage properties', including properties included on the Convention's World Heritage List, those under consideration by the World Heritage Committee for inclusion and those not submitted for inclusion but considered to be of outstanding value in any event.

Commonwealth government protection for a 'declared World Heritage property' in Australian territory includes the application of the prescribed federal environmental assessment process under the EPBC Act (which is triggered where an activity may affect the 'declared World Heritage site'),[784] and the Government's obligation to prepare and implement management plans for the preservation of the site and the outstanding natural (or cultural) values for which it was listed.[785]

(iv) *The nomination and listing process for World Heritage sites*

Ultimately, the World Heritage Committee decides whether the nominated site should be inscribed on the World Heritage List.[786] The Committee's selection criteria are set out in the Operational Guidelines for the Implementation of the World Heritage Convention, a key document that informs the operation of the Convention.

782 The Australian Government Department of the Environment, Water, Heritage and the Arts has responsibility for managing Australia's World Heritage obligations and administers the EPBC Act: see http://www.environment.gov.au/heritage/places/world/list.html.

783 Environmental Defender's Office (NSW), *Environmental Law Toolkit– NSW: A Community Guide to Environmental Law* (5th Edition), (The Federation Press, Sydney, 2005), p.232.

784 The EPBC Act assessment process is triggered where an activity is likely to have a significant impact on a 'matter of national environmental significance'. See Chapter 4, Parts 7-9 of the EPBC Act for the prescribed environmental assessment and approval process for proposed activities affecting declared World Heritage properties.

785 Section 316(1), EPBC Act.

786 For information about the 878 properties (679 cultural, 174 natural and 25 mixed) currently on the World Heritage List, see the UNESCO World Heritage website at http://whc.unesco.org/en/list.

A site selected for inclusion on the List must be of 'outstanding universal value' due to its natural or cultural heritage, and meet at least one of ten selection criteria in the Guidelines.[787]

The procedure for nomination of properties within Australian territory for inclusion on the World Heritage List is provided in Part 15 Division 1 of the EPBC Act.[788] Although ultimately, only the national government of a State Party to the Convention may nominate a site for inclusion, members of the public may approach the Commonwealth Government with recommended sites for inclusion on the World Heritage List.

10.8. Law of the Sea and Marine Pollution

Elaine Johnson and Amelia Thorpe

The key international agreement dealing with the law of the sea is the UN Convention on the Law of the Sea 1982 (*UNCLOS*)[789] while marine pollution is primarily dealt with through the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (*MARPOL 73/78*)[790] and the Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter 1972 (*London Convention*),[791] as updated by its 1996 Protocol.[792]

UNCLOS is primarily implemented in Australia through the *Seas and Submerged Lands Act 1973* (Cth), while the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and *Environment Protection (Sea Dumping) Act 1981* (Cth) are the key pieces of legislation dealing with marine pollution in Australia. There are many other State and Commonwealth laws affecting the marine environment that are derived from international law in some way and laws dealing with land-based marine pollution, which are not discussed here.

(i) *The UN Convention on the Law of the Sea 1982*

The United Nations Convention on the Law of the Sea (UNCLOS) establishes a 'constitution' for the oceans and their resources, based on the recognition that

787 UNESCO World Heritage Centre, *World Heritage Information Kit*, (June 2008), p.13.

788 For the full list of the World Heritage properties located on Australian territory, see http://www.environment.gov.au/heritage/places/world/list.html.

789 Adopted 1982, in force 1994; 157 State parties, including Australia (1994).

790 Adopted 1978, in force 1983 (Annexes I & II); 148 State parties (Annexes I & II), including Australia (1988).

791 Adopted 1972, in force 1975; 84 State parties, including Australia (1985).

792 Adopted 1996, in force 2006; 36 State parties, including Australia (1998).

problems of ocean space are closely interrelated and need to be considered as a whole. It is an expansive treaty, setting out rules for delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology and the settlement of disputes relating to ocean matters in an effort to 'facilitate international communication, and…promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.'[793]

This Convention is administered by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs within the United Nations. To make a complaint or enquiry regarding potential breaches of this Convention, you could write to the Division at:

Director, Division for Ocean Affairs and the Law of the Sea
Office of Legal Affairs
Room DC2-0450
United Nations, New York
NY 10017, USA
Telephone: (212) 963-3962
Fax: (212) 963-5847
Email: doalos@un.org
Web address: www.un.org/Depts/los/

(ii) *Marine pollution conventions (MARPOL and the London Convention)*

MARPOL 73/78 sets up an international regime for the prevention of pollution from ships as a result of routine operational discharges and accidental pollution incidents. Its six Annexes regulate the discharge from ships of oil, noxious liquid substances in bulk, harmful packaged substances, sewage, garbage and air pollution.

The London Convention regulates the dumping of waste at sea through two lists: Annex I to the Convention lists materials that cannot be dumped at sea at all, and Annex II lists materials that can be dumped only in accordance with a permit. The 1996 Protocol is intended to replace the London Convention, and takes a different approach. The Protocol prohibits all dumping of waste at sea, except for those substances listed at Annex I to the Protocol.

793 UNCLOS, Preamble.

The International Maritime Organisation is primarily responsible for establishing rules for the prevention of marine pollution from ships.[794]

The MARPOL 73/78 and London Conventions are administered by the IMO. To make a complaint or enquiry regarding potential breaches of these Conventions, you could write to the IMO at:

Offices of the Secretariat

International Maritime Organisation

4, Albert Embankment

London, SE1 7SR, UNITED KINGDOM

Telephone: +44 (0)20 7735 7611

Fax: +44 (0)20 7587 3210

Email: info@imo.org

Web address: www.imo.org

(iii) *Implementation in Australia*

(a) *Exclusive Economic Zone*

UNCLOS provides that States may establish territorial seas up to 12 nautical miles from the coast, exclusive economic zones (*EEZ*) to 200 nautical miles and claim rights in relation to the continental shelf up to 350 nautical miles.[795] The *Seas and Submerged Lands Act 1973* (Cth), declares Commonwealth sovereignty over the territorial sea and certain Commonwealth rights in respect of the contiguous zone, EEZ and continental shelf. The Offshore Constitutional Settlement (*OCS*) 1979 provides the basis for an agreed division of powers between the Commonwealth and the States including the regulation of shipping and navigation, offshore petroleum exploration, crimes at sea, and fisheries.[796] A range of legislation gives effect to the OCS at Commonwealth level.

Sovereignty over the territorial sea includes the subsoil below and airspace above, with rights to all resources and broad regulatory jurisdiction.[797] Within the EEZ,

794 See www.imo.org.

795 UNCLOS, Arts. 3, 55 and 76. This includes Australia's external territories, some 12,000 islands in total: (Geoscience Australia, '*How much territory does Australia have?*' <http://www.ga.gov.au>). Australia has claimed an EEZ from its Antarctic territory, but requested it not be considered, in accordance with the Antarctic Territory: Division for Ocean Affairs and the Law of the Sea, Commission on the Limits of the Continental Shelf, Submission by Australia, 15 November 2004.

796 Geoscience Australia, '*Delineating Australia's Maritime Boundaries*' <http://www.ga.gov.au>.

797 UNCLOS, Art. 2. The main limitation to this jurisdiction is the right of innocent passage (Art. 17).

Australia has sovereign rights to explore and exploit all living and non-living resources, as well as duties related to the conservation and utilization of marine living resources and the protection and preservation of the marine environment.[798] Generally, States and Territories manage the first three nautical miles; the Federal government manages the rest of the EEZ.[799]

Australia also has obligations related to the marine environment under the Convention on Biological Diversity (*CBD*), which applies within the territorial sea and EEZ. As with its land-based CBD obligations, these are implemented through the EPBC Act. Since 1989, Australia has promoted Marine Protected Areas (*MPAs*) internationally as a tool for marine biodiversity protection.[800] MPAs may be declared under State or Territory legislation as well as the EPBC Act, and can range from highly protected, no-take areas to areas that provide for multiple uses.

(b) *Marine Pollution*

Enforcement of MARPOL 73/78 is the responsibility of the flag State or the country in whose territorial waters the vessel is located.[801] Australia's international obligations under MARPOL 73/78 are provided for primarily through the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth). That Act applies within and outside of Australian waters, and extends to the EEZ.[802]

The Act regulates marine pollution from ships through the following:

- creating offences relating to the discharge into the sea of oil or oily mixtures, noxious substances, packaged harmful substances, untreated sewage and garbage;
- requiring notification of pollution incidents in respect of discharges of oil and oily substances, noxious substances and packaged harmful substances;
- in some cases, requiring record books to be kept in respect of oil, liquid substances in bulk and garbage; and
- giving inspectors and officers wide powers, including to order discharges of substances at specified facilities, detain ships in certain circumstances,

798 UNCLOS, Arts. 56, 61-62, Part XII.

799 State and Territory governments have primary responsibility up to three nautical miles from the territorial sea baseline (typically the low water mark, in some cases up to 60 nautical miles): Department of the Environment, Heritage Water and the Arts, *Australia's marine jurisdictions* <http://www.environment.gov.au>.

800 Department of the Environment, Heritage Water and the Arts, *Conservation of Marine Biodiversity,* <http://www.environment.gov.au>.

801 MARPOL 73/78, Art. 4.

802 For more information on this Act, see Australian Maritime Safety Authority, <www.amsa.gov.au>.

require information, board ships, inspect and test equipment, require the production of record books, to require a person to answer questions and to seize items.

Enforcement is the responsibility of the Australian Maritime Safety Authority.

Australia's international obligations under the London Convention (and now the 1996 Protocol) are implemented through the *Environment Protection (Sea Dumping) Act 1981* (Cth). That Act applies to all Australian waters extending to the EEZ, and to most Australian vessels outside of Australian waters. It regulates the dumping and incineration of certain materials at sea, through the following:

- creating a permit system for certain activities (e.g. dumping of waste, incineration of waste, loading of, or export of waste for the purposes of dumping or incineration at sea); and
- creating offences for activities carried out otherwise than in accordance with a permit.

Enforcement of that Act is the responsibility of inspectors, including members of the Australian Federal Police or of the police force of a Territory, and officers of the Australian Customs Service. In addition, the Attorney-General or 'interested persons' may seek injunctions to restrain certain breaches of the Act (s.33).

Generally, where States have enacted equivalent legislation, the Commonwealth Acts cease to apply. For example, in NSW the *Marine Pollution Act 1987* generally gives effect to MARPOL 73/78 obligations within State waters in respect of oil and noxious liquid substances (i.e Annexes I and II).

10.9. Climate Change

Natalie Johnston and Frances O'Brien

The international environmental law regulating climate change consists of the United Nations Framework Convention on Climate Change (*UNFCCC*) and the Kyoto Protocol to the United Nations Framework Convention on Climate Change (*Kyoto Protocol*).

After becoming a party to the Kyoto Protocol in December 2007, Australia has cycled through several approaches to fulfilling its international obligations. Current policy involves a 'Direct Action' approach, headed by the Emissions Reductions Fund (ERF), moving away from market mechanisms in the form of a Carbon Pollution Reduction Scheme (CPRS).

(i) *Overview of the UNFCCC and Kyoto Protocol: International Obligations*

(a) *The UNFCCC*

The UNFCCC establishes an overall framework for intergovernmental efforts to address the challenges posed by climate change.[803]

The ultimate objective of this Convention/Protocol regime 'is to achieve… stabilisation of Greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system…within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'.[804] In achieving this objective, the parties are to be guided by inter alia, the principles of intergenerational equity,[805] the precautionary principle,[806] sustainable development and cooperation between parties.[807]

In pursuing this objective the parties made certain commitments in Article 4. These include, among others to: 'formulate…national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases (GHG) not controlled by the Montreal Protocol,[808] to promote…the development… of practices…that control, reduce or prevent anthropogenic emissions of GHG…in all relevant sectors including the energy, transport, industry, agriculture, forestry and waste management sectors,[809] to promote sustainable management and…cooperate in the conservation and enhancement… of sinks and reservoirs of all GHG not controlled by the Montreal Protocol…,[810] take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions…[811] and to promote and cooperate in education, training and public awareness related to climate change.'[812]

803 Australia became a signatory to the UNFCCC on 4 June 1992 and ratified it on 30 December 1992. The Convention entered into force on 21 March 1994. 196 States have ratified it as at time of writing.

804 UNFCCC, Art. 2.

805 Ibid., Art. 3(1).

806 Ibid., Art. 3(3).

807 Ibid., Art. 3(5).

808 Ibid., Art 4(1)(b).

809 Ibid., Art. 4 (1)(c).

810 Ibid., Art. 4(1)(d).

811 Ibid., Art. 4(1)(f).

812 Ibid., Art. 4(1)(i).

(b) *The Kyoto Protocol*

The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. 192 Parties to the UNFCCC have ratified its Protocol to date, including Australia, which ratified the protocol on 3 December 2007.

The Kyoto Protocol complements the UNFCCC by setting legally binding measures.[813] As an Annex I party to the Protocol, Australia is obliged to implement policies and measures in accordance with its national circumstances[814] such as: enhancing energy efficiency,[815] enhancing sinks and reservoirs,[816] researching and promoting new and renewable forms of energy, of CO2 sequestration technologies and environmentally sound technologies,[817] and 'progressively reducing or phasing out market imperfections…[and] subsidies on all GHG emitting sectors that run counter to the objective of the Convention.'[818]

The Protocol sets limits on the emissions of certain developed countries, namely 37 industrialised countries, and the European Community. These are known as quantified emissions limitation reduction commitments (QELRC). Australia, for example, must ensure that its aggregate anthropogenic CO2 equivalent emissions do not exceed its assigned amount of 108% of 1990 levels, in order to reduce overall emissions by at least 5% below 1990 levels by 2008-2012.[819]

The Protocol does not impose specific mechanisms for achieving such targets. Instead, it features several sophisticated flexibility mechanisms for attaining its emissions reductions as economically as possible: joint implementation (JI),[820] emissions trading[821] and the clean development mechanism (CDM).[822] These allow the parties to achieve their commitments by undertaking, financing or purchasing emissions reductions outside of their territories.

The flexibility mechanisms operate via a system of tradable emissions credits (TEC), which give the right to pollute the environment only to a certain extent. If a party pollutes less than it is permitted, it can sell its unused credits to other polluters that exceed their allotted amount.

813 As distinct from the UNFCCC which merely *encouraged* countries to stabilise their GHG emissions.
814 Kyoto Protocol, Art. 2(1)(a).
815 Ibid., Art. 2(1)(a)(i).
816 Ibid., Art. 2(1)(a)(ii).
817 Ibid., Art. 2(1)(a)(iii).
818 Ibid., Art. 2(1)(a)(v).
819 Ibid., Art. 3.
820 Ibid., Art. 6.
821 Ibid., Art. 17.
822 Ibid., Art. 12.

The detailed rules for the implementation of the Protocol were adopted at Conference of the Parties (COP)[823] 7 in Marrakesh in 2001, and are called the 'Marrakesh Accords'.

(ii) *The Flexibility mechanisms in greater detail*

(a) Joint Implementation

Article 6 provides:

> 1. *For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that:*
>
> *(a) Any such project has the approval of the Parties involved;*
>
> *(b) Any such project provides a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that would otherwise occur;*
>
> *(c) It does not acquire any emission reduction units if it is not in compliance with its obligations under Articles 5 and 7; and*
>
> *(d) The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3.*

Accordingly, Article 6 allows a country with an emission reduction or limitation commitment under the Kyoto Protocol, namely, an Annex B Party, to earn emission reduction units *(ERUs)* from an emission-reduction or emission removal project *in another Annex B Party*, each equivalent to one tonne of CO_2, which can be counted towards meeting its Kyoto target. Two fundamental eligibility criteria for JI projects are, first, a JI project must provide a reduction in emissions by sources, or an enhancement of removals by sinks that is *additional* to what would otherwise have occurred. Secondly, projects must have the *approval of the host Party* and participants must be *authorised to participate* by a party involved in the project.

(b) *International Emissions Trading (IET)*

The Kyoto Protocol defines the context for IET between Annex B parties by setting a common background against which participants construct domestic emissions trading schemes involving private entities. Articles 17 and 3.1 allow for IET and the

823 A legally autonomous COP supervises compliance with the Protocol and must 'periodically review' it: see Art. 9, Kyoto Protocol.

transfers and acquisitions of parties of assigned amounts between Annex B parties 'for the purpose of fulfilling their commitments under Article 3'.[824]

(c) *Supplementarity*

Article 17 provides that 'any trading shall be supplemental to domestic actions for the purpose of meeting' countries' QELRC. The emissions allowed by each Annex B party are referred to as assigned amount units *(AAU)*, whereby one AAU is equivalent to one metric tonne of CO_2 equivalent. Parties may use AAU's from different Annex B parties for compliance, as well as other Kyoto Protocol units, including certified emission reductions (CERs) derived from CDM projects, ERU's from JI and RMUs.

(d) *The Marrakesh Accords*

The Marrakesh Accords elaborate upon the rules regulating the functioning of IET. These govern the transfers of AAU's between the national registries of Annex I parties. In addition, they clarify the practical issues surrounding participation in IET by setting out certain eligibility criteria that parties must satisfy in order to participate, including:

- Being party to the Kyoto Protocol;
- Having a national system for estimating emissions (*GHG*) by sources and removal by sinks as well as a national registry, and
- Annually submitting the most recent required GHG emissions inventory.

Parties may authorise legal entities to participate in IET. However, these authorising parties remain responsible for fulfilling their obligations under the Protocol.

The Accords confirm the *fungibility* of different Kyoto Protocol units. Namely, that every AAU, CER, ERU and RMU is considered equivalent for compliance purposes regardless of its origin, and can offset one tonne of CO_2 equivalent from any Annex B party's emissions.

Although this regime defines the context for IET, each relevant party decides the degree of its entities' participation in IET as well as the design of any domestic emissions trading scheme.

Accordingly, the extent to which domestic schemes are integrated with IET is a matter of domestic policy for the relevant national authorities to determine.

(e) *The Clean Development Mechanism*

Article 12 provides:

> 2. *The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties*

824 Art. 17, Kyoto Protocol.

included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

3. *Under the clean development mechanism:*
   (a) *Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and*
   (b) *Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.*

As distinct from JI, in which projects occur between Annex I parties, the CDM allows Annex I parties to meet part of their emissions reductions by investing in projects that contribute to sustainable development in *non Annex I parties*.

Two conditions qualify this right: first, the COP must approve all projects, and secondly, the projects must achieve 'real, measurable and long term benefits related to the mitigation of climate change.'[825]

Typically a CDM involves a bilateral agreement in which an investor entity from an Annex I party contracts to transfer funding, technology and personnel to an entity in a developing country to apply to a GHG mitigation project. In consideration, the investor entity receives CERs, which it may apply to its country's commitments in lieu of actual domestic reductions. For example, an entity from an Annex I party such as Canada, may contribute funding towards the establishment of monoculture eucalyptus plantations in Brazil, and in this way, derive CERs from the establishment of carbon sinks.[826]

Both the UNFCCC and the Kyoto Protocol are administered by the Climate Change Secretariat within the United Nations. To make a complaint or enquiry regarding potential breaches of this Convention or its Protocol, you could write to the Secretariat at:

The Climate Change Secretariat

P.O. Box 260124

D-53153 Bonn, GERMANY

Telephone: (49-228) 815-1000

Fax: (49-228) 815-1999

Web address: http://www.unfccc.int

825 Article 12(5)(b), Kyoto Protocol.

826 Namely, forests or soils, which both store and release carbon dioxide.

(iii) *Implementation in Australia*

Frances O'Brien

Following the Australian ratification of the Kyoto Protocol, the Rudd Government indicated in its *White Paper*[827] its detailed climate change policy statement, the main domestic measures through which Australia intended to meet its quantified Kyoto emissions reduction target.[828] These measures primarily involved:

- Implementation of a domestic emissions trading scheme (the proposed CPRS);
- Continuation of a national renewable energy target (the 'RET'- see further below); and
- Other national energy efficiency measures and land clearing regulations.

The current Government has taken a different approach, advocating a 'direct action' policy to address climate change, and achieve an emissions reduction target of 5% of 2000 emissions levels by 2020. The centrepiece of the Direct Action policy is the ERF. The *ERF White Paper*[829] lists five key measures:

1. Crediting – The Clean Energy Regulator will issue Australian Carbon Credit Units (ACCUs) for verified emissions reductions projects.
2. Purchasing – The Government will contract with companies, organisations and governments at state and local levels, selected on the basis of bids to undertake emissions reductions projects.
3. Safeguarding – From 1 July 2015, the Government will consult with businesses to develop emissions baselines for new projects.
4. Carbon Farming Initiative (CFI) – The CFI will be merged with the Emissions Reduction Fund (ERF).
5. Review – Both Australia's international targets and the ERF will be reviewed near the end of 2015.

Due to the rapidly evolving nature of legislative development in this area, this Chapter currently focuses on National Greenhouse and Energy Reporting Scheme (NGERS), the Renewable Energy Target (RET) and the ERF. All three are currently in force, with NGERS and the RET thus far unaffected by the repeal of the *Clean Energy Act 2011* (Cth).

827 *The Carbon Pollution Reduction Scheme: Australia's Low Pollution Future, White Paper* (Vols 1 and 2), December 2008.

828 Australia committed to ensuring its emissions would not exceed 108% of its 1990 levels during the first commitment period of 2008-2012.

829 *Emissions Reduction Fund White Paper*, April 2014.

(a) *The National Greenhouse and Energy Reporting System*

The introduction of NGERS was the first step for the Rudd Government in implementing a national emissions trading scheme and to ensure Australia met its international climate change measurement and reporting obligations under the UNFCCC and Kyoto Protocol.

The specific objectives of the Rudd Government in introducing NGERS were to:

- Provide accurate data that will support and underpin the integrity of the CPRS;
- Consolidate existing emissions and energy reporting requirements at the federal, State and Territory levels; and
- Inform the Australian public about the 'greenhouse and energy performance' of Australian corporations.[830]

Although NGERS no longer has a role to play in the implementation of a CPRS, the *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGER Act) still holds relevance.

(b) *Overview of NGERS*

The NGER Act and the *National Greenhouse and Energy Reporting Regulations 2008* (the *Regulations)* are the framework for the national GHG and energy reporting system currently in force.

The NGER Act establishes a single national compulsory[831] system of reporting of patterns of greenhouse gas emissions and energy consumption and production for Australian corporations that meet established reporting thresholds, to the Clean Energy Regulator.

The NGER Act requires Australian corporations that may meet or exceed any *one* of the reporting thresholds (see below) to collect data on their greenhouse gas emissions and energy production and consumption. Those Australian corporations likely to meet one or more of the thresholds over the first reporting period will need to register for reporting within the relevant reporting period[832] (based on the financial year) and consider establishing appropriate accounting and reporting systems.

By the 2012-2013 reporting year, 1119 corporations were registered under NGERS. NGERS does not currently include reporting requirements for greenhouse gas

830 *National Greenhouse and Energy Reporting Act* 2007 (Cth) (the NGER Act), s 3.

831 Civil penalties apply for non-compliance by eligible corporations, and CEOs may incur personal liability for a contravention by the corporation: the NGER Act Part 5, Divisions 1-4.

832 Required under s.12, NGER Act. Civil penalties apply for non-compliance where the corporate group meets one or more of the reporting thresholds.

emissions arising from sources such as agriculture, land use and forestry, because of the difficulties in accurately reporting emissions from these sources, but it is expected that they will be covered by NGERS once appropriate reporting methodologies are developed.[833]

Although the *Clean Energy Act* repeal removed carbon pricing mechanisms, liable entities are still required to report under NGERS and had to meet their carbon price responsibilities for the 2013-2014 financial year.

(c) *The compulsory reporting thresholds*

Australian companies must register and report under NGERS from 1 July 2008 if they:

- Have 'operational control'[834] of a 'facility'[835] that emits 25 kilotonnes or more of greenhouse gases (CO2 equivalent), or produce or consume 100 terajoules or more of energy; or
- Their corporate group emits 125 kilotonnes or more of greenhouse gases (CO2 equivalent), or produces or consumes 500 terajoules or more of energy.

The reporting thresholds for corporates have been progressively lowered to 50 kilotonnes of greenhouse gases (CO2 equivalent) or 200 terajoules of energy in 2010-2011.[836]

(d) *Reporting timeframes for corporations subject to the NGER Act*

The first 'reporting year' for corporations likely to be affected by the legislation followed the financial year, from 1 July 2008 through to 30 June 2009. Corporations that may meet any of the reporting thresholds established under the Act and Regulations (see above) must register (online with the Federal Government Department of Climate Change[837]) under the System by 31 August 2009. Those registered corporations had to then submit their first report under the Act by 31 October 2009, with the Government publishing the data by 28 February 2010.

833 Australian Government Department of Climate Change Greenhouse and Energy Reporting Taskforce, *The National Greenhouse and Energy Reporting System (NGERS) Information Sessions* (July 2008).

834 NGER Act, s.11.

835 NGER Act, s.9.

836 NGER Act, s.13, and the Australian Government Department of Climate Change Fact Sheet, *National Greenhouse and Energy Reporting System*. Section 13 of the Act provides further information about the applicable reporting thresholds.

837 The Australian Government Department of Climate Change website is at http://www.climatechange.gov.au/index.html.

(e) *The Renewable Energy Target*

The Australian Government's Renewable Energy Target (RET) scheme extends the previous Australian Government Mandatory Renewable Energy Target (MRET) scheme (with an annual target of 9,500GWh, introduced in 2001) and commits Australia to ensuring that 20 per cent (or 45,000GWh) of Australia's electricity supply comes from renewable energy sources by 2020. The RET will facilitate the expansion of Australia's renewable energy sector, which includes geothermal, wind and solar energy.

The RET consolidates the existing MRET and all current and proposed state and territory targets into one scheme. It was expected that the RET scheme would conclude in 2030, as the CPRS developed.[838]

The RET scheme was designed by the federal and state and territory governments through the Council of Australian Government (COAG) Working Group on Climate Change and Water. Submissions responding to the exposure draft RET legislation closed in February 2009. On 30 April 2009, COAG agreed on the design of the RET and issued a paper covering the key elements of the RET, which contains changes to the exposure draft legislation.

The RET encourages the creation of renewable energy certificates through production of megawatt hours of renewable energy produced by both large and small-scale projects. A trading system of certificates exists between producers, electricity retailers and the Clean Energy Regulator.

On 28 August 2014, an expert review of the RET was completed and a report provided to the Government. It found that the RET had been successful in stimulating renewable energy production, already exceeding the 2020 target. It also found that this additional energy generation, along with falling electricity demand, is causing a reduction in electricity prices. However, the RET is considered a high cost emissions reduction approach, and the review notes that alternative, lower cost options exist.

At present, the RET remains intact.

(f) *Emissions Reduction Fund*

The ERF is the main feature of the Federal Government's Direct Action policy. The general design of the fund was finalised in the *White Paper*, but consultation over methods for emissions reductions under the fund is still in progress, with the first draft methods released in September 2014. Exposure draft legislation is also still at the consultation stage.

838 See the Australian Government Department of Climate Change website, 'Australia's Renewable Energy Target' at http://www.climatechange.gov.au/renewabletarget/index.html.

Under the ERF, the five measures listed above are supplemented by emissions reduction methods; guidelines for industries to follow in order to reduce carbon emissions. At the time of writing, methods for waste treatment, commercial buildings, avoidance of clearing native vegetation regrowth, facilities and transport have been released for public consultation.

10.10. Participation at a Conference of the Parties

NGOs having a specific environmental interest may collect information and prepare analysis, at their own expense, for presentation at intergovernmental environmental treaty conferences. These meetings typically consider the degree of implementation and extent of compliance by States Parties. Private actors can formally participate on specified terms in such 'Conferences of the Parties'. Interested NGO's should be familiar with the relevant accreditation rules enabling attendance and the procedural rules specifying the extent and terms of participation. Organisations should contact the relevant secretariat to determine the accreditation and attendance requirements.

For example, under the UNFCCC, NGOs may be admitted to attend sessions of the Convention bodies as observers.[839] Applications for observer status should include official documents detailing the mandate, scope and governing structure of the organisation, evidence of its non-profit or tax-exempt status, information demonstrating its competence concerning UNFCCC-related matters, an annual report including financial statements and funding sources, details of affiliations, publications and designated contact points.[840] Organisations may be provisionally admitted after screening by the UNFCCC secretariat. Observers are allocated to a specific constituency group. The modalities for participation at a COP include oral interventions, written submissions, participating in workshops and conducting side events. Observers must comply with the primary enabling provision of the UNFCCC permitting attendance, procedural rules, relevant COP decision and a code of conduct.[841]

839 See further http://unfccc.int/parties_and_observers/ngo/items/3667.php.

840 See further the Observer Organization Liaison Office at the UNFCCC Secretariat.

841 Art. 7, UN Framework Convention on Climate Change (1992) 31 ILM 848; Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies to the UN Framework Convention on Climate Change, UN Doc FCCC/CP/1996/2 (1996); Action taken by the COP at its 4th Session, Report, UN Doc FCCC/CP/1998/ 16/Add.1 (1999), Decision 18/CP.4 on the attendance of intergovernmental and nongovernmental organisations at contact groups (1998).

10.11. Other resources

Suggested additional resources for Australian practitioners include:

Hunter, Salzman and Zaelke, International Environmental Law and Policy, Foundation Press, 2007.

Birnie, Boyle and Redgwell, International Law and the Environment (3d) (Oxford University Press, 2008).

Lyster, Lipman, Franklin, Wiffen and Pearson, Environmental & Planning Law in New South Wales, The Federation Press, 2007.

UNEP, Training Manual on International Environmental Law, available at www.unep.org/law/Publications_multimedia/index.asp.

Australian Government, Department of the Environment, Water, Heritage and the Arts, Environment Protection and Biodiversity Conservation Act 1999: www.environment.gov.au/epbc/.

Key international environmental organisations include:

(i) *Intergovernmental Organisations (IGOs)*

United Nations Environment Program (UNEP)
United Nations Avenue, Gigiri
PO Box 30552, 00100
Nairobi, KENYA
Phone: (254-20) 7621234
Fax: (254-20) 7624489/90
Web:www.unep.org

World Heritage Centre
United Nations Educational, Scientific and Cultural Organization
7, place de Fontenoy
75352 Paris 07 SP, FRANCE
Phone: +33-(0)1-45 68 15 71 / +33-(0)1-45 68 18 76
Fax: +33-(0)1-45 68 55 70
Email: wh-info@unesco.org
Web: whc.unesco.org

International Law Commission (ILC)
Secretary of the International Law Commission
Rm. S3460A
United Nations Plaza
New York, N.Y. 10017 UNITED STATES
Web: http://www.un.org/law/ilc/

(ii) *Non-Governmental Organisations (NGOs)*

International Union for Conservation of Nature (IUCN)
Rue Mauverney 28
Gland 1196, SWITZERLAND
Phone: +41 (22) 999-0000
Fax: +41 (22) 999-0002
Web: www.iucn.org

Worldwide Fund for Nature (WWF)
WWF International,
Av. du Mont-Blanc 1196
Gland SWITZERLAND
Phone: +41 22 364 91 11
Web: http://www.panda.org/who_we_are/offices/

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Center for International Environmental Law (CIEL) (US and Switzerland-based)
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Washington, DC 20036 UNITED STATES
Phone: (202) 785-8700
Fax: (202) 785-8701
Email info@ciel.org
Web: http://www.ciel.org/

Foundation for International Environmental Law and Development (FIELD)
3 Endsleigh Street
London WC1H 0DD UNITED KINGDOM
Phone: +44 (0)20 7872 7200
Fax: +44 (0)20 7388 2826
E-mail: field@field.org.uk
Web: http://www.field.org.uk

(iii) Dispute Resolution Bodies

It is beyond the scope of the present Chapter to provide a detailed overview of the dispute resolution and enforcement mechanisms available to States Parties to resolve

disputes arising under international environmental instruments. Those interested should refer to the provisions relating to compliance and dispute resolution in the relevant environmental instrument, the respective website for that Convention or other instrument, and the list of suggested additional resources provided above, for a more detailed treatment of this aspect of international environmental law.

The contact details for some of the main dispute resolution and enforcement bodies are also provided below.

International Court of Justice (ICJ)
Any correspondence must be submitted in one of the Court's two working languages: English or French.
Peace Palace
Carnegieplein 2 2517 KJ The Hague THE NETHERLANDS
Phone: (+31) (0)70 302 23 23
Fax: (+31) (0)70 364 99 28
Web: http://www.icj-cij.org/homepage/index.php?p1=0

International Tribunal for the Law of the Sea (ITLOS)
Am Internationalen Seegerichtshof 1 - 22609
Hamburg – GERMANY
Phone: (49)(40)35607-0
Fax: (49)(40) 35607-245
E-mail: itlos@itlos.org
Web: http://www.itlos.org/start2_en.html

World Trade Organisation (the Appellate Body) (the WTO)
Centre William Rappard,
Rue de Lausanne 154,
CH-1211 Geneva 21, SWITZERLAND
Phone: (41-22) 739 51 11
Fax: (41-22) 731 42 06
Email: enquiries@wto.org
Web:http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

Court of Justice of the European Communities/Cour de justice des Communautés européennes (ECJ)
L - 2925 Luxembourg
Phone: (Switchboard): (+352) 4303.1
Fax: (+352) 4303.2600
Web: http://curia.europa.eu/jcms/jcms/Jo2_6999/general-presentation

Chapter 11

Investment, Trade and the World Trade Organisation

11.1. Introduction

Financial markets no longer operate in isolation within a State. Advances in communication and technological innovation have permitted financial markets to be globally integrated. A significant feature of the global integration of financial markets is foreign direct investment (FDI). FDI occurs, broadly speaking, when a resident in one State invests within the economy of another State. Traditionally, transnational corporations were the dominant actor in cross-border transactions. However, over the last two decades, there have been significant changes in FDI. These changes have occurred both in the amount that FDI contributes to the global economy, and the emergence of international rules governing investment. In relation to the latter development, it has been through bilateral, regional and multilateral rules and principles, examined below, that this international legal framework has been given substance. The difficulty with FDI is that the legal framework within which the FDI will operate will be specific to the parties involved. Nevertheless, the information below sets out the fora within which FDI operates and may aid practitioners when considering FDI.

11.2. International Legal Framework of FDI

The bulk of the information below has been sourced from publications by the United Nations Conference on Trade and Development (UNCTAD).[842] The sources of law from which the international legal framework of FDI is derived include:

842 See generally UNCTAD, International Investment Agreements: Key Issues Volume 1, UNCTAD/ITE/IIT/2004/10, available at http://www.unctad.org/en/docs/iteiit200410_en.pdf.

(i) National Laws. National laws relating to FDI are framed to attract and regulate foreign investment. Local laws may also have an effect on FDI, such as company or property law. A party seeking to invest in another jurisdiction should obtain advice on local laws and procedures.

(ii) Customary International Law. There are two main legal norms that underpin the concept of FDI, which are:

   (a) sovereignty; and

   (b) States protecting the interest of nationals abroad.

   These legal norms have shaped the operation and development of FDI, particularly the concept of sovereignty. It is under sovereignty that States have the right to exclusive jurisdiction. The result of this has been that there is not a universal approach to regulating FDI.

(iii) International Investment Agreements. Currently, there are no multilateral agreements that specifically address FDI. An attempt was made by the Organisation for Economic Cooperation and Development (OECD) to create a multilateral agreement, called the Multilateral Investment Agreement (MIA). The MIA would have ensured that international investment was governed systematically, however negotiations failed due to uncertainties and protectionism concerns of Member States. However, there are several multilateral agreements which indirectly or partially consider FDI, being the:

   (a) General Agreement on Trade in Services (GATS);

   (b) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); and

   (c) Agreement on Trade-Related Investment Measures (TRIMs).

(iv) Regional and Plurilateral Investment Agreements. These are characterised by limited membership, liberalisation of capital movement and commitments to practice non-discrimination towards foreign investors. Some examples include:

   (a) European Union;

   (b) North America Free Trade Agreement;

   (c) OECD Liberalisation Codes; and

   (d) ASEAN Framework Agreement.

   Member States of these regional agreements have agreed to eliminate or reduce tariffs, preferences and other restrictions on the movement of goods and services between them.

(v) Bilateral Investment Agreements. Bilateral Investment Treaties (BITs) are very important for FDI with the primary purpose of BITs being to provide parties with investment protection, such as against currency controls, civil disturbances and State interference. Since the 1960s, more than 2,300 BITs have been concluded. BITs are generally standardised, but they provide some flexibility in recognising national laws and circumstances. The main characteristics of BITs are:

(a) the inclusion of dispute resolution mechanisms;

(b) most favoured nation treatment;

(c) fair and equitable treatment of foreign investors in the recipient State;

(d) capacity for the recipient State to expropriate investments for public purpose.

BITs normally contain binding arbitration provisions. Some BITs to which Australia is a party refer arbitration functions to the International Centre for the Settlement of Investment Dispute (ICSID). However, more ad hoc fora exist for arbitration, such as the United Nations Commission on International Trade Law (UNCITRAL) Rules. For further information on BITs, a search facility has been provided on the UNCTAD website. The search engine allows for users to retrieve all available BITs signed by one country, or to locate a specific BIT between two countries.

(vi) Soft Law. FDI regulation may also be informed by principles from soft law. Soft law principles may be found in legal documents that, while binding on a Member State generally, contain no strict legal obligations or rights in relation to FDI. Terms such as 'best efforts' or 'endeavours' are indicative of non-obligatory soft law. UNCTAD has identified the OECD Declaration on International Investments and Multinational Enterprises as containing soft law on FDI.

11.3. Dispute Resolution

Dispute resolution mechanisms may be available in the instruments overseeing FDI. For example, dispute-resolutions provisions are included in most BITs. Regional investment instruments will also have similar provisions. However, the ICSID provides a multilateral instrument, although not specifically for FDI, that is available to States party to it.

The ICSID is an institution of the World Bank group. The ICSID was established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The ICSID Convention entered into force in October 1966. There are currently 159 signatories to the ICSID Convention, including Australia, which ratified it in 1991. The ICSID Convention allows for arbitration and conciliation of investment disputes. Article 14 of the ICSID Convention gives the ICSID full international legal personality, giving it the capacity to contract; acquire and dispose of movable and immovable property and to institute legal proceedings. The ICSID's jurisdiction is outlined under Article 25, granting it jurisdiction over any legal dispute arising out of an investment between contracting States. It is important to note that parties to the dispute must consent to submit to the jurisdiction of the ICSID. Proceedings cannot be commenced unilaterally. The provisions concerning conciliation are provided for under Chapter III, while arbitration is addressed under Chapter IV of the ICSID Convention. Once parties have provided their consent to the ICSID's jurisdiction, awards granted through arbitration are binding, with possible pecuniary obligations imposed for non-compliance (Article 54). Decisions from the arbitral tribunals are available on the ICSID website.

11.4. Additional Resources

(i) FIRB website http://www.firb.gov.au/content/default.asp.

(ii) ICSID website http://icsid.worldbank.org/ICSID/FrontServlet.

(iii) UNCTAD website http://www.unctad.org/Templates/StartPage.asp?intItemID=2068.

11.5. Participation within the World Trade Organisation

NGOs 'concerned with matters related to those of the WTO' may participate in the work of the World Trade Organisation (WTO).[843] This has hitherto involved

843 Article V(2), Marrakesh Agreement establishing the WTO, Legal Instruments embodying the Results of the Uruguay Round of Multilateral Trade Negotiations done at Marrakesh on 15 April 1994, Vol 1, pp.135-47; Guidelines for arrangements on relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996, WTO Doc WT/L/162 (1996) (http://www.wto.org/english/forums_e/ngo_e/guide_e.htm). An NGO Contact Point has also been established: see generally http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm.

attendance at Ministerial Conferences, informal participation in issue-specific symposia (for example, concerning trade and the environment, trade and development and trade facilitation) and daily contact with the WTO Secretariat.

11.6. International Trade Law: Trade in Services

The Uruguay round and subsequent rounds of trade negotiations have increasingly liberalised trade in services and growth in trade in services has exceeded trade in merchandise since 1980.[844] This has benefited services exporters by bringing greater transparency and predictability in the rules applicable to international trade. Services are now considered to be the most dynamic segment of international trade.

Australia is already a significant services economy, with international trade in services increasing 4.2% and accounting for approximately $116.4 billion in 2012-2013.[845] As the services trading environment is made more conducive to international trade, this will further promote services exports from Australia. Consequently, it will become increasingly important for Australian businesses to understand the General Agreement on Trade in Services (GATS) and the commitments made by other Member States, in order for Australian businesses to export to those Member States.

11.6.1. Provisions on the General Agreement on Trade in Services (GATS)

The GATS is a WTO agreement that entered into force in January 1995 as a result of the Uruguay Round negotiations. The objective of the GATS was to establish a credible and reliable system of international trade rules to ensure fair and equitable treatment of all participants.[846] The Preamble to the GATS states that it intends to contribute to trade expansion 'under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries'.

844 The General Agreement on Trade in Services – An Introduction, 29 March 2006, http://www.wto.org.

845 Department of Foreign Affairs and Trade, Trade in Services Australia, 2012-2013, www.dfat.gov.au.

846 From 'The General Agreement on Trade in Services: objectives, coverage and disciplines'; http://www.wto.org.

The GATS is a framework for multilateral obligations that are agreed upon by Member States to the WTO, and also functions as a commitment agreement to continue liberalisation in the area of trade in services in order to improve market access and to extend national treatment to more foreign service suppliers, pursuant to Article XIX of the GATS. The first round of these negotiations began in January 2000. However, the GATS also explicitly recognises the rights of sovereign governments to regulate in order to meet national policy objectives. This is particularly in the case of the governments of developing countries.

The GATS consists of the main text, the Annexes, the Members' schedule of commitments and the lists of exemptions to the Most Favoured Nation (MFN) obligation. The annexes include:

(a) the Annex on Article II exemptions, which sets out the conditions under which members may impose exemptions to their MFN obligation;

(b) the Annex on movement of natural persons suppling services under the GATS; and

(c) Annexes on specific sectors, such as telecommunications, financial services and transport services.

(i) *Scope of the GATS*. The scope of the GATS applies to all measures made by members that affect trade in services,[847] regardless of whether the measure is taken at a central, regional or local government level, or by non-governmental bodies exercising delegated powers.[848] The definition of 'services' excludes services that are supplied in the exercise of governmental authority.[849] A service is supplied in the exercise of governmental authority if it is not supplied on a commercial basis or in competition with other service suppliers.[850] Members of the WTO are also signatories to the GATS and are bound to the obligations under the GATS.

(ii) *Definition of Services*. The GATS specifically covers four modes of supply: cross border supply, consumption abroad, commercial presence abroad and the presence of natural persons abroad:[851]

(a) Mode 1: Cross border supply. These include services from the territory of one Member into the territory of any other Member

847 General Agreement on Trade in Services, Article I:1.
848 Ibid., Article I:3(a).
849 Ibid., Article I:3(b).
850 Ibid., Article I:3(c).
851 Ibid., Article I:2(a), (b), (c) and (d).

(for example, a user in Country A receives services from abroad through its telecommunications or postal infrastructure).

(b) Mode 2: Consumption abroad. This covers services supplied in the territory of one Member to the service consumer of any other Member (for example, nationals of Country A have moved abroad to consume the respective services).

(c) Mode 3: Commercial Presence. This situation covers services supplied by a service supplier of one Member, through commercial presence, in the territory of any other Member (for example, the service is provided within Country A by a locally established affiliate, subsidiary or representative office of a foreign owned and controlled company).

(d) Mode 4: Presence of natural persons. This covers services supplied by a service supplier by one Member, through the presence of natural persons of a Member in the territory of any other Member (for example, a foreign national provides a service within Country A as an independent supplier or employee of a service supplier).

It should be noted that the definition of services under the GATS includes transactions that only involve residents of the same country.

(iii) *Obligations of Member States under the GATS*. The obligations of Member States under the GATS are divided into two categories:

(a) general obligations; and

(b) specific commitments.

11.6.2. General Obligations

(i) *Most Favoured Nation Principle*. Member States must apply the most favoured nation (MFN) principle to the services and service suppliers of all Members. The MFN principle, which is akin to a principle of non discrimination, requires that a Member treat the service and service suppliers of all Members no less favourable than that accorded to like services and services suppliers of any other country.[852] The MFN principle applies regardless of whether specific commitments have been made or not by the Member country.

The MFN principle does not apply if exemptions were sought at the time of the acceptance of the GATS.[853] For acceding countries, this date is the date of accession.

852 Ibid., Article II:1.

853 Ibid., Article II:2.

The exemption is contained in country specific lists. The duration of the exemption must not exceed ten years. Currently, there are more than 80 Members who maintain such exemptions.

(ii) *Transparency*. Members are required to publish promptly, and at the latest by the time of their entry into force, all relevant measures of general application which relate to or affect the GATS.[854] An exception exists in situations of emergency. Members must also publish all international agreements that pertain to or affect trade in services to which the Member is a signatory.[855] If publication is not practicable, the information must be made publicly available by other means.[856] Further, Members must respond promptly to any requests for such specific information that have been made by other Members,[857] and must establish national enquiry points to respond to the Members' requests for information. Members must also notify the Council for Trade in Services at least annually of all legal and regulatory changes that significantly affect trade in sectors where specific commitments have been made.[858] Other Members may contact the national enquiry points to seek such information. Members may also notify the Council for Trade in Services of any measure that has been taken by any other Member that affects the operation of the GATS. However, Members are not under any obligation to disclose confidential information.[859]

(iii) *Participation of Developing Countries.* Article IV of the GATS focuses on increasing the participation of developing countries. Developed countries have the additional obligation to establish contact points to which developing country service suppliers can access information concerning commercial and technical aspects of the supply of services, aspects related to professional qualifications, and the availability of services technology.[860] Least developed countries should be accorded special priority. The GATS also states that other Members should also do so to the extent possible.

(iv) *Economic Integration and Labour Markets Integration Agreements*. The GATS does not prevent any Members from participating in any bilateral

854 Ibid., Article III:1.
855 Ibid., Article III:1.
856 Ibid., Article III:2.
857 Ibid., Article III:4.
858 Ibid., Article III:3.
859 Ibid., Article III*bis*.
860 Ibid., Article IV:2.

or plurilateral agreement to further liberalise trade in services, provided that the agreement has substantial sectoral coverage and removes substantially all discrimination between participants.[861] Substantial sectoral coverage is determined in terms of the number of sectors, volume of trade affected and modes of supply. Discrimination may be removed by eliminating existing discriminatory measures and/or prohibiting new or more discriminatory measures. However, the overall level of barriers must not be raised against non-participants in the sectors covered. If the agreement leads to the withdrawal of commitments, appropriate compensation must be paid to the affected Members. Similarly, the GATS does not prevent Members from being a party to agreements on labour markets integration, provided that the Council for Trade in Services is notified and that the citizens of the countries involved are exempt from residency and work permit requirements.[862]

(v) *Domestic Regulation.* The GATS also contains provisions that affect domestic regulation, as measures of general application must be administered in a reasonable, objective and impartial manner.[863] Members must operate domestic judicial, arbitral or administrative tribunals or procedures where individual service suppliers may seek legal redress.[864] These domestic mechanisms should also provide for the prompt review of appropriate remedies for administrative decisions affecting trade in services.

(vi) *Recognition.* Members may recognise education, experience, licenses and other qualifications that a supplier has obtained abroad for the purpose of authorising, licensing or certifying services suppliers. This recognition may be based on an agreement or arrangement with the country concerned, or may be accorded on an autonomous basis.[865] However, the recognition must not be exclusive and other Members must be given the opportunity to negotiate their accession to these or similar agreements and arrangements or to demonstrate that their requirements should be recognised also.[866] Recognition must not be applied as a means

861 Ibid., Article V:1.
862 Ibid., Article V*bis*.
863 Ibid., Article VI:1.
864 Ibid., Article VI:2.
865 Ibid., Article VII:1.
866 Ibid., Article VII:2.

of discrimination between trading partners or as a disguised trade restriction.[867]

(vii) *Monopolies.* Members must also ensure that monopolies and exclusive service providers do not act in a manner inconsistent with the MFN obligation and the country's commitments.[868] An exclusive service supplier occurs where a member authorises or establishes a small number of service suppliers and substantially prevents competition amongst those suppliers.[869] This applies in substance over form. Members are also required to prevent suppliers who are active in sectors beyond the scope of their monopoly rights and covered by specific commitments from abusing their position and acting inconsistently with the Member's GATS commitments.[870] Members must report the formation of new monopolies to the Council for Trade in Services if the relevant sector is subject to specific commitments.[871]

(viii) *Payments and Transfers*. Members are permitted to engage in international transfers and payments for current transactions relating to specific commitments.[872] Furthermore, the rights and obligations of IMF Members shall not be affected. However, capital transactions must not be restricted inconsistently with specific commitments, except under Article XII in order to safeguard the balance of payments or at the request of the IMF.[873]

(ix) *Restrictions to Safeguard the Balance of Payments.* Members may enforce restrictions on trade in services in the event of serious balance of payments and external financial difficulties or threat of such difficulties.[874] However, the restrictions must not discriminate amongst Members, must be consistent with the Articles of Agreement of the IMF, must avoid unnecessary damage to the commercial, economic and financial interests of any other Member, must not be unnecessary to deal with the circumstances, and must be temporary and be phased out progressively

867 Ibid., Article VII:3.
868 Ibid., Article VIII:1.
869 Ibid., Article VIII:5.
870 Ibid., Article VII:2.
871 Ibid., Article VIII:4.
872 Ibid., Article XI:1.
873 Ibid., Article XI:2.
874 Ibid., Article XII:1.

as the situation improves.[875] Members may give priority to the supply of services which are more essential to the economic or development programmes when determining where the restrictions should be implemented, provided that the restrictions are not implemented for the purpose of protecting a particular service sector.[876]

11.6.3. Exceptions to the General Obligations

(i) *Exercise of Governmental Authority Exception.* Services that are supplied in the exercise of governmental authority are excluded from the definition of 'services'.[877] A service is supplied in the exercise of governmental authority if it is not supplied on a commercial basis or in competition with other service suppliers.[878]

(ii) *Government Procurement Exception.* Law, regulations or requirements governing government procurement of services purchased for governmental purposes are exempted from the requirements of Articles II (most favoured nation), XVI (market access) and XVII (national treatment). The services must not be purchased for the purposes of commercial resale or for the purposes to supply the services for commercial sale.[879]

(iii) *General Exceptions.* The GATS does not prevent Members from adopting or enforcing measures for the following purposes:

  (a) measures necessary to protect public morals or to maintain public order;

  (b) measures necessary to protect human, animal or plant life or health;

  (c) measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATS, including those related to:

    (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

    (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and

875 Ibid., Article XII:2.
876 Ibid., Article XII:3.
877 Ibid., Article I:3(b).
878 Ibid., Article I:3(c).
879 Ibid., Article XIII:1.

(iii) safety;

(d) measures inconsistent with the national treatment requirement of Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members; and

(e) measures inconsistent with the most favoured nation of Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the member is bound.

These exceptions are subject to the requirements that measures are not to be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail. The measures must also not be a disguised restriction on trade in services.

(iv) *Security Exceptions.* The GATS explicitly states that Members need not furnish any information if the disclosure of the information is considered to be contrary to the country's essential security interests.[880] The GATS also explicitly states that it does not prevent Members from taking any action which the Member considers necessary for the purpose of its essential security interests:[881]

(a) relating to the supply of services (carried out either directly or indirectly) for the purpose of provisioning a military establishment;

(b) relating to fissionable and fusionable materials (or the materials from which they are derived); or

(c) taken in times of war or other international relations emergencies.

Members are also not prevented from taking any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security.[882]

(v) *Sector Specific Exception to the GATS.* Air transport services are the one sector specific exception to the GATS. Air transport services are addressed under the GATS Annex on Air Transport Services.

880 Ibid., Article XIV*bis*:1(a).

881 Ibid., Article XIV*bis*:1(b).

882 Ibid., Article XIV*bis*:1(c).

11.6.4. Specific Commitments

(i) *National Treatment.* Unless limitations have been listed in the Member's commitment schedule, a Member must treat services and service suppliers of other Members no less favourable than the Members' own services and service suppliers.[883] It should be noted that the national treatment principle applies to substance rather than form - it is irrelevant whether the foreign services and service suppliers are treated in a formally identical way to the national services and service suppliers, provided that the conditions for competition are the same for both national and foreign services and service suppliers.[884]

(ii) *Commitments.* The level of commitments vary amongst Member States as countries may limit their commitments. Each WTO Member submits a commitments schedule under the GATS. This schedule notates the country's commitments to specific market access and national treatment obligations. Services are divided into the following 12 core service sectors:

(a) Business services (including professional services and computer services);
(b) Communication services;
(c) Construction and related engineering services;
(d) Distribution services;
(e) Educational services;
(f) Environmental services;
(g) Financial services (including insurance and banking);
(h) Health related and social services;
(i) Tourism and travel related services;
(j) Recreational, cultural and sporting services;
(k) Transport services;
(l) Other services not included elsewhere.

The 12 core services sectors are further subdivided into sub-sectors. There are approximately 160 sub sectors. A Member may not withdraw its commitments without compensating the other Members for such action.[885]

883 Ibid., Article XVII:1.
884 Ibid., Article XVII:2 and 3.
885 Ibid., Article XXI:4(a).

(iii) *Market Access.* In the absence of the terms, limitations and conditions specified in each Member's schedule, the following six types of market access restrictions must not be maintained by the Member country:[886]

(a) Limitations on the number of service suppliers;

(b) Limitations on the value of service transactions or assets;

(c) Limitations on the number of operations or quantity of output;

(d) Limitations on the number of natural persons that may be employed in a particular service sector or that a service supplier may employ to supply a service;

(e) Restrictions on the type of legal entity or joint venture through which a service supplier may supply a service; and

(f) Limitations on the participation of foreign capital.

These measures are not necessarily discriminatory since they may affect national service suppliers as well as foreign service suppliers.

(iv) *Reading Commitments.* The schedules of Member's commitments may be accessed from the WTO website at http://www.wto.org. The schedules are set out in columns. The first column specifies the sector or sub sector concerned. The second column sets out any limitations on market access. The third column contains any limitations that the Member may want to place on national treatment. The final column provides the opportunity to undertake additional commitments. The schedule is further divided into two parts. Part I lists horizontal commitments, which are commitments that apply across all scheduled sectors. Part II sets out commitments on a sector-by-sector basis. If the commitment in the Schedule states 'none', this means that the Member has made a full commitment without limitation. In contrast, if the commitment is 'unbound', this means that the Member has full discretion to apply any measure falling under the relevant Article. It should be noted that commitments need not necessarily be complied with from the date of entry into force of a schedule, as Members may specify the timeframes for implementation in the schedule.

11.6.5 Dispute Settlement

GATS obligations and commitments are enforced under the WTO dispute settlement mechanism. Whilst private firms and individuals do not have any direct

886 Ibid., Article XVI.

access to WTO, Member governments who feel that their services sector is being treated unfairly or discriminated against by other Members can bring the matter before the WTO dispute settlement mechanism. If it is suspected that the exports of services are being unfairly blocked in foreign markets, this should be reported to the Department of Foreign Affairs and Trade so that the government can take the necessary action. The first step in the WTO dispute settlement mechanism is for the complainant Member to request bilateral consultations with the alleged violating Member. If the consultations do not resolve the matter within 60 days, the complainant Member can request the establishment of a panel to hear the dispute. The panel must make a decision within 6 months of formation. However, the timetable may be modified in order to take into consideration the product in question. Once a panel has made its decision, it does not become a ruling by the dispute settlement mechanism unless the panel's decision is adopted. The ruling is then presented to the Dispute Settlement Body, and must be adopted within 60 days, unless the respondent Member has signalled its intention to appeal the report. The Dispute Settlement Body may also decide by consensus not to adopt the panel findings. If the respondent Member decides to appeal the panel findings, the matter appears before the Appellate Body. The Appellate Body consists of three independent individuals whom are not affiliated with any Member government. The Appellate Body can uphold, modify or reverse the panel's findings. An appeal normally lasts less than 60 days. The appeal report is also a ruling by the dispute settlement mechanism.

If a Member is found to be violating their GATS obligations, they are required to bring their measures into compliance with their obligations. Otherwise, they must provide compensation to the offended Member within a 'reasonable period of time', which is normally 15 months.

Third parties to the disputes are also governed by the WTO's dispute settlement rules. They do not have as many rights as the original parties to the dispute, and are entitled access only to the first written submissions of the Members involved. They also cannot appeal the decision of the panel, nor take retaliatory measures against the respondent party if it does not comply with the findings of the panel or the decision of the Appellate Body.

11.6.6. Cases brought before the WTO panel or Appellate Body that have involved the GATS

The following table lists the cases that have been brought before the WTO dispute settlement bodies and that have discussed issues relating to the GATS.

Case	Panel/Appellate Body	GATS Article Discussed
US - Gambling	Panel	I:1
		XVI
		VI:1 and VI:3
		XI
		XIV
	Appellate Body	Interpretation of Schedule
		XVI (Procedural)
		XIV (Procedural)
		XVI:2(a) and (c)
		XIV
EC - Bananas	Panel	XVII
		II
	Appellate Body	Scope of application of GATS
		Definition of service suppliers and wholesale trade services
		II
		Effective date of GATS obligations
		XVII
Canada – Automotives	Panel	I:1
		II:1
		V
		XVII
	Appellate Body	I:1
		II:1
Mexico – Telecommunications	Panel	Annex on Telecommunications – Section 5

11.6.7. Useful Resources

(a) World Trade Organisation, Services Gateway (access to the text of the GATS, the Annexes and Schedules of Member commitments, sector specific reports on trade liberalisation agreements, information on new

developments and government procurement opportunities) http://www.wto.org.

(b) UNCTAD/WTO International Trade Centre http://www.intracen.org.

(c) European Commission, INFO-POINT on World Trade in Services (user friendly way to access schedules of member's commitments) http://gats-info.eu.int/gats-info/gatscomm.pl?MENU=fff

(d) WorldTradeLaw.net http://www.worldtradelaw.net/.

Chapter 12

International Copyright Law

BY MORGANE POULLAIN

12.1. Definition, Origin and Rationale of Copyright

In most European countries copyright legislations find their origins in the 15th and 16th centuries through efforts of the governments to regulate and control printing. But the first act to directly protect the rights of authors was the British *Statute of Anne* in 1710.[887] In United States it is part of the 1787 *Constitution*.[888] In Asia and Africa copyright laws are more recent, as they were first introduced by European colonial empires, mainly French and British.[889] Copyright legislation in Australia is embodied in the *Copyright Act 1968* (Cth).

Copyright issues are dealt with at an international level through a patchwork of international treaties and conventions, often overlapping each other, and combined with national laws. An international copyright law does not exist as such. However, in a world of growing globalisation and multi-medias, works of authorship travel easily across national borders. Therefore, increasingly, copyright laws are getting unified through international conventions and treaties. The World Intellectual Property Organization (WIPO) defines the purpose of copyright law as "to encourage a dynamic culture, while returning value to creators so that they can lead a dignified

887 '*Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of as booths such copies, during the time therein mentioned*' - 1710.

888 Article 1, section 8, clause 831.

889 British '*Imperial Copyright Act*' - 1911.

economic existence, and to provide widespread, affordable access to content for the public".

Copyright protects an original work of authorship: the original expression of ideas, not the ideas themselves. Ownership of a work is different from the ownership of its copyright. Copyright is a "chose in action", an intangible property. The purchaser of a book buys ownership of the book as a tangible good, but not the underlying copyright of the book's content. Only the copyright holder has the privilege to "use" the work by publishing, reproducing or copying it.

12.2. Key International Conventions and Treaties

12.2.1. Berne Convention for the Protection of Literary and Artistic works (1886)

The *Berne Convention* is a foundation treaty in international copyright. It is administered by the WIPO and created for "the protection of the rights of authors in their literary and artistic works".[890] The convention requires the Berne Union members to comply with strong minimum standards.

12.2.2. European Copyright Law

In order to facilitate free movement of goods and services within the European Union, Member States have been pursuing an ambitious programme of harmonization, which might lead to a unified European copyright law in the long-term. To this affect important Directives have been enacted, including: *Copyright Duration Directive,*[891] *Directive on Resale Right for the Benefit of the Author of an Original Work of Art,*[892] *Directive on the Legal Protection of Databases,*[893] *Electronic Commerce Directive,*[894] *and Directive on the Enforcement of Intellectual Property Rights.*[895]

890 Article 1.

891 Council Directive 93/98/ EEC of 29 October 1993 '*Harmonising The Term of Protection of Copyright And Certain Related Rights*'; replaced by Directive 2006/116/ EC of the European Parliament and of the Council of 12 December 2006 on '*The Term Of Protection Of Copyright And Certain Related Rights*'.

892 2001/84/EC.

893 96/9/EC.

894 2000/31/EC.

895 2004/48/ EC of the European Parliament and of the Council of 29 April 2004 on '*The Enforcement of Intellectual Property Rights*'.

12.2.3. TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights

TRIPS was promulgated in 1994 as Annex IC of the agreement establishing the World Trade Organisation (WTO) at the Uruguay round of the GATT as a result of growing tensions in international economic relations with respect to counterfeit goods in international trade.

12.2.4. Anti-Counterfeiting Trade Agreement (ACTA)

ACTA is a plurilateral agreement, which negotiations began in June 2008 with European Union countries, the US, Japan and other countries, including Australia. The scope of the agreement is broad including counterfeit goods, as well as "internet distribution and information technology".

12.3. When copyright arises

Historically the type of works subject to copyright only covered books. Today, copyright protects works of authorship ranging from maps, charts, prints, musical compositions, dramatic works, photographs, paintings, drawings, sculptures, motion pictures, computer programs, databases, choreography, architectural works, etc.

Copyright protection is automatically granted and simply arises at the creation of the work. Since the *Berne Convention*, registration formalities are prohibited for members of the Berne Union. However, in the US, although registration is not necessary for copyright to occur, it will not be enforced unless it has been registered.

12.4. Exclusive rights granted by copyright

The *Berne Convention* grants to copyright holders a set of exclusive rights on their work. Thus actions such as reproduction, public performance, broadcast, adaptations, alterations and translations of copyrighted work cannot usually be carried out without the copyright holder's permission; although the Convention also provides for the exception of "fair use" in other publications and broadcasts.

In Europe a number of directives have been enacted particularly targeting issues of copyright related to multi-medias. In order to provide legal certainty for business and consumers across the EU, the *E-Commerce Directive* harmonises the European legislations on information requirements for online service providers, transparency, commercial communications, electronic contracts, limitation of liability of

intermediary services providers. While, the *Directive on the Legal Protection of Databases* creates a special sui generis protection for databases, for a period of 15 years from the completion of the database or from the date the database is made available to the public, whichever is the later. The criteria to qualify for protection is not one of "originality" as it is usually the case for copyright protection, but "the investment of considerable human, technical and financial resources" in creating the database.[896]

12.5. "Droit de suite"

Based on the French concept of "droits d'auteur", the *Berne Convention* introduced in the International Copyright Law the "droit de suite",[897] which provides for artist's resale rights and entitle them to a fraction of the price every time their work is re-sold.

In Europe this is also covered by the *Directive on Resale Right for the Benefit of the Author of an Original Work of Art* and is considered to be a personal right that cannot be transferred other than by inheritance.

12.6. Term of copyright

The *Berne Convention* provides that the minimum term prescribed by the convention is 50 years after the author's death.[898] However the signatories can provide for longer terms, which is the case in most countries including Australia. This applies to all types of work, except photographic and cinematographic works, for which the minimum term is of 25 years from the year the photograph was created, and 50 years after the first showing for cinematography.[899]

'The rule of shorter term'[900] provides that "the term shall not exceed the term fixed in the country of origin of the work". This means that Member States are allowed to limit the duration of copyright protection they grant to foreign works under national treatment, to at the most the copyright duration granted in the work's country of origin. However, again countries are free to go beyond that term, if they wish.

896 Para 7 of the preamble of the *Directive on the Legal Protection of Databases*.
897 Article 14ter of the *Berne Convention*.
898 Article 7(1) of the *Berne Convention*.
899 Article 7(2) of the *Berne Convention*.
900 Article 7(8) of the *Berne Convention*.

Consequently, the same work may be copyrighted for different durations in different countries.

In Europe the *Copyright Duration Directive*[901] aims at ensuring across the EU a single duration of 70 years from the death of the author. In the *Butterfly case*,[902] the European Court of Justice held that the articles 10 (2) and (3) of the Directive, read together, clearly provide that copyright and related rights that had expired under the application of the previous legislation could be revived for the future under the new Directive, while leaving it to the Member States to adopt measures to protect the rights acquired by third parties.

12.7. Limitations and Exceptions

Limitations and Exceptions to copyright are also often seen as "users rights", and are traditionally said to create a balance with the exclusive rights of copyright that stimulates investments and creativity, as well as the public interest.

The *Berne Convention* only allows them in certain special cases,[903] for which it leaves it to the signatories to legislate nationally in more details.

12.7.1. Public Domain

A work is said to be in the public domain if its intellectual property rights have expired, have been forfeited or have never been claimed. In such cases, use of the work does not require any prior authorisation or license. Indeed, works in the public domain are not protected by copyright law and are publicly available.

12.7.2. Moral Rights

A 1928 revised version of the *Berne Convention* introduced the concept of "moral rights",[904] which are distinct from the economic rights related to copyright. They protect the work from alterations even after the copyright in the work has been assigned.

Some jurisdictions, such as the United States allow for the waiver of moral rights; whereas, in European countries, exceptions to moral rights are generally not possible,

901 Article 1 of the *Copyright Duration Directive* - 93/98/ EEC.

902 *Butterfly Music srl v Carosello Edizioni Musicali e Discografiche srl (CEMEd)*, (case C- 60/98), OJ no. C246 of 28 August 1999.

903 Article 9 of the *Berne Convention.*

904 Article 6s bis of the *Berne Convention.*

as copyright is not traditionally, considered to be a property that can be sold but only licensed.

12.7.3. First Sale Doctrine & Exhaustion of Rights

The First Sale Doctrine is a US doctrine that was recognised by the Supreme Court in the *Dobbs-Merrill Co v Strauss* case in 1908[905] and later codified as Para. 109(a) of the *Copyright Act* 1976. In other countries, this doctrine is known as "Exhaustion of Rights" and also applies to patents and trademarks.

The doctrine allows the purchaser of a copyrighted work's lawful copy to transfer it without permission. The reason is that the transfer of the physical copy does not include transfer of the actual copyright rights to the work.

12.7.4. Fair Use and Fair Dealing

'Fair Use' is a doctrine in the US Copyright Law,[906] which permits limited use of copyrighted work without the need of acquiring permission from the copyright holder. This includes research, teaching, commentaries, criticisms, news reporting, citations… Subject to a 'balancing test' taking into account: (1) the purpose and character of the use;[907] (2) the nature of the copyrighted work;[908] (3) the amount and substantialness of the portion used in relation to the copyrighted work as a whole;[909] (4) the effect of the use upon the potential market for or value of the copyrighted work.[910] However, the list is not meant to be exhaustive and the court may consider other factors. Thus, the analysis must be conducted on a case-by-case basis. 'Fair Use' can be a difficult area of copyright law, therefore, when in doubt, it is wiser to always ask for the permission of the owner of the copyright, prior to use.

Article 10 of the *Berne Convention* expressly grants exceptions for quotations, illustrations for teaching purposes and news reporting.

'Fair Dealing' is a similar principle used in the UK and some Common Law jurisdictions, such as Australia, Canada, NZ, Singapore, and South Africa. The notion also includes, as limitations to copyright, the concepts of "incidental inclusion" and

905 210 US 339.
906 *Copyright Act* -1976 at 17 US. C Para 107.
907 *Mattel, Inc. v Walking Montana Productions*, No. 01-56695, 9th Circuit, December 29, 2003.
908 *Warner Bross. and J. K. Rowling. vs. RDR Books*, 575 F. Supp. 266060 Zd 513 (S. o/D. N. Y. 2008).
909 *Harper & ROW, Publishers, Ina. v. Nations Enters* (471 U.S. 539 (1985).
910 *Folsom v Marsh,* 9 F. Cas. 342 (1841).

"time shifting", as well as the recordings of broadcasts, back up copy for personal use of a computer program, and playing sound recording for a non-profit making organisation.

12.8. Licensing and assignment of copyright

The owner of the copyright may transfer the copyright wholly or partially. This is usually done by an assignment or by licensing. With an assignment the copyright owner sells his rights to the assignee in an irrevocable manner. With a licence the copyright owner retains the ownership but grants the licensee a right to use the copyrighted work according to the limitations in the agreement. The copyright owner may, as well, transfer the copyright on an exclusive or a non-exclusive basis.

Competition issues can arise when the licensing agreement is unfair, engages in price discrimination, or unfairly leverages market power. Thus, licensing is governed in the US by anti-trust law, anti-monopoly Law in Japan, and competition law in the EU.

The terms and conditions of a copyright licence agreement usually define the copyrighted works and rights subject to the licence to use, the geographic territories in which the licence applies, the term of the licence (not allowed to exceed the local law requirement), the consideration (such as payment of royalties, which may be accompanied by marketing duties for the licensee, such as best or reasonable effort to promote the copyrighted work).

Copyright licence agreements can also include complex conditions since the exclusive rights granted can be split territorially, with respect to language, or sequences of uses can be fixed, number of copies to be made, their subsequent use and possible sub-licences.

Licensing can also be granted by collective rights management organisations acting on behalf of rights owners. They can come in the form of "collecting societies", "right clearance centres" or "one-stop shops" (popular for multi-media works requiring multiple licenses). Collecting societies can also negotiate extended collective licensing (ECL) agreements specifically designed for mass use.

12.9. Enforcement and infringement of copyrights

As one of the signatories of the *Berne Convention*, Australia is required to recognize the copyright of works of authors from other signatory countries in the same way

as it recognizes the copyright of its own nationals.[911] Non-national people but who have their habitual residence in a signatory country will also be regarded as a national of the country for that purpose.

Copyright violations are constituted by the unauthorised use of works covered by copyright law. Copyrights are generally enforced by the holder in a civil law court. However, in most jurisdictions criminal penalties also generally apply to serious counterfeiting activities and large-scale commercial piracy. Counterfeited goods can be seized, an injunction to stop the infringement, as well as damages can be ordered by a court against infringing individuals or entities, depending on the jurisdiction.

The European Directive on the *Enforcement of Intellectual Property Rights*[912] does not cover criminal offences, but covers remedies available in civil courts and harmonizes European procedural rules on evidences,[913] interlocutory measures, damages, injunctions, etc. It requires all Member States to apply dissuasive, effective, proportionate remedies, penalties against those engaged in counterfeiting and piracy,[914] which are necessary to enforce intellectual property rights[915] in a "fair and equitable" manner, but not act as barriers to trade.

TRIPS' standards, which confirm the principles of the *Berne Convention,* are mandatory for WTO members and bring international intellectual property dispute resolution into the WTO system.

911 Article 3-5 of the *Berne Convention.*
912 2004/48/ EC of the European Parliament and of the Council of 29 April 2004.
913 Section 2 of the Directive on the *Enforcement of Intellectual Property Rights.*
914 Article 3(2) of the Directive on the *Enforcement of Intellectual Property Rights.*
915 Article 3(1) of the Directive on the *Enforcement of Intellectual Property Rights.*

Chapter 13

International Sale of Goods

BY RICHARD HUGHES

13.1. Introduction and application

Each of the Australian states have adopted[916] the United Nations Convention on Contracts for the International Sale of Goods[917] usually referred to as "the Vienna Convention on Sale of Goods" and hereafter referred to as the "CISG". To locate a copy of the Convention see paragraph 13.20 hereunder.

Unless expressly provided for in the contract between vendor and purchaser that the CISG is excluded from operating in the contract, the operation of the CISG is automatically in effect operating as to a contract in which an Australian entity is a party. Commonly international sale of goods contracts may provide that the law of New South Wales or Australia applies, in which situation although not referred to in the contract, the CISG automatically applies being part of the law of the Australian states. The CISG laws also provide that in the event of an inconsistency with other legislation, the CISG prevails over that inconsistent legislation.[918] If the CISG is

916 See for example Sale of Goods (Vienna Convention) Act NSW 1986 or the Sale of Goods (Vienna Convention) Act 1987 (Victoria). Each of the states' statutes provides the Convention has the force of law in the jurisdiction: usually section 5.

917 Signed at Vienna on 11 April 1980.

918 Section 6. Also s66A of the Trade Practices Act provides that the CISG overrides inconsistent provisions of that Act as to conditions and warranties in consumer transactions.

expressly excluded from the contract,[919] then in the absence of express agreement that a particular jurisdiction's law applies, it is implied that the New South Wales Sales of Goods Act and the Australian Competition Law would apply.

By September 2014 there were 83 signatory countries.[920] The CISG applies to contracts for sales of goods between business in different countries which are signatories to the CISG or where the applicable law of the contract is a country which is a signatory to the CISG.[921] Thus a party to a contract which is in a non signatory country (e.g. UK) can be bound if the law of the contract or the other party to the contract is in a signatory country (e.g. Australia).

There are some matters or types of goods to which the CISG expressly does not apply.[922] The CISG does not apply to contracts for manufacturing goods[923] and distribution agreements. The CISG does not regulate non parties to the contract e.g. financiers or shippers.[924]

13.2. CISG Interpretation

The CISG provides that in interpreting its provisions, the international character and the need to promote uniformity of interpretation and application is to be observed.[925] "Good faith" is also to be observed. Whereas in Australian law parole evidence is not admitted to qualify written provisions of a contract, under the CISG parol evidence e.g. as to the intentions of parties to the contract can be admitted into evidence in determining disputes.[926]

919 The parties may exclude the operation of the CISG: Article 6. This needs to be clearly stated in the contract.

920 The major non signatories now are: United Kingdom, India, South Africa and in addition such countries as Philippines, Indonesia, Malaysia, Pakistan, Thailand and Vietnam.

921 Article 1(1) of the CISG. In this chapter the reference to "Article" refers to the Articles of the Convention.

922 E.g: Goods bought for personal, family or household use; auction sales, intangibles including stocks and shares, ships, vessels and aircraft: see CISG Article 2.

923 Article 3. CSIG.

924 See Article 4 CISG.

925 Article 7 CISG. This suggests courts should have regard to the interpretations of other courts which consider the CISG's provisions and that domestic legal concepts may have to be secondary to other international courts' interpretations of the CISG.

926 Article 8 CISG. If the other party did not know or could not have known the intentions of the other party, then the understanding of a reasonable person of the same kind can be applied: Article 8(2).

13.3. Formation and variation of the Contract

A contract is concluded when an acceptance of an offer becomes effective.[927] An offer must have sufficient detail (including e.g. as to description of the goods and price) and indicate an intention to be bound upon acceptance.[928] An offer is effective when it reaches the offeree and can be withdrawn before acceptance of the offer but an offer is revoked upon rejection by the offeree.[929] An acceptance qualified by requests for modifications acts as a counter offer.[930] The parties are bound by customary trade usages which the parties have agreed and usages ordinarily applicable to the particular trade in question.[931] A sales contract is not required by the CISG to be in writing[932] and may be proven by any means including by witnesses[933] and correspondence.

A contract can be modified or terminated by agreement between the parties and there can be application of the principles we know as estoppel as to such variation: see Article 29.

13.4. Conformity of Goods

The goods delivered by the seller must conform with the description, quantity and quality (including packaging) provided for in the contract and do not conform unless:[934]

(i) they are fit for the purpose for which goods of that description would ordinarily be used;[935]

(ii) they are fit for any particular purpose expressly or impliedly made known to the seller at the time the contract was made unless the buyer did not rely or could not reasonably have relied on the seller's skill and judgment;

927 Article 23.
928 Article 14.
929 See Articles 15 to 17 inclusive.
930 See Article 19.
931 See Article 9.
932 Except where a country has legislated that the convention provisions that don't require writing are overridden: see Article 96.
933 Article 11. However in some countries there is a requirement of writing if under Article 96 a country has declared the CISG provisions against the need for writing will not apply pursuant to Article 96: some countries which have made these declarations include China, Chile, Russia and Argentina.
934 Article 35 generally. The onus of proof rests with the party alleging the non conformity.
935 Unless the seller was informed by the buyer of the applicable standard, fitness is to the standard applicable in the seller (not buyer's) country: Article 35(2).

(iii) comply with a sample provided by the seller; and

(iv) are packaged in the agreed or usual manner for such goods or adequate to preserve and protect the goods. Generally the seller is responsible for any non conformity after delivery or transfer of risk[936] and generally can remedy a non conformity provided this does not cause unreasonable inconvenience or cost to the buyer.[937] The buyer may have an entitlement arising from the non conformity to reduce the price (whether or not the price has been paid) by the proportionate reduction in value of the goods arising from the non conformity.[938]

13.5. Examination of Goods

Any examination of the goods (e.g for their rejection for non conformity) must occur within the shortest reasonable time in the circumstances[939] with reasonable diligence with notification with sufficient particularity to the seller within a reasonable time after discovery[940] of the non conformity failing which the buyer may lose a right to reject the goods. The purpose of such examination is to enable determination of the qualities of the goods at the time of transfer or within a reasonably short time thereafter.

13.6. Interests of Third Parties in the Goods

In the absence of any agreement to the contrary, the seller must deliver goods free from any right or claim of a third party[941] including of intellectual property rights.[942] The buyer cannot rely on these provisions unless it gave notice to the seller as to the nature of the claim within a reasonable time after becoming aware of the interest.[943]

936 See Article 36.

937 Article 37: the buyer usually retains any right to claim damages.

938 See Article 50: the right to reduce the price can be lost if the buyer refuses to accept the performance of the vendor's obligation (e.g. by remedying a non conformity).

939 Article 38.

940 Article 39: discovery can be actual or if reasonable diligence would have enabled the discovery. The buyer loses the right to rely on any non conformity if the seller is not notified within two years of transfer unless the contract expressly provides otherwise: Article 39(2).

941 Article 41

942 Article 42: this obligation does not apply where the seller complies with technical specifications made by the buyer.

943 Article 43. The buyer could reduce the price or claim damages if the buyer has a reasonable explanation for its failure to give notice to the seller: see Article 44.

13.7. Payment and Prices

The buyer must pay the price of the goods[944] and take steps to enable the payment to be made.[945] If the contract does not state or make provision for the calculation of the price, unless provided to the contrary the price is agreed to be that generally charged for such goods under comparable circumstances in that trade at the time the contract was made.[946] The buyer (in the absence of contrary provisions) is not required to pay until given an opportunity to inspect the goods but generally the buyer must pay when the seller places the goods available to the buyer.[947] If the contract includes carriage of the goods, the seller can require the goods not be handed to the buyer without payment being effected.[948]

13.8. Delivery

If no place for delivery is specified in the contract, the general obligation is to make the goods available to the buyer at the seller's place of business unless carriage to the buyer or a place for delivery is provided for.[949] The time for delivery is that specified in the contract or within a reasonable period of time after entry into the contract.[950] The buyer must take delivery.[951] Delivery of goods that do not conform is not a breach of the seller's obligation of delivery but of the obligation to provide goods conforming to the contract.

13.9. Preservation of Goods and Passing of Risk

The seller must take reasonable steps to preserve the goods if the buyer delays in taking delivery of the goods and the seller is entitled to charge the reasonable costs so doing.[952] The buyer must take reasonable steps to preserve the goods he has received that he intends to reject and return to the seller and the seller can

944 Article 53.
945 Article 54.
946 Article 55.
947 Article 58.
948 Article 58(2).
949 Article 31.
950 Article 33.
951 Articles 53 and 60.
952 Article 85

be liable to pay the buyer's reasonable costs of so doing.[953] A party responsible for preservation can deposit them in a warehouse at the other party's reasonable expense.[954] A party obliged to preserve the goods may sell them if the other party has unreasonably delayed taking possession or paying the price or costs of preservation, provided reasonable notice of the intention to sell has been given. A party who sells the goods may retain from the proceeds of sale the reasonable costs of preservation and sale but must account to the other party for the balance.[955] Risk passes ordinarily when the goods are handed to the first carrier unless there is an agreed place and time at which the goods are to be delivered to a carrier for the buyer.[956] The buyer remains liable to pay for goods if loss or damage occurs after the passing of risk to the buyer unless that loss is caused by the seller's act or omission.[957] A buyer's remedies are not impaired by these provisions if the seller has committed a fundamental breach.[958]

13.10. Extension of Time for Compliance ("Nachfrist")

A buyer or seller can, by a written notice, specify a further period of time in which the other party is to comply with its obligations. This is known as a Nachfrist from the German word for notice. After the notice's expiration the issuing party can then exercise remedies in addition to damages arising from the failure to comply. A right to damages is not affected by the extension of time being given or expiring. A buyer can give a notice of further time to comply to the seller and until the expiration of the notice, the buyer cannot resort to any remedy (other than damages for the delay).[959] Conversely a seller can give notice of an additional reasonable period of time for the buyer to comply with its obligations and unless the buyer has notified the seller that the buyer cannot satisfy its obligations with that time, until the expiration of the notice, the seller cannot exercise its remedies other than as to damages.[960] In one of the few Australian decisions on this

953 Article 86.
954 Article 87.
955 Article 88. As to perishable or rapidly deteriorating goods, or goods for which preservation would be unreasonably expensive, a party bound to preserve those goods must take reasonable efforts to sell giving notice of intention to sell as far as is possible: Article 88(2).
956 Article 67.
957 Article 66. The risk as to goods sold in transit passes from the time the contract is concluded: Article 68.
958 Article 70.
959 Articles 47 and 48.
960 Article 63.

Convention the Queensland Court of Appeal questioned that a Nachfrist notice could extend time for compliance where the contract provided that "time was of the essence".[961]

13.11. Anticipatory Breach of Contract

The performance of a contract can be suspended by a party where clearly the other party will not or is not able to perform the substantial part of the contract's obligations due to firstly, a serious deficiency in their ability to perform or creditworthiness, or secondly their conduct in performance or preparation. The party suspending performance must immediately give notice to the other party. If the party asserted to be in anticipatory breach provides adequate assurance to the other party as to performance, both parties must continue to perform the contract. [962]

13.12. Frustration and exemption from Performance of Contracts

Similar to the Australian law of frustration of contracts,[963] an impediment beyond the party's control which they could not reasonably avoid or overcome at the time the contract was concluded can enable that party to be not liable for failure to perform their obligations.[964] That a contract has become unprofitable to a party does not permit the party to rely on that to disclaim responsibility to perform the contract. Notice of the impediment must be given to the other party failing which that party which failed to give notice may be liable in damages.

13.13. Fundamental Breach of Contract

A fundamental breach of contract is one that results in such detriment to the other (innocent) party as to substantially deprive that party of the expected benefits of the contract but only if the party in breach foresaw or a reasonable person in those

961 *Downs Investments Pty Ltd (In Liq) v Perwaja Steel Sdn Bhd* [2002] 2 Qd R 462, paragraphs 33-34.

962 Article 71.

963 See *Frustrated Contracts Act 1978* (NSW).

964 Article 79.

circumstances would have foreseen such a result.[965] Non payment is a common form of fundamental breach.[966]

13.14. Buyer's Remedies for Seller's Breach

The buyer can require the seller to perform its obligations unless the buyer has sought to use a remedy inconsistent with continued performance of the contract.[967]

The buyer can extend time for compliance by issuing a Nachfrist notice.[968]

The buyer can require the non conformity be remedied e.g. by replacement of a part at the seller's expense.[969]

The buyer can avoid the contract: see 13.15 hereunder.

The buyer can reduce the price payable under the contract.

The buyer can claim damages[970] noting the exercise of other remedies does not deprive the buyer of the right to claim damages.

Specific Performance: a remedy which might be useful if the goods are unique or irreplaceable. As specific performance is determined by the domestic law, if a party is entitled to require performance of any obligation by the other party, a court is not

965 Article 25. In *Roder Zelt und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216, the Australian buyer was put into administration whilst some instalment payments remained unpaid to the German seller. The administrator refused to give evidence to the retention of title in the goods clause. The (Australian) Federal Court held the appointment of the administrator (held to be an agent of the buyer) was a fundamental breach as this substantially deprived the vendor of the benefits of the contract. In *Downs Investments Pty Ltd (In Liq) v Perwaja Steel Sdn Bhd* [2002] 2 Qd R 462 the contract provided that payment was to be made by letter of credit. The Queensland Court of Appeal held the failure to obtain the letter of credit was a fundamental breach including as it showed the buyer had no intention of meetings its obligations under the contract, itself a fundamental breach.

966 In ICC Case No 7531 of 1994 the tribunal held (where the cost of sorting conforming from non conforming goods was over one third of the purchase price) the lack of conformity of such a large proportion of the goods constituted a fundamental breach entitling the buyer to avoid the contract.

967 Article 46.

968 Articles 47 and 48.

969 The buyer can require delivery of substitute goods only if the non conformity constitutes a fundamental breach, such request being made by a notice of non-conformity under Article 39 or within a reasonable time under Article 46.

970 Article 45.

bound to enter a judgment for specific performance unless the court would do so under its own domestic law.[971]

13.15. Sellers Remedies for Breach by the Buyer

The seller can require the buyer to perform the contract unless the seller has used a remedy inconsistent with performance.[972]

The seller can extend time for compliance by issuing a Nachfrist notice.[973]

The seller can avoid the contract.[974]

The seller can make the goods in accordance with the specifications made known by the buyer if the buyer has not complied within the reasonable time allowed for in the seller's request notice for provision of specifications (e.g. form, measurements or other features of the goods).[975]

The seller can claim damages.[976]

13.16. Avoidance of the Contract

Until a contract is declared by a party to be avoided[977] the contract remains in force. Avoidance releases both parties from their contractual obligations subject to any claim for damages or other rights and obligations upon avoidance[978] and a buyer who has lost the right to declare the contract avoided retains its other

971 Article 28: which states "If in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention". As specific performance is not ordinarily granted (due to difficulty of supervision) where damages or restitution are adequate remedies under Australian equitable principles, this remedy would usually only be available if the goods were irreplaceable or so special that damages would not be the appropriate remedy.

972 Article 62.

973 Article 63.

974 Article 64.

975 Article 65.

976 Article 61. The ability to claim damages is not impeded by the resort to other remedies.

977 Whilst there are no specific requirements as to the form of the notice of declaration of avoidance, such declaration must clearly state the party issuing the notice no longer regards itself as bound by the contract.

978 Article 81(1).

remedies.[979] A party may declare the contract avoided by notice if before the date of performance it is clear the other party will commit a fundamental breach, subject to reasonable time being given by the notice to enable the receiving party to provide adequate assurance that it will perform the contract.[980] The seller may give notice of the contract being avoided if the buyer's failure is a fundamental breach or if after the Nachfrist notice expires, the buyer has still not paid the price or taken delivery.[981] The buyer can, by notice, declare the contract avoided if the seller's failure to perform amounts to a fundamental breach or if in the case of non delivery, the seller does not deliver during any Nachfrist extension.[982] The buyer's exercise of rights must be done within a reasonable time.[983] Where goods are to be delivered by instalments,[984] the seller's failure to deliver that instalment constitutes a fundamental breach, the buyer can declare the contract as to that instalment avoided. If a party has good grounds to believe the other party will fundamentally breach the contract as to a future instalment of delivery, the innocent party may declare the contract avoided as to the future delivery. A buyer who declares the contract avoided as to a delivery may at that time declare the contract avoided as to prior or future deliveries if the interdependence of the deliveries means that those deliveries could not be used for the purposes contemplated by the parties when concluding the contract.

13.17. Damages

Damages are assessed on the basis of the amount of the loss suffered due to the breach including lost profits[985] but cannot exceed the loss which the party in breach foresaw or ought to have foreseen at the time the contract was entered

979 Article 83.

980 Article 72. A declaration of avoidance is only effective if notified to the other party: see Article 26.

981 Article 64.

982 Article 49. The buyer can declare the contract avoided entirely only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach: Article 51(2). The ICC tribunal in ICC Case No 7660 of 1994 has said that partial avoidance is "the rule rather than the exception" where there is a partial non conformity which does not amount to a fundamental breach.

983 See Article 49 generally as to time constraints.

984 See Article 73.

985 There is divergence of agreement as to what constitutes or quantifies "lost profits" including with some courts holding that the lost profit is only the usual trade margin and legal costs are not a recoverable loss under Article 74.

into as a possible consequence of the breach.[986] If the contract is avoided and the buyer has purchased replacement goods or the seller resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction.[987] A party can also claim the difference in the contract price and the substitute contract price for the goods where the price has varied.[988] The party claiming damages is under an obligation to mitigate its loss.[989]

13.18. Interest

Interest can be recovered by a party from the other party who has failed to make a payment or otherwise owes money (e.g. on a refund of part or all of the price consequent on avoidance) however the rate or method of calculation of interest is not specified in the Convention[990] and there is some diversity between tribunals as to how this issue is dealt with.

13.19. Restitution

A party who has performed the contract (wholly or in part) may be able to claim restitution (or return) of what it supplied or paid under the contract.[991] The right to declare the contract avoided by the buyer is lost if it is not possible to return the goods in the substantial condition inwhich the buyer received the goods.[992] The right to declare the contract avoided remains where restitution is not possible due to the buyer's act or omission, where the goods have perished or deteriorated as a result of the examination of the goods, or if the goods have been sold in the normal course of business or have been transformed by the buyer in normal usage before discovery of the lack of conformity.

986 Article 74: In *Downs Investments Pty Ltd v Perwaja Steen Sdn Bhd* (op cit) the Queensland Court of Appeal held that the seller's loss from chartering a vessel (as to which they had sub chartered in order to mitigate the loss) was recoverable since it "would not have been sustained except for the fundamental breach".

987 Article 75. See the Queensland Court of Appeal decision in *Downs Investments Pty Ltd (In Liq) v Perwaja Steel Sdn Bhd* (op cit) as to an application of this Article.

988 Article 76.

989 Article 77.

990 See Articles 78 and 84.

991 Article 81.

992 Article 82.

13.20. Further resources

United Nations Commission on International Trade Law: http://www/uncitral.org: (text of the Convention, status and lists of signatories, summaries of case law etc).

Pace University (USA) School of Law CISG database: http://www/cosg.law.pace.edu: (texts and translations of court and tribunal decisions as to interpretation of the CISG, many text articles).

CISG Australia: http://www.business.vu.edu.au/cisg/.

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Chapter 14

The Protection of Cultural Property

BY DIANE BARKER

In the international arena, the protection of cultural property is regulated by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970) (Convention).[993] The Convention is incorporated into Australian law by the *Protection of Movable Cultural Heritage Act 1986* (Cth) (PMCH Act). The PMCH Act and the *Protection of Movable Cultural Heritage Regulations 1987* (Cth) (PMCH Regulations) provide a framework for the protection and movement of Australia's movable cultural heritage across its external (rather than domestic) borders and support foreign countries' rights to protect their movable cultural heritage.[994] The legislation is administered by the Minister for the Environment, Water, Heritage and the Arts (Minister) and the day-to-day operation of the legislation is governed by the Movable Cultural Heritage Unit (Unit) of the Department of Environment, Water, Heritage and the Arts (Department). The Unit provides the Secretariat to the National Cultural Heritage Committee (Committee).[995]

993 The Convention came into force 24 April 1972.

994 http://www.arts.gov.au/movable_heritage. At the state level, the Heritage Branch of the NSW Department of Planning regulates movable cultural heritage.

995 The Committee is established under section 15 of the *Protection of Movable Cultural Heritage Act 1986* (Cth) (PMCH Act).

14.1. What is 'Cultural Property' and Why Does it Need Protecting ?

The term 'cultural property' refers to 'property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'.[996]

Cultural property requires protection because it 'constitutes one of the basic elements of civilization and national culture, and…its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.'[997] Although the authorised movement of cultural property among nations for scientific, cultural and educational purposes has a beneficial effect on the expansion of knowledge on a global scale,[998] the illicit trade in cultural property has a destructive effect which limits the access to, or value of, the information potentially obtainable from the cultural property. Such trade deprives the cultural property of its context, and therefore its meaning. Furthermore, given the often intrinsic relationship between items of cultural significance and national, cultural, ethnic and/or religious heritage and identity, it is important to protect such items of cultural heritage.

14.2. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970

The Convention was adopted in Paris at the sixteenth session of the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 November 1970. The instrument was drafted with the recognition that cultural heritage represents 'one of the basic elements of civilization and national culture', thereby necessitating cross-border cooperation

996 Article 1, Convention. See paragraphs (a) – (k) for the list of items constituting 'cultural property'.

997 Ibid., Preamble.

998 Ibid.

among member States to curb the illicit trade in cultural property.[999] As at April 2014, there were 127 States who were parties to the Convention.[1000]

The Convention renders individual State Parties responsible for the protection of cultural property within their respective borders from theft, unauthorised excavation and illicit export. A moral onus is cast upon each State Party to recognise not only the value of its own cultural heritage, but that of other nations.[1001]

Broadly, the Convention:

(a) defines 'cultural property' and emphasises the importance of protecting such property from illicit trade;[1002]

(b) creates a prohibition on the illicit trade of cultural property;[1003]

(c) requires State Parties to impose penalties or administrative sanctions to punish breaches of the Convention;[1004]

(d) imposes jurisdictional limits on the operation of the Convention;[1005]

(e) sets out a framework for the application of the Convention by State Parties;[1006]

(f) calls upon State Parties to implement specific measures in relation to the export, import and restitution of items of cultural heritage;[1007]

(g) encourages State Parties to render assistance to other State Parties whose cultural heritage is at risk;[1008] and

(h) encourages the use of preventative measures such as education and monitoring in an attempt to prevent the illicit movement of cultural property.[1009]

999 UNESCO, Reports of the Member States on Measures They Have Adopted to Implement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), General Conference, Twenty Eighty Session, Paris, 1995, p. 1 (1995 UNESCO Report).

1000 http://www.unesco.org.

1001 Convention, Preamble.

1002 Ibid., Articles 1 and 2.

1003 Ibid., Articles 3 and 11.

1004 Ibid., Article 8.

1005 Ibid., Articles 4 and 22.

1006 Ibid., Articles 5 and 14.

1007 Ibid., Articles 6, 7, 12 and 13.

1008 Ibid., Article 9.

1009 Ibid., Article 10.

14.3. Incorporation of the Convention into Australian Law

(i) Protection of Movable Cultural Heritage Act 1986 (Cth) and the Protection of Movable Cultural Heritage Regulations 1987 (Cth)

The PMCH Act was enacted as an essential precursor to Australia's accession to the Convention on 30 January 1990.[1010] Its stated intention is 'to protect Australia's heritage of movable cultural objects, [and] to support the protection by foreign countries of their heritage of movable cultural objects'.[1011]

The PMCH Act creates a system of export and import licences for the purpose of regulating the movement of movable cultural heritage. It is not intended to stifle legitimate trade in cultural heritage objects and does not override an individual's rights in relation to ownership and transfer of cultural heritage objects within Australia. Rather, the PMCH Act's primary aim is to prohibit the export of objects that would result in a significant loss to the cultural heritage of Australia.[1012]

(ii) The export of movable cultural heritage objects[1013]

The movable cultural heritage of Australia refers to 'objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons'[1014] and includes archaeological, ethnographic, scientific, technological, artistic, decorative, documentary, military, historical, philatelic and numismatic objects, as well as objects of Aboriginal and Torres Strait Islander heritage.[1015]

1010 The PMCH Act received Assent on 13 May 1986 and both the PMCH Act and Regulations commenced on 1 July 1987. See PMCH Act and PMCH Regulation. See Department of Regional Australia, Local Government, Arts and Sport, Annual Report 2011-2012, Appendix 02 (Annual Report).

1011 PMCH Act.

1012 Department of the Environment, Water, Heritage and the Arts, Guidelines for Expert Examiners Under the Protection of Movable Cultural Heritage Act 1986, Commonwealth of Australia, Canberra, 2008, p.2.

1013 PMCH Act, Division 1 of Part II – Exports.

1014 Section 7(1), PMCH Act.

1015 For the full list, see s.7(1)(a)-(j), PMCH Act and cl.3(a)-(e), PMCH Regulations.

The PMCH Regulations define an object that is of 'significance to Australia'[1016] as being one that is Australian in origin, has substantial Australian content, or has been used in Australia and which fulfils one of the following criteria:

(a) it is associated with a person, activity, event, place or business enterprise, notable in history;

(b) it has received a national or international award or has significant association with an international event;

(c) it represents significant technological or social progress for its time; or

(d) it is an object of scientific or archaeological interest.[1017]

The 'National Cultural Heritage Control List' contains two classes of objects which collectively comprise the movable cultural heritage of Australia and which are therefore subject to export control:[1018]

(a) Class A object: any object falling within this class cannot be exported other than in accordance with a certificate of exemption (certificate) granted under section 12 of the PMCH Act. These objects presently comprise:

  (i) the following items of Aboriginal and Torres Strait Islander heritage: bark and log coffins, human remains, rock art, dendroglyphs (carved burial and initiation trees) and sacred and secret ritual objects;[1019]

  (ii) Victoria crosses awarded to Australians;[1020] and

  (iii) each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in 1880.[1021]

(b) Class B object: any object falling within this class may be exported if a permit under section 10 of the PMCH Act is granted. The general categories of class B objects are listed below (although they specifically exclude any Class A objects that also belong to any one of the categories).

Table 1 summarises the Class A and B objects listed in Schedule 1 of the PMCH Regulations.

1016 The PMCH Act refers to objects that are 'of importance to Australia' whereas the PMCH Regulations refer to objects that are 'of significance to Australia'.

1017 Clause 2(1)(a)-(d), PMCH Regulations.

1018 Section 8, PMCH Act and PMCH Regulations, cl. 4 and Schedule 1.

1019 PMCH Regulations, Part 1 of Schedule 1, cl.1.3.

1020 Ibid., Part 7 of Schedule 1, cl.7.3.

1021 Ibid., Part 9 of Schedule 1, cl.9.2A.

Table 1 Summary of Class A and B objects listed in Schedule 1 of the PMCH Regulations

	Object Category	Definitions & Characteristics	Class A Object?	Class B Object?
Part 1	Objects of Australian Aboriginal and Torres Strait Islander Heritage	Clause 1.2	Clause 1.3	Clause 1.4
Part 2	Archaeological Objects	Clause 2.2	N/A	Clause 2.3
Part 3	Natural Science Objects	Clauses 3.2, 3.3, 3.5	N/A	Clause 3.4
Part 4	Objects of Applied Science or Technology	Clauses 4.2, 4.3	N/A	Clause 4.4
Part 5	Objects of Fine or Decorative Art[1022]	Clause 5.2, 5.4	N/A	Clause 5.3
Part 6	Objects of Documentary Heritage	Clauses 6.2, 6.4	N/A	Clause 6.3
Part 7	Numismatic Objects	Clauses 7.2, 7.5	Clause 7.3	Clause 7.4
Part 8	Philatelic Objects	Clause 8.2	N/A	Clause 8.3
Part 9	Objects of H istorical Significance	Clause 9.2, 9.4	Clause 9.2A	Clause 9.3

An application to export a Class B object must be made in writing using the prescribed form.[1023] The application involves three steps:

(a) the application is referred by the Committee to one or more expert examiners for assessment;[1024]

(b) the Committee reviews the written assessment of the expert examiner(s) and makes a written recommendation to the Minister as to whether or not an export permit should be granted;[1025] and

(c) the Minister decides whether the export permit will be granted.[1026]

1022 See http://arts.gov.au.

1023 Section 10(2), PMCH Act.

1024 Section 10(3), PMCH Act. During 2011-2012, 4 permits were issued to temporarily export 21 Australian protected objects (APOs). See Annual Report.

1025 Section 10(4), PMCH Act.

1026 Section 10(5), PMCH Act. During 2011-2012, 14 permits were issued to permanently export 14 APOs. See Annual Report.

The Committee maintains a register of the names of expert examiners[1027] who are required to advise the Committee on various matters.[1028] Expert examiners must:

(a) assess the 'significance' of the object as part of Australia's cultural heritage (being 'national' significance rather than 'regional' or 'local' importance);[1029]

(b) establish if the object is an 'Australian protected object' (APO) by examining whether it meets the criteria of the National Cultural Heritage Control List; and

(c) advise whether the object is of such importance to Australia that its export would constitute a diminution of Australia's cultural heritage.[1030]

Figure 1 illustrates the three potential outcomes of the assessment process.[1031]

If the Minister refuses to grant a permit, a written notice (including reasons for the refusal) must be served on the applicant within 14 days of the decision.[1032]

Specific provisions[1033] apply for applications for export permits made by 'principal collecting institutions'[1034] which largely mirror the process described above. However, in such cases, a permit for the export of a Class B object must be granted on the basis that it is exported on loan for the purpose of research, public exhibition or a similar purpose.[1035]

The Committee maintains the Australian Movable Cultural Heritage Register (Register) which includes all objects defined as Class A objects in the National Cultural Heritage Control List and those objects in Class B that have been denied an export permit. There are presently 92 Class B objects in the Register which have been refused export permits.[1036]

1027 Section 22, PMCH Act.
1028 Ibid., s.23.
1029 Examiners' Guidelines, pp. 6 & 12. See also pp.9-13 for a guide to the 'Significance Assessment' that must be undertaken by expert examiners.
1030 Examiners' Guidelines, p.6.
1031 Ibid.
1032 Section 10(7), PMCH Act and PMCH Regulation, cl.5.
1033 Section 10A, PMCH Act.
1034 Defined in s.3, PMCH Act.
1035 Section 10A(7), PMCH Act.
1036 For the complete list, see: http://www.arts.gov.au/movable/exporting_cultural_heritage_objects/movable_cultural_heritage_prohibited_exports_register.

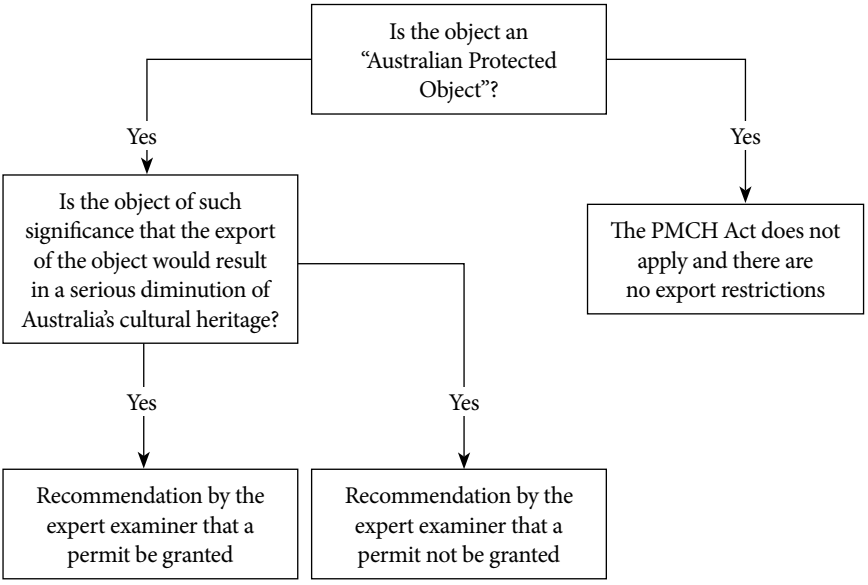

Figure 1 Potential outcomes of the assessment process

Section 12 of the PMCH Act provides for certificates to be issued permitting APOs that are currently overseas to be imported into Australia and subsequently re-exported, including Class A objects.

Again, the application must be made in writing using the prescribed form.[1037] The Minister may either:

(a) grant a certificate authorising the exportation of the object, either conditionally or unconditionally; or

(b) refuse to grant a certificate.[1038]

If the Minister refuses to grant a permit, a written notice (including reasons for the refusal) must be served on the applicant within 14 days of the decision.[1039]

1037 Section 12(2), PMCH Act.

1038 Section 12(3), PMCH Act. See also s.13(1) and (3), PMCH Act for provisions regarding conditional permits.

1039 Section 12(6), PMCH Act and PMCH Regulation, cl. 6. During 2011-2012, the Minister refused an export permit for five objects. See Annual Report.

It is an offence to export (or attempt to export) an APO otherwise than in accordance with a permit or certificate.[1040] A person shall be taken to export an object if the person conveys, or has possession of, the object with intent to export it or knowing that it is intended to be exported.[1041] The APO is forfeited (or liable to forfeiture)[1042] punishable in accordance with the penalties set out in Table 2.[1043]

Table 2: Penalties for illicit export of APOs

Offender	Monetary Penalty	Period of Imprisonment
Individual	Fine not exceeding 1,000 penalty units[1044] and/or	Not exceeding 5 years
Corporation	Fine not exceeding 2,000 penalty units[1045]	N/A

Letters of clearance can be issued for customs purposes for an object that is not an APO and which does not require an export permit.

(iii) The import of movable cultural heritage objects[1046]

If a protected object of a foreign country has been illegally exported from that country and subsequently imported into Australia, the object is liable to forfeiture.[1047] The relevant penalties are summarised in Table 3.[1048]

Table 3: Penalties for the illicit import of foreign protected objects

Offender	Monetary Penalty	Period of Imprisonment
Individual	Fine not exceeding $100,000 and/or	Not exceeding 5 years
Corporation	Fine not exceeding $200,000	N/A

1040 Section 9(3)-(3A), PMCH Act.
1041 Section 9(5), PMCH Act. Freight forwarders could therefore be subject to prosecution if the correct procedures are not followed.
1042 Section 9(1)-(2), PMCH Act.
1043 Section 9(3B), PMCH Act.
1044 A penalty unit is $170.00. See s.4AA, *Crimes Act 1914* (Cth). The maximum penalty is therefore $170,000.
1045 Ibid. The maximum penalty is therefore currently $340,000.
1046 PMCH Act, Division 2 of Part II – Imports.
1047 Section 14(1), PMCH Act.
1048 Section 14(2), PMCH Act.

APOs that are currently overseas can be imported and re-exported if a certificate is issued. For instance, a certificate may be issued in relation to the importation of an object of a foreign country for the purpose of public exhibition in Australia for a period of not more than two years.[1049]

Importers are advised to obtain relevant permits from the country of origin before attempting to import protected objects into Australia. The importer must ensure that any such objects were not illegally exported from the country of origin, because the object would be liable to forfeiture even if the importer sourced the object from a neutral third country.[1050]

(iv) Enforcement

Part V of the PMCH Act deals with enforcement. It establishes the role of Inspectors[1051] who have the following powers (exercisable with or without a warrant):[1052]

(a) to enter upon or into land, premises, structures, vessels, aircraft or vehicles;[1053]

(b) to search the above locations for Australian or foreign protected objects;[1054]

(c) to require a person to produce a permit or certificate;[1055]

(d) to seize any APO or other protected object which the Inspector believes, on reasonable grounds, to be forfeited or connected with an offence;[1056] and

(e) to arrest without warrant any person suspected of committing, or having committed, an offence under the PMCH Act.[1057]

A power of retention is created by section 35(1) of the PMCH Act in respect of objects that have been seized. However, the Minister has discretion to release any

1049 Section 14(3), PMCH Act.

1050 http://www.arts.gov.au/movable/import_of_cultural_heritage_objects_from_australia (13 October 2008).

1051 Section 28(1) and (2), PMCH Act.

1052 Sections 30-31, PMCH Act for the procedure in relation to search warrants. See s.30(4), PMCH Act for powers of seizure in relation to objects falling outside the terms of the warrant. See s.32, PMCH Act for emergency searches in the absence of a warrant.

1053 Section 30(1)(a), PMCH Act.

1054 Section 30(1)(b), PMCH Act.

1055 Ibid., s.39(1).

1056 Ibid., ss.30(1)(c), 30(4) and 34.

1057 Ibid., s.33(1).

object to the person who had possession, custody or control of the object immediately prior to seizure.[1058]

As soon as practicable after the object has been seized, a notice of seizure (Notice) must be issued which, among other things, must identify the object and the date of seizure and which must also set out the reasons for the seizure.[1059]

Within 30 days of the seizure, the owner must either:

(a) write to the 'appropriate person' stipulated in the Notice;[1060] or

(b) commence recovery proceedings in a court of competent jurisdiction.[1061]

If the owner discontinues any court proceedings[1062] or is unsuccessful in such proceedings,[1063] or fails to bring proceedings prior to the expiration of the 30 day period,[1064] the object is forfeited and title vests in the Commonwealth.[1065] The Minister may then give directions for the disposal of the object.[1066] In the case of an APO, this would ordinarily result in placing the object in a museum or other institution. In relation to a foreign protected object, the Minister would ordinarily order its return to the country of origin.[1067] In any other case, the court may order the return of the object to the person who had possession, custody or control of the object prior seizure.[1068]

Offences against sections 9(3), 9(3A) and 14(2) of the PMCH Act are indictable offences, although it is possible for a court of summary jurisdiction to hear such proceedings.[1069] If so, the maximum penalties the court may impose upon conviction are summarised in Table 4.[1070]

1058 See Ibid., s.35(2).
1059 Ibid., s.36(2).
1060 Ibid., s. 36(5)(a). The 'appropriate person' is the Minister or the Minister's delegate: PMCH Act, s. 36(1).
1061 Ibid., s.36(5)(b).
1062 Ibid., s.37(2).
1063 Ibid., s.37(3)(a)-(d).
1064 Ibid., s.36(5)(b).
1065 Ibid., s.38(a).
1066 Ibid., s. 38(b).
1067 See text *supra*.
1068 Section 37(3)(e), PMCH Act.
1069 Ibid., s.46(1) and (3).
1070 Ibid., s.46(4).

Table 4: Maximum penalties on summary conviction

Offender	Monetary Penalty	Period of Imprisonment
Individual	Fine not exceeding 50[1071] penalty units and/or	Not exceeding 2 years
Corporation	Fine not exceeding 200[1072] penalty units	N/A

(v) Reviews and Appeals

A person may apply to the Administrative Appeals Tribunal for review of a decision by the Minister:

(a) to refuse to grant a permit or certificate;

(b) to impose a condition on a permit or certificate; or

(c) a time period limiting a permit or certificate.[1073]

14.4. Additional Resources

Forrest, C., 'Strengthening the international regime for the prevention of the illicit trade in cultural heritage' (2003) 4 MJIL 592-610.

O'Keefe, P., Trade in Antiquities: Reducing Destruction and Theft, UNESCO Publishing and Archetype Publications, Paris and London, 1997.

Vrdoljak, A., International Law, Museums and the Return of Cultural Objects, Cambridge University Press, Cambridge, 2008.

Department of the Environment, Heritage, Water and the Arts - Movable Cultural Heritage link: http://www.arts.gov.au/movable_heritage.

Heritage Branch, NSW Department of Planning: http://www.heritage.nsw.gov.au/06_subnav_04.htm

UNESCO - Culture link: http://portal.unesco.org/culture/en/ev.php-URL_ID=36193&URL_DO=DO_TOPIC&URL_SECTION=201.html.

1071 See text *supra*. The maximum penalty is therefore $8,500.

1072 Ibid. The maximum penalty is therefore $34,000.

1073 PMCH Act, s.48(1).

UNIDROIT (International Institute for the Unification of Private Law) Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995): http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm.

Young, L., 'Australian and international laws on export controls for cultural heritage', Paper presented at the Art Crime: Protecting Art, Protecting Artists and Protecting Consumers Conference convened by the Australian Institute of Criminology, Sydney, 2-3 December 1999: www.aic.gov.au/conferences/artcrime/young.pdf.

Chapter 15

International Family Law and Succession

BY SANDRINE ALEXANDRE-HUGHES

15.1. Introduction

In a globalised era where travels and expatriation have become common experience, international family law is developing as a significant branch of private international law.

This chapter purports to give a brief overview of selected core areas, and is meant to be used as a starting point for further research when dealing with conflict of laws.

15.2. Marriages

The issue of legal recognition of marriages celebrated in other countries is an essential feature of modern international family law.

15.2.1. Recognition in Australia of marriages celebrated overseas

Principles

Rules for the recognition in Australia of marriages celebrated overseas are set out in Part VA of the *Marriage Act 1961* (Cth).[1074] In brief, and subject to certain

1074 Part VA (Sections 88A-88G) of the *Marriage Act 1961* (Cth) was introduced by way of the *Marriage Amendment Act 1985* (Cth), and gives effect to Chapter II of The *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.*

exceptions,[1075] Part VA prescribes that if a marriage is validly celebrated according to the law of the place of celebration (*lex loci celebrationis*), the marriage is recognised in Australia.

Worth noting, Section 88E of the Act maintains the concept of recognition at common law. Recognition at common law was developed to recognise marriages which did not comply with the *lex loci celebrationis* but which complied with the formalities of the English common law. Pursuant to Section 88E(1), marriages which do not comply with the requirements of Section 88C or Section 88D may still be recognised as valid under the common law rules of private international law.[1076]

Same sex marriages

Although validly celebrated in a foreign jurisdiction, a same-sex marriage will not be recognised in Australia. This principle is made clear by Sections 88B(4) and 88EA of the Marriage Act.

Marriages by foreign diplomatic or consular officers

The Marriage Act permits the celebration of marriages by foreign diplomatic or consular officers.[1077] However, no parties to such a marriage can be an Australian Citizen.[1078] To be valid in Australia, a marriage celebrated by foreign diplomatic or consular officers, must comply with some of the rules imposed by the Marriage Act: neither of the parties can be, at the time of the marriage, lawfully married to some other person; the parties cannot be within a prohibited relationship; and both of the parties must be of marriageable age.[1079]

15.2.2. Recognition overseas of marriages celebrated in Australia

The recognition overseas of a marriage celebrated in Australia will be governed by the law of the State in which recognition is sought. In addition to legal research, visiting the web site of (or contacting) the Consulate or Embassy of the country in question may provide useful information.

1075 See *Marriage Act 1961* (Cth), Section 88D.
1076 This principle is subject to Section 88E(2).
1077 *Marriage Act 1961* (Cth), Pt IV, Division 3.
1078 Ibid, Section 55(a).
1079 Ibid, Section 55(b).

15.3. Divorces

Where parties to a divorce have lived or have owned property or held interests in multiple countries, recognition of a divorce order in these other jurisdictions is often critical.

15.3.1. Dissolving a marriage in Australia: grounds for jurisdiction

In Australia, an application for divorce may be filed where, at the date of filing the application, either party to the marriage:

(a) is an Australian citizen;

(b) is domiciled in Australia; or

(c) is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date.[1080]

However, where satisfied that the forum is a "clearly inappropriate forum" for the proceedings, a court may decline its jurisdiction.[1081]

15.3.2. Applicable Law

The classic view is that, subject to legislation, the lex fori must be applied to divorce proceedings.[1082] Further, Section 53 of the *Family Law Act 1975* (Cth) (FLA) allows the court to take into account circumstances occurring before commencement of the FLA or outside Australia. In other words, facts which occurred outside of Australia (or before the commencement of the FLA) may be taken into account although they may be deemed irrelevant to a similar procedure in the country where they occurred. The legal qualification of these facts is governed by the applicable law to the proceedings (see Section 42(2), FLA).

15.3.3. Dissolving a marriage overseas: grounds for recognition in Australia

For a divorce, an annulment of a marriage, or a legal separation of the parties to a marriage to be recognised in Australia, two requirements must be satisfied.

1080 *Family Law Act 1975* (Cth), Section 39(3).

1081 *Voth v Manildra Flour Mills* (1990) 171 CLR 538; *Cashel v Carr* (2005) 34 Fam LR 256.

1082 M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (8thed, LexisNexis Butterworths. 2010) p538-539.

First, the dissolution must be effected in accordance with the law of an overseas jurisdiction. Second, there must be a jurisdictional ground for recognition in Australia. These grounds are quite broad, as set out in Section 104(3) of the FLA:

> "(3) A divorce or the annulment of a marriage, or the legal separation of the parties to a marriage, effected in accordance with the law of an overseas jurisdiction shall be recognized as valid in Australia where:
>
> (a) the respondent was ordinarily resident in the overseas jurisdiction at the relevant date;
>
> (b) the applicant or … one of the applicants, was ordinarily resident in the overseas jurisdiction at the relevant date and either:
>
> (i) the ordinary residence of the applicant or of that applicant, as the case may be, had continued for not less than 1 year immediately before the relevant date; or
>
> (ii) the last place of cohabitation of the parties to the marriage was in that jurisdiction;
>
> (c) the applicant or the respondent or …, one of the applicants, was domiciled in the overseas jurisdiction at the relevant date;
>
> (d) the respondent was a national of the overseas jurisdiction at the relevant date;
>
> (e) the applicant or, … one of the applicants, was a national of the overseas jurisdiction at the relevant date and either:
>
> (i) the applicant or that applicant, as the case may be, was ordinarily resident in that jurisdiction at that date; or
>
> (ii) the applicant or that applicant, as the case may be, had been ordinarily resident in that jurisdiction for a continuous period of 1 year falling, at least in part, within the period of 2 years immediately before the relevant date; or
>
> (f) the applicant or …, one of the applicants, was a national of, and present in, the overseas jurisdiction at the relevant date and the last place of cohabitation of the parties to the marriage was an overseas jurisdiction the law of which, at the relevant date, did not provide for divorce, the annulment of marriage or the legal separation of the parties to a marriage, as the case may be."

However, in certain circumstances, a decree satisfying the above requirements will not be sufficient for the decree to be recognised in Australia. This is so where a party to the overseas proceedings was denied natural justice or where the recognition would manifestly be contrary to public policy.[1083]

1083 FLA, Section 104(4).

Similar to the provisions regulating the recognition in Australia of marriages celebrated overseas,[1084] Section 104(5) of the FLA provides that:

> "(5) Any divorce or any annulment of a marriage, or any legal separation of the parties to a marriage, that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this subsection shall not be limited by any implication from those provisions."

15.4. International child abduction

This section deals with the abduction of a child from his/her country of habitual residence to another country, by one parent, upon the breakdown of the parents' relationship. *The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Hague Abduction Convention) directly addresses those matters.

The regime applicable to a matter will depend upon whether the child is abducted from a Contracting State to the Hague Abduction Convention or from a State which is not a Contracting State.

A large number of States are parties to the Hague Abduction Convention.[1085] In Australia, the Hague Abduction Convention was implemented into domestic law by way of Section 111B of the FLA and the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) (FLCACR).[1086]

15.4.1. Key concepts of the Abduction Convention

The objects of the Convention are:

> *"a)* to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> *b)* to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[1087]

The philosophy of the Convention aims to promptly return a child abducted from his/her country of habitual residence to that country. The Convention is built upon

1084 See above, "Recognition in Australia of marriages celebrated overseas".
1085 93 States as at September 2014.
1086 Hereinafter "the FLCACR".
1087 The Hague Abduction Convention, Article 1.

two presumptions. First, abductions are against the best interests of children. Second, the judge of the State of a child's habitual residence is best placed to determine questions of "custody"[1088] and "contact".

These two premises are key features of the Convention designed to operate as deterrents against abductions. Consequently, return orders are not decided upon the merits of "custody" issues.

Definitions – wrongful removal or retention

Pursuant to s 2(2) of the FLCACR, the removal or retention of a child is wrongful where:

> *"a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and *b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."[1089]

Children within the scope of the Convention

The Hague Abduction Convention applies to children who have not attained the age of 16.[1090]

15.4.2. Child abducted from a "Hague country" to Australia

Application to a Central Authority

Where a child has been wrongfully removed from a "Hague country" to (or wrongfully retained in) Australia, the left behind parent may apply to the Central Authority of the child's habitual residence (or of any other State party) to request the return of the child. The request will then be forwarded to the Attorney-General's Department which is the Central Authority under the Convention for the Commonwealth of Australia. After ensuring that the application satisfies the requirements set out by the Convention, the Attorney-General's Department will forward it to the relevant State / Territory Central Authority in Australia.

Pursuant to Article 7 of the Convention, the Central Authorities have an obligation to co-operate with each other, to promote co-operation amongst the competent

1088 The meaning of "Rights of custody" is defined by the FLCACR, Regulation 4.

1089 The Hague Abduction Convention, Article 3.

1090 Hague Abduction Convention, Article 4; FLCACR, Regulation 2(1).

authorities in their respective States, and to secure the prompt return of children and to achieve the other objects of this Convention.[1091]

Pursuant to Regulation 14 of the FLCACR, where a child is removed from a Convention country to, or retained in, Australia, the responsible Central Authority may apply to the court, in accordance with Form 2, for a range of orders including:

(i) a return order for the child;

(ii) an order for the delivery of the passport of the child, and the passport of any other relevant person, to the responsible Central Authority, a member of the Australian Federal Police or a person specified in the order, on conditions appropriate to give effect to the Convention …

The fundamental rule

The fundamental obligation binding State parties to the Hague Abduction Convention is set out in Article 12, paragraph 1, of the Convention,[1092] and provides that:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

Article 12 further provides that an order for return *must* also be made by the judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to above - *unless* it is demonstrated that the child is now settled in its new environment.

Exceptions to the fundamental rule

Article 13 of the Convention provides two exceptions where the relevant authorities are *not bound* by the obligation set out in Article 12 where:

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

1091 See also FLCACR, Regulations 5 and 9.

1092 See also FLCACR, Regulation 16.

Note that Article 13 further provides that the judicial or administrative authority *may* also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Article 20 of the Convention specifies that the return of the child under Article 12 *may* be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms

In order to preserve the efficiency of the Convention, exceptions are to be construed in a restrictive fashion. Importantly, the wording used in Articles 13 and 20 ("not bound", "may") provide the relevant administrative / judicial authorities with a *discretion* not to return the child - as opposed to an obligation not to return the child.

15.4.3. Child abducted from Australia to a "Hague country"

Where a child has been wrongfully removed from Australia to (or wrongfully retained in) a "Hague country", the process would follow the process described in the above section but in a reverse fashion:

The left behind parent resident in Australia would apply to the responsible Central Authority.[1093]

The Central Authority would then ensure that the application complies with the Convention requirements.

The Central Authority would subsequently forward the application to the Central Authority of the Country where the child has been abducted or wrongfully retained.

The relevant administrative or judicial authorities of the country where the child was abducted would make an order that the child be returned to Australia – unless circumstances described in Articles 13 or 20 cause these authorities to decide otherwise.

15.4.4. Child abducted from a "Non-Hague country" to Australia

If a child wrongfully removed to (or wrongfully retained in) Australia was not habitually resident in a Contracting State immediately before the breach of "custody" or "access" rights, the Convention does not apply.[1094]

1093 The Commonwealth Attorney-General's Department, see supra at 15.4.2.

1094 The Hague Abduction Convention, Article 4. See also FLCACR, Regulation 4(1)(a).

In such circumstances, inquiries should be made as to whether Australia has a bilateral agreement with the other country at stake.

Additionally, avenues other than litigation may be explored to resolve the matter: the parental conflict may also be suited for international mediation.

If litigation is the appropriate avenue, the left behind parent may apply to the court in Australia for a recovery order for the return of the child.[1095] The categories of persons entitled to apply for a recovery order are listed under s 67T of the FLA. Further to s 67V the child's best interest is paramount consideration in making a recovery order.[1096]

15.4.5. Child abducted from Australia to a "Non-Hague country"

Similar to the situation where a child is abducted from a "Non-Hague country" to Australia, where a child is wrongfully removed to a State which is not a Contracting State, the Convention does not apply.[1097]

Whether the country where the child was abducted has a bilateral treaty with Australia, or whether the conflict is suited for international mediation are also options to explore.

Ultimately, it is possible that the parent left behind in Australia will have to begin ("custody" / parenting) proceedings in the country where the child was wrongfully removed. Enquiries have to be conducted to contact specialised lawyers, as well as to identify the requirements to benefit from the equivalent of legal aid in the country in question.

15.5. Custody and Protection Measures

With the growing simplicity of international travel and the increase in bi-national couples, protection of children across borders has become a very broad topic, notably governed by international conventions.

1095 FLA, Section 67Q.

1096 See Sections 60CB to 60CG which set out with how a court determines a child's best interests.

1097 The Hague Abduction Convention, Article 4. See also FLCACR, Regulation 4(1)(a).

15.5.1. Relevant law in Australia

In Australia, the relevant statute is the FLA.

15.5.2. A broad jurisdiction under the FLA

Pursuant to s 69E(1) of the FLA, there are five jurisdictional bases on which proceedings relating to children can be instituted under the Act, i.e. where:

> "(a) the child is present in Australia on the relevant day (as defined in subsection (2)); or
>
> (b) the child is an Australian citizen, or is ordinarily resident in Australia, on the relevant day; or
>
> (c) a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
>
> (d) a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
>
> (e) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings."

15.5.3. Cross border protection of children

Relevant law

The domestic implementation of international conventions relating to children is found under Pt XIIIAA of the FLA.[1098] More specifically, Division 4 of Pt XIIIAA deals with the international protection of children.[1099]

Jurisdiction of an Australian court for the person of a child

The bases for a court's jurisdiction to take personal protection measures in respect of a child are set out under Section 111CD of the FLA. The court's jurisdiction varies depending upon the location and the country of habitual residence of the child.

1098 FLA, Part XIIIAA entitled "International conventions, international agreements and international enforcement". (Sections 110 – 111D).

1099 FLA, Part XIIIAA, Division 4 "International protection of children (Sections 111 CA – 111CZ).

Overview of the bases for jurisdiction to take personal measures with respect to a child (S 111CD of the FLA):

Child's location and Habitual Residence:	The Jurisdiction of the court to take personal protection measures is subject to:
A child who is present and habitually resident in Australia[1100]	No specific requirements under S 111CD.
A child present in Australia and habitually resident in a Convention[1101] country[1102]	(i) the child's protection requires taking the measure as a matter of urgency; or (ii) the measure is provisional and limited in its territorial effect to Australia;[1103] or (iii) the child is a refugee child; or (iv) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence; or (v) a competent authority of the country of the child's habitual residence agrees to the court assuming jurisdiction; or (vi) the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3))[1104]
A child who is present in a Convention country[1105]	(i) the child is habitually resident in Australia; or (ii) the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the Child Protection Convention; or (iii) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent

1100 Section 111CD(1)(a), FLA.

1101 Pursuant to 111CA, FLA, *Convention country* means a country, other than Australia, for which the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental responsibility and Measures for the Protection of Children* has entered into force.

1102 Section 111CD(1)(b), FLA.

1103 But see Section 111CD(2).

1104 See Section 111CD(3).

1105 Section 111CD(1)(c), FLA.

	authority of the country of the child's habitual residence or country of refuge; or (iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the court assuming jurisdiction; or (v) the child is habitually resident in a Convention country and the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3))[1106]
A child who is present in Australia and is a refugee child[1107]	No specific requirements under S 111CD.
A child who is present in a non-Convention country[1108]	(i) the child is habitually resident in Australia; **and** (ii) any of paragraphs 69E(1)(b) to (e) applies to the child;
A child who is present in Australia[1109]	(i) the child is habitually resident in a non-Convention country; **and** (ii) any of paragraphs 69E(1)(b) to (e) applies to the child.

Note that the court's jurisdiction will be limited if prior proceedings are pending in a Convention country.[1110]

Applicable Law[1111]

Where an Australian court exercises its jurisdiction under Pt XIIIAA, Division 4, Subdivision B *(jurisdiction for the person of a child)* and C *(jurisdiction for decisions about a guardian of a child's property)* of the FLA, the court must apply the law of Australia in exercising that jurisdiction.[1112]

In exceptional circumstances, and if the court considers the protection of the person of the child, or the child's property, requires the court to do so, the court may apply

1106 Ibid.
1107 Section 111CD(1)(d), FLA
1108 Section 111CD(1)(e), FLA
1109 Section 111CD(1)(f), FLA
1110 Section 111CF, FLA.
1111 Under Part XIIIAA, Division 4, Subdivision D of the FLA, "applicable law" does not include choice of law rules (see Section 111CQ).
1112 Section 111CR (1) & (2), FLA.

or take into account the law of another country with which the child has a substantial connection or the child's property is substantially connected.[1113]

It should be noted, however, that issues relating to parental responsibility are generally governed by the law of the country of the child's habitual residence.[1114]

Recognition of foreign measures

An "overseas child order"[1115] can be registered in a court in accordance with *Family Law Regulations 1984* (Cth).[1116] If so registered, the foreign measure has the same force and effect as a Commonwealth personal protection measure or a Commonwealth property protection measure (as appropriate). The foreign measure also prevails over any earlier inconsistent measure in force in Australia.[1117]

15.6. Succession[1118]

In the past decades, it has become increasingly common for people to die owning property and holding rights or interests in more than one jurisdiction. In the context of international succession, a key concept is the dual qualification of property.

15.6.1. Basic notions

Qualification of property

Although at domestic common law property is classified as either real or personal, in the context of conflict of laws a different classification is used: property is either immovable or movable.

1113 Section 111CR (3), FLA.

1114 See Section 111CS, FLA for principles and exceptions in respect of the law applicable to parental responsibility.

1115 An overseas child order relates to concepts such as "custody" / "lives with" / "contact" in respect of a child under the age of 18. See definition under Section 4, FLA.

1116 *Family Law Regulations 1984* (Cth), Part III (Overseas Orders), Division 1 (overseas child order), Regulations 23-24.

1117 Section 111CT, FLA.

1118 The following principles are described in greater detail in M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (9thed, LexisNexis Butterworths. 2014), Chapter 38.

The fundamental conflict of laws rule

With respect to succession, the conflict of laws rule is dual and operates as follows:

> Succession to immovable property is governed by the law of the jurisdiction where the immovable property is located.[1119]
>
> Succession to movable property is governed by the law of the domicile of the deceased.[1120]

15.6.2. Immoveable / Moveable qualification and location

The question as to whether a specific property is immovable or movable (i.e. the qualification process) is governed by the law of the jurisdiction where the property is located. It is therefore crucial to establish where the relevant property is located. Thus, in Australia, the courts have developed, inter alia, the following qualifications:

(i) In principle, tangible property (such as chattels or "choses in possession") are located where they are physically situated;[1121]

(ii) Intangible property (such as choses in action) receives a notional location, e.g:
   - A contract debt is located where the debtor resides or where the debt is expressed to be payable. If the contract is constituted by deed, the debt is located where the deed is situated.[1122]
   - Patents and trademarks are located where they are granted.[1123]

(iii) Interests in land are located where the land is located[1124]

Where an estate is incompletely administered, an interest in the estate is located where the legal personal representative resides or where action to enforce the obligations can be sought.[1125]

1119 I.e. the lex situs.

1120 I.e. the lex domicilii.

1121 *Haque v Haque [No2]* (1965) 114 CLR 98, 39 ALJR 144, Windeyer at 136 (CLR).

1122 *Ex parte Coote* (1948) 49 SR (NSW) 179, 66 WN (NSW) 28 (FC), Jordan CJ (SR (NSW)). See also *Asset insure Pty Ltd v New Cap. Reinsurance Corporation Ltd (in. Liquidation)* (2004) 61 NSWLR 451.

1123 *Re Usines de Melle's Patent* (1954) 91 CLR 42, Fullagar J at 48.

1124 *Haque v Haque [No2]* (1965) 114 CLR 98.

1125 See, e.g., *Commr of Stamp Duties (Qld) v Livingston* [1965] AC 694, (1964) 112 CLR 12, 38 ALJR 197 (PC).

15.6.3. Intestate succession

Interstate succession to movables is governed by the law of the domicile of the deceased at the time of death.[1126] Interstate succession to immovables is governed by the lex situs. The applicable law determines the categories of next of kin entitled to take and whether a person falls within such categories.[1127] The operation of renvoi may render these rules more flexible.[1128]

15.6.4. Specific issues relating to wills

Testamentary capacity, formal validity and construction are key issues in the context of domestic law which are equally critical in the context of conflict of laws.

Testamentary capacity

The dual qualification of immovable / movable property also operates in the field of testamentary capacity. Testamentary capacity relating to immovables is governed by the law of the jurisdiction where the immovable property is located.[1129] Testamentary capacity relating to movables is governed by the law of the testator's domicile.[1130] Note that issues relating to onus of proof are governed by the lex fori.[1131]

Formal validity

Formal validity of testaments is governed by the *Hague Convention on the Conflict of Laws Relating to the Forms of Testamentary Dispositions* (1961 Convention). The Convention entered into force in Australia on 21 November 1986. In New South Wales, the dispositions of the Convention were enacted in the *Succession Act 2006* (NSW), Part 2.4.

1126 *Pipon v Pipon* (1754) Amb 25; 27 ER 14.

1127 M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (9thed, LexisNexis Butterworths. 2014) p853.

1128 Ibid.

1129 I.e., the lex situs. See M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis Butterworths 2014) p855.

1130 I.e., the lex domicilii. See *Hartley v Fuld* [1968] P 675; [1966] 2 WLR 717; [1965] 3 All ER 776, Scarman J at 696 (P). If the testator changed domicile between the date of the will and the date of his/her death, it is suggested that the applicable law is the law of the domicile at the date of the will, See M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis Butterworths 2014) p854.

1131 Ibid, Scarman J at 696-698 (P).

A will executed in another jurisdiction will be taken to be properly executed if its execution conforms to the internal law in force in the place:

(a) where it is executed, or

(b) that was the testator's domicile or habitual residence, either at the time the will was executed or at the time of the testator's death, or

(c) of which the testator was a national, either at the time the will was executed or at the time of the testator's death.

The 1961 Convention sets out specific provisions for federated countries, such as Australia, where succession law is not a federal matter. These provisions are reflected in Section 49(2) of the *Succession Act 2006* (NSW) which provides that the system of law to be applied under Section 48 is to be determined as follows:

(a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed,

(b) if there is no rule, the system of internal law is that with which the testator was most closely connected:

  (i) if the matter is to be determined by reference to circumstances prevailing at the testator's death—at the time of the testator's death, or

  (ii) in any other case—at the time of execution of the will.

It is worth noting that where the death of the testator occurred before the entry into force of the 1961 Convention (21 November 1986), formal validity will be determined in accordance with the common law rules. At common law, the validity of wills concerned with movables is governed by the law of the domicile of the deceased at the time of death.[1132] At common law, the validity of wills concerned with immovables is governed by the lex situs.[1133]

Construction

As a general rule, the law governing construction is the law which was intended by the testator.

It is presumed that the law intended by the testator is the law of his/her domicile as at the date of the will.[1134] The presumption applies to both movables[1135] and immovables.[1136] However, this presumption may be rebutted where there is sufficient

1132 *In the will of Lambe* (1972) 2 NSWLR 273.

1133 *Pepin v Bruyere* [1902] 1 Ch 24.

1134 *Re Lungley* [1965] SASR 313.

1135 *Re Lungley* [1965] SASR 313; *Public Trustee v Vodjdani* (1988) 49 SASR 236.

1136 *Re Voet* [1949] NZLR 742.

indication (expressed or implied) that the testator intended the law of another jurisdiction to apply to questions of construction.[1137]

Note that with respect to immovable property, two laws must be considered. Questions of construction are generally determined by the law of the testator's domicile at the time the will was made. However, such an interpretation must not conflict with the law of the jurisdiction in which the immovable property is situated. In such a case, the disposition conflicting with the lex situs cannot be given effect.[1138]

1137 *Public Trustee (SA) v Vodjdani* (1988) 49 SASR 236, Johnston J at 240. *Re Lungley* [1965] SASR 313, Napier CJ at 315.

1138 *Public Trustee (SA) v Vodjdani* (1988) 49 SASR 236.

Chapter 16

Sydney Statement on the Practice of International Law before National and International Fora[1139]

Australian legal practitioners provide professional legal services, including oral and written advice, conducting legal proceedings and undertaking other forms of interaction with the courts, tribunals and other institutions of Australia, those from other States and with various regional and international fora. The purpose of this Statement is to identify standards of conduct for Australian legal practitioners when acting before national or international fora where international legal questions are considered. The Statement seeks to enhance the effectiveness, credibility and expertise of Australian legal practitioners by specifying appropriate standards of ethical behaviour and professional conduct in the provision of legal services.

1139 For comparable examples, see International Bar Association, Code of Professional Conduct for Counsel before the International Criminal Court, 2003; International Criminal Tribunal for Yugoslavia, Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal; International Criminal Tribunal for Rwanda, Code of Professional Conduct for Defence Counsel; International Bar Association, International Code of Ethics; Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union.

Australian legal practitioners,

Noting that international law can advance the national interest, both locally and overseas,

Observing the increasing influence of international law over national law, policies and institutions,

Affirming the universal applicability and authority of international law for all States,

Considering the rule of international law to be essential to achieving peace and security for all States, realising sustainable development and promoting accountability, transparency and democracy,

Guided by the principles of impartiality, objectivity and facilitating a constructive dialogue,

Recognising the need for cooperation in addressing transnational issues of common concern within an interdependent world,

Acknowledging that, pursuant to Article 33 of the United Nations Charter, the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice,

Recalling that international human rights law enshrines certain principles for the benefit of individuals and others including equality before the law and the right to a fair and public hearing by a competent, independent and impartial tribunal,

Mindful of the primary responsibility of governmental institutions in the field of international law and the complementary roles and responsibilities of individuals and organisations,

Emphasising that Australian legal practitioners may act as specialist experts, requiring them to act honestly, fairly, skilfully, diligently and courageously,

Intending to uphold the highest standards of efficiency and integrity including probity, impartiality, equity, care, and good faith expected from legal professionals,

Confirming that Australian legal practitioners may be subject to obligations, including a duty to act in the best interests of their client within the law, a duty to the forum before whom they appear and a duty to act in conformity with the exigencies of the administration of international justice,

Stressing that Australian legal practitioners are obliged to comply with legal requirements, rules of professional conduct and standards of professional ethics are

as applicable to them in any relevant jurisdiction, including the jurisdiction in which they have been admitted and in fora exercising international jurisdiction,

Considering the Draft Sydney Statement on the Practice of International Law before National and International Fora to establish desirable standards of conduct by all Australian legal practitioners engaged in the practice of international law,

undertake to achieve, consistent with national and international law and the proper exercise of their professional responsibilities, the following objectives in the practice of international law within Australian and international fora:

(i) to uphold the rule of international law, including promoting the observance in the practice of all States responsibility for their international obligations, free from parochial national concerns wherever possible and consistent with the consensus of the international community;

(ii) to interpret and apply in good faith international law in a manner consistent with the requirements of national and international law as are appropriate to the forum, having due regard to the desirability of uniformity and consistency;

(iii) to respect, protect and promote all human rights and fundamental freedoms at all times, including not engaging directly or indirectly in discriminatory conduct in relation to any person on any ground prohibited under international law;

(iv) to exercise their functions and discharge their national and international responsibilities free from actual or perceived conflicts of interest, including not acquiring financial interests in the matter in which they act, and preserving, and being seen to preserve, their capacity for independent professional judgment, free from compromise or interference, and ensuring that opinions are without prejudice to performing their functions;

(v) to defend without fear the best interests of their clients, providing candid legal opinions, exploring alternative means for an acceptable solution, acting in accordance with instructions and decisions, regularly consulting on the objectives of representation, keeping clients informed and promptly complying with all reasonable information requests, whether the client is an individual, governmental, non-governmental or intergovernmental organisation;

(vi) to conduct themselves in a manner appropriate to the judicial or non-judicial character of the forum in which they appear, including observing the applicable procedural rules, practice directions or other rulings regulating conduct and procedure, avoiding abusive language or making manifestly

unfounded or politically-motivated claims, and at all times pursuing the objective of fair and just proceedings;

(vii) to maintain the honor and dignity of the legal profession at all times, treating professional colleagues with the utmost courtesy, honesty and fairness and demonstrating proper respect for the forum;

(viii) to respect the obligation to maintain the confidentiality of privileged or protected information where applicable, including in respect of any oral or written communication between legal practitioners, between practitioners and their clients and between practitioners and the forum, and protecting from disclosure any such information which becomes known in connection with representing a client, even where that representation has ceased, unless required to be disclosed by law, to prevent death or substantial bodily harm to any person or to prevent the commission of an offence;

(ix) to not accept instructions unless suitably competent and appropriately qualified, able to discharge their responsibilities promptly until conclusion of the matter and only charging remuneration which is fair and reasonable;

(x) to assume personal responsibility for presenting their client's case, including not deceiving or knowingly misleading the forum, maintaining the integrity of evidence, desisting from frivolous or vexatious applications and taking all steps to ensure that their actions do not bring the forum into disrepute;

(xi) to not commit acts or omissions constituting professional misconduct, including engaging in conduct involving dishonesty, fraud, deceit or misrepresentation or which is prejudicial to the proper administration of international justice;

(xii) to not engage in any conduct that adversely reflects upon the fitness of an Australian legal practitioner to act, including refraining from intimidating or humiliating witnesses, not advising others to engage in conduct known to breach applicable rules, facilitating the commission of offences, not attempting to influence decision-makers or other officials in an improper manner and seeking to establish the facts based upon objective, reliable information emanating from relevant and credible sources;

(xiii) to raise public awareness of international law.

Chapter 17

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