REPORT

International Law Association Committee on International Law in National Courts: Report of the Australian Branch*

Part A: A Brief Overview of the Role and Rank of International Law in the Legal Order of Australia

(a) The Australian constitutional and legal system

The Commonwealth of Australia was formed in 1901 by the federation of six former British Crown Colonies, which became the States of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia.[1] Under the Australian Constitution legislative responsibilities are conferred on the Commonwealth (Federal) Parliament in respect of specified matters,

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Members of the Australian Response Group were: Professor IA Shearer (convener), Mr H Burmester, Professor HC Charlesworth, Dr G Griffith QC, Ms P Hewitson, Ms RE Martin, Ms L Robinson, and Mr E Willheim. The convener would especially like to thank Dr C Staker of the Australian Solicitor-General's Office for his very substantial contributions to the Report. The convener must accept responsibility for the final form of the Report and for any errors or omissions that remain.

1 At the time of Federation in 1901 Australia did not yet possess full international personality. This evolved in stages between 1901 and 3 September 1939 (the effective date of the adoption by Australia of the Statute of Westminster 1931). It is difficult to determine a precise date on which Australia became an independent State in international law. The Balfour Declaration in 1926 may properly be regarded as a significant date, although by then Australia already had considerable international status, having been a signatory to the Treaty of Versailles in 1919 and an original member of the League of Nations. See generally Crawford J, *The Creation of States in International Law* (1979), pp 238–46; O'Connell and Crawford, "The Evolution of Australia's International Personality" in Ryan KW (ed), *International Law in Australia,* 2nd ed (1984), p 1. After 1926 Australia retained constitutional links with the United Kingdom. The last of these links were severed in 1986 on the entry into force of the Australia Act 1986, enacted in substantially identical versions by the Parliament of Australia and the Parliament of the United Kingdom.

including trade and commerce with other countries, taxation, defence, quarantine, fisheries, currency, immigration, naturalisation and aliens, and external affairs. Commonwealth (federal) laws prevail over State laws to the extent of any inconsistency, and may bind the States themselves. The States are competent to make laws for their territories on matters not designated by the Constitution as areas of federal legislative responsibility.

The Commonwealth Parliament has exclusive power to make laws with respect to Australian territories not forming part of any State. In exercise of this power the Parliament has established the two "internal" territories, the Australian Capital Territory and the Northern Territory, as self-governing territories, and has transferred to them powers and responsibilities broadly similar to those of the States. These territories are represented in the Federal Parliament, and Commonwealth laws generally apply in these territories in the same way as in the States. (Another internal territory, the Jervis Bay Territory, is administered directly by the Federal Government.)

The External Territories are the Territory of Ashmore and Cartier Islands, the Australian Antarctic Territory, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Coral Sea Islands Territory, the Territory of Heard Island and McDonald Islands, and the Territory of Norfolk Island. Norfolk Island enjoys limited self-government. The other External Territories are directly under the control of the Commonwealth Parliament.

The States and Territories are not international persons in their own right, and they have limited capacity to act outside Australia. They cannot conclude treaties. Breaches of a treaty or other rule of international law by the authorities of an Australian State or Territory will engage the international responsibility of Australia.

The formal Head of State is the Queen of Australia.[2] However, the only power which the Queen of Australia exercises in practice is the appointment, on the advice of the Commonwealth Government, of the Governor-General of Australia. Otherwise, the Queen's powers and functions in relation to the Government of Australia are exercisable, at federal level, only by the Governor-General of Australia. The Queen also appoints State governors, on the advice of the State government concerned. At the State level, except when the Queen is personally present in that State, all her powers are exercised by the Governor of the State. The Queen does not represent Australia internationally.

Both at federal and at State level, and in the internal self-governing territories, the system of government derives from the "Westminster system", under which Ministers must be members of parliament and are accountable to it. The leader of the political party which has the support of a majority of members

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2 The Queen of Australia is a separate juristic person from the Queen of the United Kingdom and has separate styles and titles as determined by Australian legislation. The situation is similar for Canada and New Zealand and for 12 other independent countries of the Commonwealth of Nations. Other Member States of the Commonwealth acknowledge the Queen only as the Head of the Commonwealth, not as Head of State.

in the lower house of parliament is appointed as the head of government (the Prime Minister of Australia, the Premier of a State, or the Chief Minister of a Territory) and forms a government. The Governor-General and each of the State Governors act on the advice of their respective Ministers, and in practice have largely ceremonial functions. Certain features of the Australian Constitution (especially the federal system) were influenced by the United States Constitution, although the Australian Constitution contains no Bill of Rights.

Each State, the Australian Capital Territory, the Northern Territory, and Norfolk Island has its own system of superior courts, with a common final court of appeal in the High Court of Australia. There is also a separate system of federal courts, including the Federal Court of Australia and the Family Court of Australia. These courts too are subject to the final appellate authority of the High Court of Australia. Questions of international law may arise and be dealt with in any of these State, Territory, or federal courts.

The Australian legal system is a common law system, and Australian courts frequently refer to decisions of courts in other common law jurisdictions as persuasive authority. Common law principles applied by Australian courts to matters such as the relationship between international law and domestic law, and the roles of the legislature, the executive, and the judiciary in the conduct of foreign relations, are similar to those applied by the courts in other common law countries.

(b) Australia and customary international law[3]

With regard to the role and rank of customary international law within Australian law there is no definitive constitutional provision or general judicial pronouncement.

(i) Customary international law and statutes

It is clear, consistently with inherited principles of British constitutional law, that neither customary international law nor the provisions of a treaty binding on Australia can prevail over the clear terms of a statute, whether passed by the Federal or a State parliament, and whether passed before or after the international law obligation arose. The leading judicial expression of this principle is the decision of the High Court of Australia in *Polites v Commonwealth*,[4] where it was held that Parliament was competent to legislate contrary to rules of customary international law limiting the right to conscript resident aliens into the armed forces. That decision is authority for two propositions:

(a) that the courts will give effect to the clear terms of a statute even if inconsistent with customary international law; but that

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3 See generally Crawford and Edeson, "International Law and Australian Law" in Ryan KW (ed), n 1 above, p 71; Triggs, "Customary International Law and Australian Law" in Bradbrook A et al (eds), *The Emergence of Australian Law* (1989), p 376.

4 (1945) 70 CLR 60; 12 ILR 208.

(b) a statute will be interpreted so far as its language will admit in a manner not inconsistent with international law.[5]

It is also a common law rule of statutory interpretation that a court will interpret the laws of parliament in the light of a presumption (which is rebuttable) that the parliament does not intend to abrogate human rights and fundamental freedoms.[6] It can be expected that the courts will have regard to international human rights norms when applying this presumption.[7]

(ii) Customary international law and common law

The sweeping assertion of Lord Denning MR in the English Court of Appeal case *Trendtex Trading Corporation v The Central Bank of Nigeria*[8] that "the rules of [customary] international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament" has not been endorsed by Australia's highest courts. The direct occasion for the testing of such a proposition has not arisen. Even indirectly, occasions when a judicial remark, *obiter dicta*, might have been expected have mostly passed in silence, or non-committally. For example, Chief Justice Gibbs of the High Court of Australia in *Koowarta v Bjelke-Petersen*[9] stated that in that case the arguments of counsel had not rested on the proposition that racial discrimination was prohibited by customary international law and was thus prohibited by Australian common law; "it is therefore unnecessary to discuss the question, which has been considered by this court in *Chow Hung Ching v R* (1948) 77 CLR 449 at 462, 477, and more recently in England in *Trendtex Trading Co v Bank of Nigeria* [1977] QB 529 at 553–4, whether international law is incorporated into and forms part of the law of Australia, or whether it becomes part of Australian law only when it has been accepted and adopted by the law of Australia".[10]

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5 Ibid, at 68–69, 74, 77, 79, 81. See also *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304 (Gummow J).

6 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 (Brennan J); 85 ILR 154 at 161 (Brennan J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 183 (Dawson J); *Nationwide News v Wills* (1992) 177 CLR 1 at 43 (Brennan J).

7 See Part A(c) below, and *Dietrich v R* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J), 348–49 (Dawson J); *Minister v Magno* (1992) 37 FCR 298 at 339–44 (Einfeld J).

8 [1977] 1 QB 529.

9 (1982) 153 CLR 168 at 203–04.

10 See also *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 519 (Mason CJ, Wilson and Dawson JJ); 85 ILR 154 at 157–58 (Mason CJ, Wilson and Dawson JJ); *R v Shrestha* (1991) 173 CLR 48 at 71 (Deane, Dawson and Toohey JJ); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 (Brennan J); *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 266 (Brennan J); *Dietrich v R* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J), 321 (Brennan J), 337 (Deane J), 348–49 (Dawson J), and 359–61 (Toohey J) (*"Marion's"* case); *Jago v Judges of the District Court of NSW* (1988) 12 NSWLR 558 at 569 (Kirby P), 580–82 (Samuels JA) (no reference to international instruments was made in the High Court on appeal: (1989) 168 CLR 23); *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 203 (Kirby P); *Re Jane* (1988) 85 ALR 409 at

The House of Lords in the United Kingdom, while not rejecting Lord Denning's view, has recently stated that automatic incorporation would occur in relation to a rule of international law "only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate".[11]

Although independent of the British court hierarchy both in law and in fact, Australian courts tend to respect pronouncements such as these. Echoing a caution similar to that of the House of Lords and recalling the words of a former Chief Justice of Australia, Sir Owen Dixon, in *Chow Hung Ching v The King*[12] the present Chief Justice of Australia, Sir Anthony Mason, stated extracurially in 1990 that the view of Sir Owen Dixon that "international law is not a part, but is one of the sources", of domestic law may still be correct. Sir Anthony Mason stated that universally accepted rules of customary international law are certainly accepted by the Australian courts. But others may not be. It depends on a number of factors, including the nature of the rule, the extent to which it has achieved international acceptance, and the degree of its conformity with existing municipal law.[13] To a similar effect are the views of the President of the Court of Appeal of New South Wales, Justice Kirby, who sees in customary international law and in the standards laid down in international instruments—especially those related to human rights—important principles on which Australian judges ought to draw in exercising their duty to interpret and apply the existing law, and to fill gaps in that law, having proper regard always to the legitimate leeways of judicial choice, to the effect of precedent and, of course, to the superior force of statutes.[14] Indeed, Justice Kirby has gone so far as to describe as "an error" the view that international human rights law, as such, is automatically incorporated into Australian domestic law: "[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 the proper construction of the legislative provision in question".[15]

423–25 (Nicholson CJ); *Limbo v Little* (1989) 65 NTR 19 at 45–46 (Martin J); 88 ILR 481 at 507–08 and on appeal to the High Court: *Re Limbo* (1990) 64 ALJR 241 at 243.

11 *JH Rayner Ltd v Department of Trade* [1990] 2 AC 418 at 513 (Lord Oliver) (the *International Tin Council* case).

12 (1948) 77 CLR 449 at 477; 15 ILR 147 at 169.

13 "The Relationship between International Law and National Law, and its Application in National Courts": Address delivered to the International Law Association, 64th Conference, Broadbeach, Queensland, 24 August 1990, [1990] *Australian International Law News* 214–18.

14 See also the extracurial views of Justice Kirby in his article "Advancing Human Rights by Reference to Human Rights Norms" (1988) 62 *Australian Law Journal* 514.

15 *Cachia v Hanes* (1991) 23 NSWLR 304 at 313.

Most of the recent statements on the relationship between customary international law and the common law have been made with issues of international human rights particularly in mind. In the recent *Mabo* case, in which the High Court of Australia overturned the previously established legal view that Australia constituted a *terra nullius* when settled by Europeans, Justice Brennan, in a judgment in which the Chief Justice and Justice McHugh concurred stated:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[16]

International norms of human rights are clearly an influence on the common law. However, in the present context, there are particular reasons for regarding international law as a "source" or "influence" on the common law, rather than as part of the common law or as automatically incorporated within it. One reason is that international human rights law is concerned with standards which must be observed by municipal law, rather than with prescribing particular rules to be adopted into municipal law. Indeed, the level of protection of human rights afforded by municipal law may be higher in some countries than that required under international standards; it would be unfortunate if a theory of automatic incorporation had the effect of lowering the previous standards of municipal law. A second reason is that international law standards by themselves are not always sufficiently precise to be applied without more by domestic tribunals. This point is illustrated by the *Political Advertising* case decided by the High Court of Australia in 1992.[17] In that case Chief Justice Mason and Justice Gaudron, who held the legislation restricting the broadcasting of political advertising prior to elections to be invalid, referred to judgments of the European Court of Human Rights to demonstrate the fundamental importance of the freedom of political discussion, but did not actually consider whether the legislation was or was not consistent with the international standards there discussed. On the other hand, Justice Brennan, who dissented and would have upheld the validity of the legislation, noted that paid political advertising, for various reasons, was not permitted during election periods in a number of other liberal democracies which were parties to international human rights instruments or which had constitutional provisions guaranteeing freedom of expression, and that the European Commission of Human Rights had in fact held that a complete ban on political advertising on television and radio in the United Kingdom was not contrary to article 10 of the European Convention.[18]

Outside the area of human rights, it is very rare that Australian courts are faced with the question of the relationship between international law and the

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16 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.
17 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
18 Ibid, at 140 (Mason CJ), 154–55 (Brennan J), 211 (Gaudron J).

common law. Most areas of international law previously dealt with directly by the courts as part of the common law (the privileges and immunities of diplomats, consuls, foreign States and foreign visiting forces) are now regulated by statute.[19] In *Reid v Republic of Nauru,*[20] a case relating to events which occurred before the entry into force of the Foreign States Immunities Act 1985 (Cth), the Supreme Court of Victoria relied on the House of Lords' decision in *I Congreso del Partido*[21] as authority for the restrictive (as opposed to the earlier absolute) doctrine of sovereign immunity, rather than on customary international law as such. Nevertheless the court did refer (albeit tangentially) to cases from the United Kingdom, the United States, Germany, and Italy, and *I Congreso* itself referred to decisions of other States. The case can be regarded as indicating a tacit inclination towards the incorporation doctrine, at least in respect of well settled rules of international law.[22]

The following statement made by Edeson and Crawford in 1984 summarises the position in Australia on this point:

> Apart from constitutions and statutes, it may be that conflicting rules of common law can exclude international law. This is certainly so where such rules are rules of internal competence (e.g. the domestic act of state doctrine). They can also (and this is much more common) preclude international law by covering the same ground in a manner not necessarily at odds with the international rule but so that formally the court applies an ordinary domestic rule... What is less clear, because few cases have arisen, is how the courts are to resolve a clear conflict between an established domestic common law rule and an equally well-established international law rule in some area of substantive law. The Australian dicta suggest that in such a case the common law rule would be preferred, but given the more flexible attitudes to precedent now adopted, this need not inevitably follow. At least the inconsistency with international law would be a reason for reconsidering the conflicting domestic rule. But in practice, given the increasingly dominant role of statutes in the public law field, the problem is rather unlikely to arise.[23]

(c) Australia and treaties (conventions and other international agreements)

(i) Effect of treaties in municipal law

It is easier to state the role and rank of treaties and other international agreements in Australian municipal law. Consistently with British constitutional law and practice, treaties in Australia are made by the executive branch of government without any reference to Parliament (although treaties are tabled in Parliament for information). Treaty-making is within the exclusive power of the Federal Government of Australia; however, there is machinery for consultation

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19 See eg such older cases as *Wright v Cantrell* (1943) 44 SRNSW 45; 12 ILR 133 and *Chow Hung Ching v R* (1948) 77 CLR 449; 15 ILR 147.

20 [1993] 1 VR 251.

21 [1983] 1 AC 244.

22 Cf Brownlie I, *Principles of Public International Law,* 4th ed (1990), p 47.

23 Crawford and Edeson, n 3 above, at 78–79.

between the Federal and State governments on treaty matters.[24] Ratification of treaties also is a purely executive act, although exceptionally in some cases of treaties of high political significance (such as the Charter of the United Nations and the Peace Treaty with Japan) they have been put before Parliament for approval. Treaties do not operate to impose obligations on, or otherwise to affect the rights of, citizens, or to invest citizens with additional rights, without incorporation by statute.[25] Treaties requiring the expenditure of public funds beyond existing appropriations likewise require statutory implementation. Nor can an individual complain in a domestic court of a breach of Australia's international treaty obligations if unincorporated by statute.[26]

These principles were recently reaffirmed in the High Court of Australia in the following words:

> The entry into a treaty by Australia does not change the domestic law. The validity of legislation enacted by the Parliament (other than some legislation enacted pursuant to s.51(xxix)) does not depend on its being consistent with a convention to which Australia is a party.[27]

(ii) Treaties and statutory interpretation

The High Court of Australia has also recently reaffirmed the principle that "the courts should, in case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international

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24 See Burmester, "Federalism, the States and International Affairs—A Legal Perspective" in Galligan B (ed), *Australian Federalism* (1989), p 192 at 204–14. A Standing Committee of senior Commonwealth and State/Territory officers was established in 1992 in order to provide a mechanism for the exchange of views on the desirability of Australia's adherence to particular treaties and on the appropriate means of their legislative incorporation, where necessary. Sometimes it is thought more appropriate for the States to implement a treaty by coordinated but separate legislation in areas of primary State jurisdiction: see eg the Sale of Goods (Vienna Convention) Act 1986 (NSW). In areas of primary federal competence the Commonwealth will legislate alone: eg the Carriage of Goods by Sea Act 1991 (Cth). This is a purely political compromise; in law the Commonwealth has legislative superiority over the States in any matter concerning treaties or other aspects of external affairs.

25 *Bradley v Commonwealth* (1973) 128 CLR 557; 52 ILR 1, holding that the United Nations Charter, which was not incorporated as the law of Australia, did not justify the cutting off of the telephones and postal facilities of the Rhodesian Information Service in pursuance of mandatory sanctions ordered by the United Nations Security Council; cf *R v Phillips and Pringle* [1973] 1 NSWLR 275 (cutting down goal posts as a protest against visiting South African football players); *Simsek v Macphee* (1982) 148 CLR 636. This rule is qualified only by the historic prerogative exceptions of treaties of peace and war, and the cession of territory.

26 *Tasmanian Wilderness Society v Fraser* (1982) 153 CLR 270; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (NSW) (1988) 19 FCR 347; 87 ILR 170.

27 *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 74 (McHugh J), 38 (Brennan, Deane and Dawson JJ), 52 (Toohey J). The qualification made by his Honour refers to the special class of legislation which depends for its validity on the invocation by the Commonwealth Parliament of its power to legislate with respect to "external affairs"—(s 51(xxix)—where no other head of power would support the legislation.

treaty".[28] There are some *dicta* in very general terms which could be taken to suggest that where there is an ambiguity in *any* statute, it will be construed in the light of a presumption that Parliament has not intended to legislate inconsistently with Australia's obligations under *any* international treaty.[29] The full extent of this presumption remains to be tested.

These *dicta* may in fact reflect two somewhat narrower propositions. The first proposition is that legislation will be presumed not to be inconsistent with Australia's obligations under international human rights treaties. This proposition is probably an aspect of the common law rule of statutory interpretation that a court will interpret laws in light of a presumption that Parliament does not intend to abrogate human rights and fundamental freedoms (see Part A(b), above). The second proposition is that where a treaty is referred to in the text of legislation, or where it is clear from extrinsic materials, such as parliamentary debates, that the legislation was enacted or amended in order to give effect to, or to make Australian law consistent with, Australia's obligations under an international treaty, that treaty may be referred to in order to resolve an ambiguity or obscurity in the legislation. This approach is permitted in relation to federal legislation by the Acts Interpretation Act 1901 (Cth), Section 15AB(1)(i) and (2)(d)–(f) and (h).[30] Under Section 15AB(1)(ii) regard may also be had to the treaty in the absence of an ambiguity or obscurity, if the ordinary meaning conveyed by the text of the legislation leads to a result that is manifestly absurd or unreasonable. In a number of cases the Federal Court has indicated that, under Section 15AB(1)(i), if there is no ambiguity in the text of the legislation, a doubt cannot be created by the use of a treaty in order to have that doubt settled by reference to the same treaty.[31] On the other hand, under common law principles, English courts may refer to a treaty that legislation was specifically intended to implement, "even in the absence of ambiguity in the legislative text when taken in isolation".[32] It is unclear whether Australian courts, in addition to the Acts Interpretation Act 1901 (Cth), or when interpreting State legislation to which that Act does not apply, would follow the same common law principles.[33]

It is not clear to what extent the courts would be willing to refer to international treaties in other circumstances. It might be argued that legislation

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28 *Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

29 *Dietrich v R* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J), 348 (Dawson J); *Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

30 See also *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 305 (Gummow J).

31 For example, *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564 at 569–70; *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112 at 120; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304 (Gummow J).

32 Brownlie, n 22 above, p 49.

33 See *Lim v Minister for Immigration* (1992) 176 CLR 1 at 38, referring to English cases rather than to the Acts Interpretation Act 1901 (Cth), but only in the context of cases of ambiguity.

dealing with a specific subject matter, even if not intended to implement a treaty, should be presumed to be intended to be consistent with Australia's obligations under international treaties dealing with the same specific subject matter (for example, any provision of a copyright law should be interpreted consistently with copyright treaties, and any provision of a taxation law should be interpreted consistently with international taxation agreements).

Because of the constitutional principle that rights and duties under municipal law may not be affected by treaties alone the distinction between self-executing and non-self-executing treaties, made in some other legal systems, has little or no relevance in Australia. In one case, however, two Justices of the High Court of Australia expressed the opinion that the rules of the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, permitting straight baselines to be drawn across deeply indented or island-fringed localities, could be applied judicially without legislative or executive action.[34] In this instance it could be argued that the treaty did not purport directly to affect the rights or duties of citizens.

Treaties affecting the rights or obligations of individuals are often implemented in Australia in the form of an annexure (usually termed a "Schedule") to a statute, an operative provision of which states that the provisions of the treaty as set out in the annexure "have the force of law in Australia": see for examples the Diplomatic Privileges and Immunities Act 1967 (Cth); and the Crimes (Hijacking of Aircraft) Act 1972 (Cth).

A unique example of a different approach—which might be termed "quasi-incorporation"—is the Human Rights and Equal Opportunity Commission Act 1986 (Cth), to which several conventions and United Nations General Assembly Declarations are annexed but without words in the body of the Act declaring their provisions to have the force of law. The Conventions and Declarations, the texts of which appear in Schedules to the Act are: the Convention Concerning Discrimination in Respect of Employment and Occupation (ILO, No 111) 1958, the International Covenant on Civil and Political Rights 1966, the Declaration on the Rights of the Child 1959, the Declaration on the Rights of Mentally Retarded Persons 1971, and the Declaration on the Rights of Disabled Persons 1975. This list may be expanded by the responsible Minister by notice in the Australian Government Gazette under Section 47 of the Act. The following instruments were thus added in 1993: the Convention on the Rights of the Child 1989, and the Declaration on the Elimination of Intolerance and of Discrimination Based on Religion or Belief 1981.[35] The mandate of the Commissioners appointed under the Act is to work for the progressive implementation of these conventions and declarations through representations to Parliament and to the executive, through other public awareness activities and,

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34 *A Raptis and Sons v South Australia* (1977) 138 CLR 346 at 385 (Mason J), 395 (Murphy J); 69 ILR 32 at 63 (Mason J), 72 (Murphy J). These views were criticised by Professor O'Connell in (1978) 52 *Australian Law Journal* 64.

35 *Gazette*, 13 January 1993, 24 February 1993.

where appropriate, by intervening in judicial proceedings.[36] This form of incorporation does not make the international instruments part of the law of Australia in the sense that discretionary statutory powers are thereby directed or limited.[37] That argument was not presented to the High Court by counsel in *Dietrich v R* who accepted that the ICCPR was not part of domestic law. Such provisions may be regarded rather as standards of aspiration or example. Indeed, were they to be regarded as part of Australian law, the Human Rights and Equal Opportunity Commission Act 1986 (Cth) would be indistinguishable from a Bill of Rights. Attempts to enact such a Bill in the past have encountered vigorous political and other opposition.

(iii) Treaties and administrative discretion

An unsettled question in Australia is the extent to which administrative decision-makers should have regard to unincorporated treaties in exercising their discretionary powers of decision within the limits laid down by statute or by established common law rules (precedent). The issue is whether, when exercising an administrative discretion under a statute, the decision-maker is bound to have regard to the provisions of a treaty, and whether the decision is amenable to judicial review if regard is not had to the treaty or if the treaty is misapplied.

The current state of Australian law appears to be as follows. In some cases a statute which confers an administrative discretion expressly requires the decision-maker to have regard to the provisions of an international treaty. See the answer to Question 6, below. Additionally, a statute may impliedly confer on a decision-maker the function of determining whether the provisions of an international treaty apply. Thus, the former Section 6A(1)(c) of the Migration Act 1958 (Cth) was treated by the courts as conferring on the Minister the function of determining whether a person was a refugee within the meaning of the Convention on the Status of Refugees 1951.[38] In such circumstances the

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36 For an example of such intervention, in support of the contention that judges should have regard to the Covenant, see *Re Marion* (1990) 14 Fam LR 427 (Family Court of Australia). A similar legislative technique is used in the Racial Discrimination Act 1975 (Cth) s 28, and in the Sex Discrimination Act 1984 (Cth), although the latter Act actually incorporates part of the Convention on the Elimination of All Forms of Discrimination Against Women. See also, the Disability Discrimination Act 1992 (Cth).

37 *Dietrich v R* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J), 321 (Brennan J), 348–49 (Dawson J), 359–61 (Toohey J). These views were followed in *Young v Registrar* (1993) 32 NSWLR 262 and may therefore be regarded as a rejection of the views of Nicholson CJ of the Family Court of Australia who had earlier held that the instruments scheduled to the HREOC Act 1986 (Cth) were part of the law of Australia: *Re Marion* (1990) 14 Fam LR 427. See, however, *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982 and *Teoh v Minister* (1994) 121 ALR 436 (currently under appeal to the High Court of Australia). See also the discussion of the relevance of the Act of 1986 by Einfeld J in *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 at 568–75. In relation to the general question see *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 575; *Kioa v West* (1985) 159 CLR 550.

38 *Minister for Immigration v Mayer* (1985) 157 CLR 290.

Federal Court has tended to treat the meaning of the treaty as a matter directly justiciable in municipal law in proceedings for judicial review of the decision.[39]

Where the statute conferring the discretion does not expressly require the decision-maker to have regard to an international convention, the decision-maker is not *bound*, but is *entitled* to do so, provided at least that the subject matter, scope and purpose of the statute conferring the discretion indicate that the treaty may properly be taken into account.[40] If in such circumstances the decision-maker does not have regard to Australia's treaty obligations (or expressly decides not to comply with the provisions of the treaty), the decision will not be amenable to judicial review on such grounds alone.[41]

Where a decision-maker, though not bound to have regard to a treaty, has purported to give a decision complying with the treaty, it is unclear to what extent the decision is amenable to judicial review on the ground that the treaty has been misinterpreted or misapplied. The courts have not decided whether such a decision can be reviewed directly on the ground of an error of (international) law, or whether the decision could only be reviewed on such grounds as error of fact or unreasonableness.[42] If the latter is correct, the scope for judicial review will be narrower.

While the courts will now have regard to international human rights law in developing common law principles and in statutory interpretation (see above), references by the High Court in *Dietrich v R* [43] to the House of Lords' decision in *Brind* would seem to indicate that, under Australian law, an administrative decision will not be reviewable on the ground that it is inconsistent with Australia's obligations under international human rights treaties.

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39 *Somaghi v Minister for Immigration* (1991) 31 FCR 100 at 114; 91 ILR 169 at 175–76; *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 305; *Nagalingam v Minister for Immigration* (1992) 38 FCR 191; *Morato v Minister for Immigration* (1992) 39 FCR 401. But cf *Chan Yee Kin v Minister for Immigration* (1989) 169 CLR 379; 90 ILR 138, in which the decision was reviewed on grounds of unreasonableness.

40 *Gunaleela v Minister for Immigration* (1987) 15 FCR 543 at 559–60; 90 ILR 9 at 27. See also *Re Secretary, Department of Social Security and Underwood* (1992) 15 AAR 81, and *Re Secretary, Department of Social Security and Kumar* (1992) 15 AAR 75.

41 *Kioa v West* (1985) 159 CLR 550 at 570–71, 604, 630; *Gunaleela v Minister for Immigration* (1987) 15 FCR 543 at 560; *Heshmati v Minister for Immigration* (1991) 31 FCR 123 at 129, 130–31; 91 ILR 180 at 184–85; *Ali v Minister for Immigration* (1992) 38 FCR 144 at 151. See also *Tasmanian Wilderness Society v Fraser* (1982) 153 CLR 270 at 274; the New Zealand case of *Ashby v Minister of Immigration* [1981] 1 NZLR 222; and the British case *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696.

42 *Gunaleela v Minister for Immigration* (1987) 15 FCR 543 at 561; *Heshmati v Minister for Immigration* (1991) 31 FCR 123 at 133; *Minister of Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304–05 (Gummow J).

43 (1992) 67 ALJR 1 at 6, 30–31.

(d) International law and the external affairs power

A distinctively Australian issue is the potential role of treaties and customary international law in enlivening the constitutional power of the Federal Australian Parliament to legislate on matters of "external affairs", thus broadening the reach of federal legislative power beyond the specific subjects set out in Section 51 of the Constitution.[44] This issue goes to the heart of the Australian federal compact since the division of the subject matter of legislative powers between the Federal and State parliaments operates centrifugally: a power not clearly allocated to the Federal Parliament falls within the province of the States. It has long been accepted that treaties to which Australia is a party bring the subject matter of that treaty within federal power under the allocated federal subject "external affairs".[45] It would seem that a rule of customary law, if properly proved as such, would also be a sufficient basis to enliven the external affairs power of the Commonwealth.[46] But it has thus far not been necessary to consider whether, in the absence of an implementing statute, customary law could operate unaided as a direct source of rights or obligations of Australian citizens.[47]

A striking example of how international law is peculiarly relevant to the federal constitutional balance in the Australian polity is provided by the Disability Discrimination Act 1992 (Cth). Since there is no specific head of power mentioned in Section 51 of the Constitution which would permit the Federal Parliament to legislate for the whole of Australia on the topic of discrimination reliance must be placed on the external affairs power and thus, in turn, on treaties, customary law, or evidence of "international concern" or externality, in order to validate the enactment. Thus the core of the Act consists of what are defined in the Act as "limited application provisions", limited, that is, by the limits of federal power with respect to external affairs. This is expressed in Section 12(8) of the Act as follows:

> The limited application provisions have effect in relation to discrimination against a person with a disability to the extent that the provisions:
>
> (a) give effect to the Convention [the ILO Convention on Discrimination in Employment], or
>
> (b) give effect to the International Covenant on Civil and Political Rights, or

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44 Constitution of the Commonwealth of Australia, Section 51(xxix).

45 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; 8 ILR 54; *Commonwealth v Tasmania* (1983) 158 CLR 1; 68 ILR 266 (the *Tasmanian Dam* case).

46 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 560 (Brennan J); 91 ILR 1 at 21. Cf also the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth); Foreign State Immunity Act 1985 (Cth). The former Act must rest almost entirely on the external affairs power; the latter possibly in part.

47 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 558–62 (Brennan J), 656–57, 666–77 (Toohey J). This may in part be because of the higher degree to which customary international law, where it is most likely to be relevant to the decisions of national courts, has been codified in international conventions which are now incorporated into municipal law by statutes; eg diplomatic and state immunity, law of the sea, international crimes, human rights.

(c) give effect to the International Covenant on Economic, Social, and Cultural Rights, or

(d) relate to matters external to Australia, or

(e) relate to matters of international concern.

In interpreting this Act, therefore, Australian courts must limit the effect of the provisions to the extent that they give effect to "external affairs" and thus read them down from any *prima facie* wider application to that application which is within the constitutional power of the Commonwealth Parliament. This in turn will require the courts to examine, from an international law perspective, the scope and content of the matters relied on as constituting an "external affair".[48]

Part B: Questions Relevant to the Committee's Study

Question 1. Are all courts competent to decide questions of international law arising in the course of proceedings before them, or only certain courts? If the latter, which courts?

All courts in Australia are competent, in principle, to decide questions of international law arising in the course of proceedings before them.

Question 2. Where lower courts, being in principle competent to decide questions of international law, are in doubt about that law, may they/must they refer such questions to a higher court?

Under the various statutes governing the constitution and powers of courts in Australia—federal and State—there is usually provision allowing for removal of a case involving unusual difficulty, or involving a particular kind of question (for example, a constitutional question), into a different or higher court. This may be for the purpose of having the case decided there or for the purpose of obtaining directions on the law to be applied in the continued conduct of proceedings in the first court. None of these statutes requires that questions of international law, as a distinct category, be removed from one court to another. Nor has, so far as can be discovered, any issue of international law been removed from one court to another as, by itself, a difficult question on which a lower court sought guidance.

Question 3. May the courts (or a specific court) be asked to give an advisory opinion on a question of international law, not relating to an actual litigious cause? If yes, which entities or persons may request such an opinion?

None of the statutes governing the constitution and powers of courts in Australia give power to a court to give an advisory opinion. An earlier attempt by legislation to invest the High Court of Australia, like the Supreme Court of Canada, with a competence to give advisory opinions was declared

48 *Queensland v Commonwealth* (1989) 167 CLR 232; 90 ILR 115.

unconstitutional by the High Court.[49] All proceedings before courts in Australia thus relate to an actual litigious cause.

It may be that the tradition of common law judges of making occasional remarks in the course of their judgments, not strictly necessary to the decision but by way of comments on deficiencies or trends in the law (*obiter dicta*), can sometimes have an effect not dissimilar to an advisory opinion; but such statements are in no way binding and their persuasive weight will vary according to the context, and the level in the judicial hierarchy, in which they were made, and how fully argued, or carefully considered, they were.

Question 4. Is there a mechanism whereby an otherwise final and binding court decision may be corrected or invalidated if that decision is perceived to be wrong, or if international law has changed in the meantime, in order to prevent the State from incurring international responsibility for a breach of international law?

There is no judicial mechanism in Australia whereby an otherwise final and binding court decision may be corrected or invalidated, if that decision is perceived to be wrong, or if international law has changed in the meantime, in order to protect Australia from incurring international responsibility for a breach of international law. The only corrective action available is by way of statute. If the judicial decision contrary to international law were handed down by a State court applying State law, and the State legislature proved to be unwilling to take the necessary corrective action, the Federal Government of Australia might be able to invoke the powers of the Federal Parliament under Section 51(xxix) of the Constitution (external affairs) to pass such legislation; but the political consequences of intervening in State matters would also have to be assessed by the government at the time. The matter would have to be of very serious consequence to warrant such a step. No occasion for such legislative correction has arisen in Australia.[50]

It should be noted, however, that because of the hierarchical structure of Australian courts, and as a consequence of the doctrine of binding precedent operating within that structure (the doctrine of *stare decisis*), a subsequent decision of a higher court in a different case might distinguish or overrule a decision thought to be in conflict with international law, thus bringing Australian law back into compliance with international law, at least so far as future cases are concerned.

Question 5. In what kinds of cases—civil, criminal, administrative, constitutional, etc—have courts had occasion to consider issues of international law? Give examples in each category, where possible. Where especially good examples exist, kindly furnish a copy of the text of the court's judgment (unless published in internationally accessible reports).

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49 In *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

50 In the United Kingdom there have been at least two such legislative corrections in the light of European decisions contrary to domestic judicial decisions: see *Derbyshire County Council v Times Newspapers* [1992] 3 WLR 28 at 50 (Ralph Gibson LJ).

Australian courts have had to consider international law on occasion in cases covering a wide range of subject matter.

In *constitutional law* international law lies at the heart of the content of "external affairs" as an area of federal legislative competence, which in case of conflict overrides that of the States (Constitution of Australia, Sections 51(xxix), 109). Federal legislative power is engaged under that provision where Australia is a party to a treaty, where a rule of customary international law is involved, where the subject matter of the legislation is territory, persons, or activities, geographically external to Australia, or where otherwise a matter of international concern affecting Australia arises. The legislation passed in exercise of this power must be related to the scope and nature of the treaty, rule, geographically external matter, or matter of international concern and must be commensurate with an intention to carry into effect that treaty or rule, or to deal with geographically external places, things, or persons, or to treat other matters of international concern, so as to secure the benefits and carry out the obligations inherent therein. Moreover, legislation pursuant to the power may not violate any express or implied prohibitions in the Constitution. This shortly stated summary of the scope of the external affairs power of the federal legislature is the effect of a series of decisions of the High Court of Australia from 1936 to 1992 in which an ever wider view of the scope of the power has been pronounced.[51]

It follows that in judging whether a federal enactment can be regarded as valid under the external affairs power, being related to and reasonably commensurate with a relevant external affair, the courts have had to examine the scope and content of that "affair" from the point of view of international law. For example, in considering whether the Air Navigation Act 1920 (Cth) was a valid exercise of the power, close attention was paid by the court to the Paris Convention on Air Navigation, on which the enactment purported to be based. The High Court of Australia found significant departures from, and even contradictions between, the Convention and the Act and thus declared the offending sections of the legislation invalid.[52] In the *Tasmanian Dam* case the High Court had to consider whether the enactment of federal legislation designating land areas of great natural beauty as World Heritage sites and prohibiting the exploitation of their natural resources by such invasive actions as the felling of trees and the construction of hydro-electric dams (as the State of Tasmania wished to do) was justified by the Convention for the Protection of the World Cultural and Natural Heritage 1972. It was argued by Tasmania that the words of the Convention did not impose precise obligations on the parties

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51 The principal cases are *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; 8 ILR 54; *New South Wales v The Commonwealth* (1975) 135 CLR 337; 51 ILR 89 (the *Seas and Submerged Lands* case); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; 68 ILR 266 (the *Tasmanian Dam* case); *Richardson v Forestry Commission* (1988) 164 CLR 261; 90 ILR 58; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; 91 ILR 1.

52 *R v Burgess; ex parte Henry*, ibid. See also *Richardson v Forestry Commission*, ibid.

but rather expressed aspirations and set goals, and thus did not constitute an external affair justifying the exercise of the power. The High Court discussed the notion of "international agreement" under international law, and the meaning of the words used in the Convention according to the methods set out in the Vienna Convention on the Law of Treaties. The court concluded that, even if it were necessary that a treaty contain legal rights or obligations for it to constitute an external affair, the Convention did relevantly impose obligations which the Federal Parliament was lawfully implementing through the impugned legislation.[53] Where the relevant external affair is an international duty assumed by Australia, "the existence of an international duty depends upon the construction which the international community would attribute to the Convention [for the Protection of the World Cultural and Natural Heritage] and on the operation which the international community would accord to it in particular circumstances. The municipal court must ascertain that construction and operation as best it can in order to determine the validity of a law of the Commonwealth, conscious of the difference between the inquiry and the more familiar curial function of construing and applying a municipal law."[54]

In interpreting a different provision of the Constitution, the High Court had to consider whether Section 117 of the Constitution was breached by the Rules of Court of the State of Queensland requiring barristers seeking admission to practise in that State to practise principally there. Was this a disability or discrimination to which the applicant would have been equally subject as a resident of another State in seeking admission in that other State? In declaring the Queensland Rules unconstitutional the court had regard not only to foreign cases interpreting statutes proscribing discrimination but also to the decisions of international tribunals: the *Belgian Linguistic* case, and the *South West Africa* cases.[55]

In *civil cases* international law sometimes arises by reason of the incorporation of a convention in a statute applicable to the case, for example, suits seeking damages against airlines for death, injury, or damage to goods, requiring interpretation of the provisions relating to limitation of liability under the Warsaw Convention and Hague Protocol. In a recent case in the Court of Appeal of New South Wales regard was had to the Vienna Convention on the Law of Treaties, international jurisprudence, and the opinion of commentators on the Warsaw Convention.[56] In similar vein the High Court of Australia in interpreting the Hague Rules on Carriage of Goods by Sea, incorporated by the Sea Carriage of Goods Act 1924 (Cth), stated that "a national court, in the interests of uniformity, should construe rules formulated by an international

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53 *Commonwealth v Tasmania*, n 51 above.

54 *Queensland v Commonwealth* (1989) 167 CLR 232 at 239–40 (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ); 90 ILR 115 at 129.

55 Cited in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487 (Mason CJ), 510–12 (Brennan J), 571 (Gaudron J).

56 *SS Pharmaceutical Co Ltd v Qantas Airways* [1991] 1 Lloyd's Rep 288 (CA).

convention...on broad principles of general acceptation".[57] The High Court of Australia, in the interpretation of the Double Taxation Agreement between Australia and Switzerland, turned to the Vienna Convention on the Law of Treaties for guidance and applied that Convention's rules of construction. It was also considered appropriate in that case to look to the OECD Model Convention and commentaries thereon when seeking definitions of terms used in the bilateral agreement.[58]

In *criminal cases* there are no examples of courts applying international law not incorporated as part of a statute (for example, the Crimes (Hijacking of Aircraft) Act 1972 (Cth)). But a trend has recently emerged to interpret difficult provisions of the criminal law, where possible, in the light of international human rights instruments, even though unincorporated. This trend may be said to have been begun by Justice Murphy of the High Court in his dissenting judgment in *McInnis v R* [59] in which he argued for the right of a person charged with a serious criminal offence to counsel, based on, *inter alia*, the provisions of the International Covenant on Civil and Political Rights. It has been continued by Justice Kirby of the Court of Appeal of New South Wales in a number of cases in which he has referred to the Covenant and other human rights instruments in interpreting the provisions of municipal law.[60] As Justice Kirby has stated extracurially, the "green light" to this approach has now been given by the High Court of Australia in *Mabo v Queensland* in the passage cited above in this report, in Part A.[61]

Nevertheless, where the common law cannot be shown to be ambiguous or uncertain there is no warrant for appealing to international conventions or customary international law as in themselves grounds for changing that law. Thus the High Court of Australia held in *Dietrich v R* (1992) that the common law clearly did not recognise a right to counsel for defendants in serious

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57 *Shipping Corporation of India Ltd v Gamlen Chemical Co (Aust)* Pty Ltd (1980) 147 CLR 142 at 159 (Mason and Wilson JJ). See also *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448 at 453 (CA).

58 *Thiel v Commissioner of Taxation* (1990) 171 CLR 338.

59 (1979) 143 CLR 575.

60 *Herron v McGregor* (1986) 7 NSWLR 246 (CA); *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45 (CA); *S and M Motor Repairs Pty Ltd v Caltex Oil* (1988) 12 NSWLR 358 (CA); *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 (CA); *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 (CA); *Cachia v Hanes* (1991) 23 NSWLR 304 (CA); *Gill v Walton* (1991) 25 NSWLR 190 (CA); *Smith v R* (1991) 25 NSWLR 1 (CA); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 (CA); *DPP v Saxon* (1992) 28 NSWLR 263 (CA). See also cases in the Court of Criminal Appeal of New South Wales: *Carroll v Mijovich* (1992) 58 A Crim R 243 (CCA); *R v Greer* (1992) 62 A Crim R 442 (CCA); *R v Astill* (1992) 63 A Crim R 148 (CCA). See also *J v Lieschke* (1986–87) 162 CLR 447, where Deane J, in the High Court of Australia, referred to the Universal Declaration of Human Rights and to the decisions of United States courts on the right of a parent to participate in proceedings relating to the custody of a child.

61 Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol—A View from the Antipodes" (1993) *University of New South Wales Law Journal* 363.

criminal cases, and no such right could be directly imported into the common law by way of international human rights instruments. However, the common law itself could be changed in the usual way by the judges; and the court proceeded to declare that Australian law should now be regarded as providing that a trial in a serious criminal matter should be stayed until the defendant could be provided with counsel, whether at public expense or not.[62] It would be difficult, however, to deny that the High Court was fortified in its decision by the recognition of a right to counsel in international legal instruments.

Extradition cases form a further class of criminal case in which the courts frequently have cause to interpret bilateral extradition treaties, and sometimes have regard to the decisions of courts in other countries.[63]

In *administrative law* there is a similar trend by judges to have regard to the obligations of Australia under international conventions, even where these have not been given the force of law by statute. In an immigration case the High Court had to decide whether a person was a refugee within the meaning of the 1951 Convention on the Status of Refugees and Protocol. In the definition of the term "refugee" help was sought by the court from international commentators and from the UNHCR Handbook.[64] This practice has since become common in other courts. On the other hand, although executive decision-makers may have regard to human rights instruments such as the Convention on Refugees, they are not bound to do so as a condition of the validity of their decisions.[65]

Question 6. Do any constitutional or statutory provisions require courts to apply international law in particular cases or circumstances? Please provide corresponding texts and examples.

The Australian Constitution does not mention international law. Certain federal statutes require the executive or the courts to apply international law in their exercise of a power or discretion or as incorporated in the law itself. The following are some examples:

The War Crimes Act 1945 (Cth), Section 17, allows for a defence based on the laws, customs, and usages of war, and in particular allows a defendant to plead that the act alleged to be a crime "was not under international law a crime against humanity".

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62 (1992) 177 CLR 292.

63 See eg *Riley v Commonwealth* (1985) 159 CLR 1; 87 ILR 144; *Prevato v Governor*, Metropolitan Remand Centre (1986) 8 FCR 358 at 367; *Hempel v Attorney-General* (1987) 77 ALR 641; 87 ILR 159; *Winkler v DPP* (1990) 25 FCR 79.

64 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379 at 397–99 (Dawson J), 407 (Toohey J), 414–15 (Gaudron J), 426ff (McHugh J); 90 ILR 138 at 149–52 (Dawson J), 156–57 (Toohey J), 163–64 (Gaudron J), 173ff (McHugh J). For an analysis of this case see *Lek v Minister for Immigration* (1993) 117 ALR 455 at 458–63 (Wilcox J).

65 *Kioa v West* (1985) 159 CLR 550 at 630 (Brennan J). Cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

The Fisheries Act 1952 (Cth), Section 4, defines the 200-mile Australian fishery zone as extending from "the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law".

The Migration Act 1958 (Cth), has undergone extensive revisions in recent years. A number of the cases mentioned in this Report have concerned the former Section 47 of this Act which incorporated the definition of a refugee given in the Convention on the Status of Refugees 1951, and the Protocol of 1967. As a result of the Migration Reform Act 1992, the equivalent provision is now Section 26B, which establishes a category of "protection visas": "(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen of Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol." Decisions on the issue of protection visas are reviewable under Part 4A of the Act which establishes the Refugee Review Tribunal.

The Antarctic Treaty Act 1960 (Cth), Section 4, declares that in giving effect to the Antarctic Treaty 1959, nothing in the Act "in any way affects the rights, or the exercise of rights, of any country under international law with regard to the high seas within Antarctica".

The Narcotic Drugs Act 1967 (Cth), Section 6, provides that in exercising any power or function under the Act the Minister shall "have regard to the obligations of the Commonwealth under the Convention [the Single Convention on Narcotic Drugs 1961] and to no other matter".

The Great Barrier Reef Marine Park Act 1975 (Cth), Section 65, states that the Act has effect "subject to the obligations of Australia under international law, including obligations under any agreement between Australia and another country or countries".

The Historic Shipwrecks Act 1976 (Cth), Section 28, extends to foreigners and to foreign ships "subject to the obligations of Australia under international law, including obligations under any agreement between Australia and another country or countries".

The Antarctic Marine Living Resources Act 1981 (Cth), Section 5, subjects the operation of the Act to "the obligations of Australia under international law, including obligations under any international agreement binding on Australia".

The Environment Protection (Sea Dumping) Act 1981 (Cth), Section 19(6), directs that the Minister, in considering whether to grant a permit for dumping or loading "shall have regard to...any treaty or convention to which Australia is a party".

The Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth), Section 70(2), states that where the Act confers a power or discretion on a person, "the person shall have regard to Australia's obligations under the relevant international agreements in exercising that power or discretion".

The Charter of the United Nations Amendment Act 1993 (Cth), invests the executive with power to make regulations giving effect in Australian law to resolutions of the United Nations Security Council (such as "sanctions" resolutions) which are binding on Member States under article 25 of the Charter,

but not those involving the use of armed force. Under the doctrine of *ultra vires*, the Australian courts might have to consider in this, as in other cases, whether the regulations are within, or go beyond, the limited mandate established by the Act; this in turn would require interpretation by the courts of the Security Council resolution in question.

Question 7. Do any constitutional or statutory provisions regulate the means by which courts are to ascertain and apply rules of international law relevant to cases before them? Please provide details, where applicable.

There are no constitutional or statutory provisions in Australia which regulate the means by which courts are to ascertain and apply rules of international law relevant to cases before them.

It should be borne in mind in evaluating the response to this and the next question that Australia, in common with other countries of the Anglo-American common law tradition, has an adversarial system of court proceedings in which the courts are—for the most part—confined to the material evidence of the law which the parties choose to put before them. The Australian judicial tradition, in common with that of other common law countries, is to look primarily to counsel to provide all relevant legal considerations and to rely on their professional skill and honesty. Judges may suggest to counsel that a point not raised in the proceedings—such as an issue of international law—ought to be addressed; or they may deal with such a point without the benefit of assistance by counsel, *proprio motu*. But the latter course of proceeding is relatively unusual.

Question 8. Have the higher courts issued directions to other courts as to how international law is to be ascertained and applied by them?

No higher courts in Australia have issued directions to other courts as to how international law is to be ascertained or applied by them. No doubt it would be possible for the High Court of Australia, in its judgment in a particular case, to recommend a particular method, applied by itself, to lower courts, but not by way of formal direction. The example would in itself be enough.

A rare, but significant, example of the methodology to be applied is contained in the judgment of Justice Brennan of the High Court of Australia in the *War Crimes Act* case.[66] In that case he considered whether an obligation was imposed on States by customary international law to try alleged war criminals in respect of extraterritorial war crimes. He began by recalling the sources of international law as stated in article 38(1) of the Statute of the International Court of Justice. He then referred to the discussion of custom by the International Court in the *North Sea Continental Shelf* cases and the *Nicaragua* case. He quoted also from the writings on this subject by Professors I Brownlie and M Akehurst. He concluded that "in the present case, there is no evidence of widespread State practice which suggests that States are under a legal obligation to seek out Axis war criminals and bring them to trial. There is no *opinio juris* supportive of such a rule".

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66 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 559–60.

Question 9. When a relevant rule of international law is contained in a treaty or other international agreement binding on the State, do the courts:

(a) apply the canons and approaches of interpretation of municipal law in ascertaining and applying its meaning?

Australian courts are now well aware of the need to approach the interpretation of treaties, and other international agreements which are part of the applicable law, otherwise than by the canons and approaches of municipal law. The High Court of Australia has clearly laid down that when Australian courts are applying the text of a treaty, incorporated by statute into national law, the courts must apply international law rules of interpretation, not municipal rules of statutory interpretation.[67]

(b) have regard to the rules of interpretation of treaties contained in the Vienna Convention on the Law of Treaties 1969?

It now appears to be the standard practice of courts in Australia when interpreting the terms of a treaty or other international agreement binding on Australia to have regard to the rules of interpretation of treaties contained in the Vienna Convention on the Law of Treaties 1969. That Convention has not itself been made part of municipal law in Australia by statute. But the Convention's provisions on interpretation have been accepted by Australian courts as declaratory of customary international law and as thus applicable by them. The leading case is the *Tasmanian Dam* case, where the High Court of Australia applied the Vienna Convention rules in ascertaining the meaning of the provisions of the World Heritage Convention.[68] A more recent example is the interpretation of the controversial limitation of liability provisions of the Warsaw Convention on International Carriage by Air 1929 as amended by the Hague Protocol 1955. In *SS Pharmaceutical Co Ltd v Qantas Airways*[69] the judge at first instance found that the parties were in agreement that article 25 of the Warsaw-Hague Convention required the application of a subjective test and that the decision of the English High Court in *Goldman v Thai Airways*[70] (which had analysed the Convention and its *travaux preparatoires* in detail) correctly stated that test. The parties differed only as to the facts of the case and as to the inferences of actual knowledge that could be drawn. On appeal two judges found it unnecessary to explore the meaning of the Convention further,

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67 *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142 at 159.

68 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 94 (Gibbs CJ), 222 (Brennan J); 68 ILR 266 at 303 (Gibbs CJ), 419–20 (Brennan J). See also *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349 (Dawson J), 356 (McHugh), where regard was had to the Vienna Convention, on the basis that it represented customary international law, in the interpretation of an agreement on double taxation between Australia and Switzerland.

69 (1988) 22 NSWLR 734 (Rogers CJ, Comm D).

70 [1983] 1 WLR 1186.

but a third judge examined the *travaux preparatoires* of the Convention and Protocol invoking, in part, the Vienna Convention as his warrant for so doing.[71]

(c) have regard to the decisions of international courts and tribunals relating to the treaty?

(d) have regard to the decisions of courts of other States relating to the treaty?

(e) have regard to the published opinions of jurists, textbooks, commentaries, etc, on the meaning of the treaty?

It has been declared by the Federal Court of Australia that "in deciding questions as to the meaning of provisions of treaties which arise in a matter before this court, it is permissible to have regard, *inter alia*, to the commentaries of learned authors and the decisions of foreign courts as aids to interpretation".[72]

In *SS Pharmaceutical Co Ltd v Qantas Airways*, both at first instance and on appeal, the judges obtained assistance in their interpretation of the disputed provisions of the Warsaw-Hague Convention from the decisions of courts in other countries and from the writings of commentators. Decisions from the courts of Argentina, Austria, Belgium, France, Greece, India, Italy, Korea, the Netherlands, Switzerland, the United Kingdom, and the United States were examined. Manuals of authority on international air law were referred to, as were articles in international legal journals. Kirby P made explicit his particular reasons for doing so:

> First, it is essential to approach the construction of the international instruments attached to the Australian statute keeping in mind their international character and the desirability (so far as possible) that they should be given a consistent construction by the courts of the several contracting parties. As was observed in *Brown Boveri* [*Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448] at 453, but is equally applicable here, the very subject matter of these instruments, and the dependence of the international community upon international transportation, makes it important that municipal courts should avoid parochial constructions which are uninformed (or ill-informed) about the jurisprudence that has gathered around such instruments. In relation to the Warsaw Convention and the Hague Protocol this is the approach sanctioned by the House of Lords in England in *Fothergill v Monarch Airlines Ltd* [1981] AC 251. See especially at 276. Were such an approach not taken, the result would be forum shopping or the unequal application of an international treaty in an unpredictable way according to the approach of the domestic court. I agree with the following statement as to the methodology to be adopted. It is contained in the judgment of the *Cour de Cassation* of Belgium in *Tondriau v Air India*

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71 [1991] 1 Lloyd's Rep 288 (CA), (Gleeson CJ, Kirby P, and Handley JA). See also the reference to the *travaux preparatoires* of the Hague Convention on the Civil Aspects of International Child Abduction 1980, by the Full Family Court of Australia in the *Marriage of Murray and Tam* (1993) 16 Fam LR 982.

72 *Somaghi v Minister for Immigration* (1991) 102 ALR 339 at 356–58 (Gummow J with whom Keely and Jenkinson JJ agreed on this point); 91 ILR 169 at 177 (Gummow J with whom Keely and Jenkinson JJ agreed on this point). See also the cases of *Chan* n 64 above, and *Morato* n 39 above.

> (1977) RFDA 193 at 202 (translated): The interpretation of an international convention, the purpose of which is the unification of law, cannot be done by reference to the domestic law of one of the contracting states. If the treaty text calls for interpretation, this ought to be done on the basis of elements that actually pertain to the treaty, notably its object, its purpose, and its context, as well as its preparatory work and genesis. The purpose of drawing up an international convention, designed to become a species of international legislation, will be wholly frustrated if the courts of each State were to interpret it in accordance with concepts that are specific to their own legal system. Secondly, the foregoing approaches take place in the context, inevitably contemplated by the Warsaw Convention and the Hague Protocol, that claims for recovery against international air carriers will be determined by municipal courts of great variety. No provision is made for an international court or tribunal to decide such claims. Therefore, the law makers concerned in drafting the Warsaw Convention and Hague Protocol plainly envisaged that municipal courts would be called upon to give meaning to their language.

In *Minister for Foreign Affairs and Trade v Magno*[73] the Full Federal Court had to consider the meaning of the phrase "impairment of the dignity" of a diplomatic mission or diplomatic agent appearing in articles 22 and 29 of the Vienna Convention on Diplomatic Relations 1961, which are given the force of law in Australia by the Diplomatic Privileges and Immunities Act 1967 (Cth). The question arose because of the placing by protesters of crosses outside the Indonesian Embassy in Canberra in order to represent those killed in the cemetery at Dili, East Timor, in November 1991. The Minister had caused new Regulations to be issued under the authority of the Act in order to give the executive power to remove objects which, in the Minister's opinion, constituted such an impairment of a mission's dignity. He then declared his opinion that the placing of the crosses constituted such objects. The validity of the opinion was not the issue before the court: only the validity of the Regulation empowering the formation of such an opinion. On that basis the majority of the court (Gummow and French JJ) upheld the validity of the Regulation, but indicated that had the factual issue been before the court the issue whether the opinion had been formed *ultra vires* the Regulation and the Act would have arisen. Einfeld J, dissenting, held that the validity of the Regulation was inseparable from the act of forming an opinion and held it bad on the ground that it went beyond what the Act and the Convention allowed. All three judges referred to the opinions of learned writers on diplomatic relations and diplomatic immunity (for example, Denza, Sen, and Hardy, French J, also referred to the *travaux preparatoires* of the Vienna Convention in the International Law Commission, a passage from the judgment of the International Court of Justice in the *US Diplomatic and Consular Staff in Teheran (Hostages)* case,[74] and UK Government public comments on the Libyan Bureau incident in London in 1985. Einfeld J took into account UK and US State practice which to him indicated that a narrow interpretation of article 22 was to be preferred in democratic countries so as to preserve the right of free speech, including the right of peaceful demonstration.

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73 (1992) 37 FCR 298.
74 *USA v Iran* [1980] ICJ 3.

In *Morato v Minister for Immigration, Local Government and Ethnic Affairs*[75] the judge at first instance and the Full Federal Court on Appeal derived assistance in their interpretation of the definition of a refugee under the Refugees Convention 1951, from the UNHCR Handbook, the decisions of courts in other countries, and academic writings on refugee law.[76] Reference has been made to the UNHCR Handbook in a number of other cases,[77] and the practice appears to have the support of the High Court of Australia.[78] Nevertheless, there may be limitations on the use of the UNHCR Handbook by the courts. Although it appears from the detailed account of argument in an English case before the House of Lords that the UNHCR itself regards the Handbook as evidence of State practice and as such to be consulted by courts in interpreting the Convention,[79] Australian courts will not necessarily regard the Handbook as conclusive. The Chief Justice of Australia has stated that he would not wish to deny the usefulness or the admissibility of extrinsic materials, such as the UNHCR Handbook, in deciding questions as to the content of customary international law and as to the meaning of the provisions of treaties, but he regarded the Handbook more as a practical guide for those involved in determining refugee cases that as an interpretive guide [for the courts] to the Refugees Convention.[80]

In *Young v Registrar, Court of Appeal*,[81] the issue was whether the applicant had been denied a right of review of his conviction and sentence for a criminal offence, as required by article 14.5 of the International Covenant on Civil and Political Rights. The Court of Appeal of New South Wales was in agreement that the case fell for decision under municipal law, which did not by reason of ambiguity or silence allow for the Covenant to be applied by adoption in this instance. Nevertheless, two members of the court considered the meaning and scope of article 14.5. The applicant had been convicted of contempt of court in that he had defied the earlier order of the court relating to the custody of his young child, and was sentenced to six months imprisonment. Under the law of New South Wales relating to contempt he had been tried and sentenced by the Court of Appeal (constituted by three different judges from the three now hearing this application). The difficulty thus posed was that the only higher

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75 (1992) 39 FCR 401.

76 106 ALR at 375–77 (Olney J), 39 FCR at 404 (Black CJ), 413–15 (Lockhart J).

77 See especially *Lek v Minister for Immigration* (1993) 117 ALR 455 at 459–64 (Wilcox J).

78 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 162 CLR 379; 90 ILR 138.

79 *Reg v Home Secretary; Ex parte Sivakumaran* [1988] 1 AC 958 at 976–89.

80 *Chan Yee Kin v Minister for Immigration* (1989) 169 CLR 379 at 392 (Mason CJ). Followed by Davies J in *Thavarajasingham v Minister for Immigration* (1989) 19 ALD 751. See also *Lek v Minister for Immigration* (1993) 117 ALR 455, where Wilcox J arrived independently at his conclusion that under the Refugees Convention the critical date for recognition of refugee status is the date at which the application is decided, not that at which it was first presented; but he added his opinion that paragraph 28 of the UNHCR Handbook was not inconsistent with that view.

81 (1993) 32 NSWLR 262 (CA).

court to which an appeal might go was the High Court of Australia. That court does not hear appeals as of right but only by special leave; an appellant must show not only manifest likely error on the part of the court below but also that the question raised is one of public or general importance going beyond the particular case. In a brief hearing before three of its judges the High Court of Australia rejected the application for special leave to appeal, without considering the substance of the alleged error. Kirby P concluded that the law of Australia, in denying a right of review in these circumstances, was in conflict with the provisions of the Covenant. He considered the likely attitude of the Human Rights Committee to rights of review generally, citing McGoldrick D, *The Human Rights Committee* (1991), but noted that the particular question of conviction for contempt had not been dealt with expressly by that Committee. He considered also the similar provisions of article 2 of Protocol 7 to the European Convention on Human Rights, noting a conflict of view between the Council of Europe's Explanatory Memorandum and van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights,* 2nd ed (1990), on the question whether an application for leave to appeal to a court which does not hear appeals as of right can satisfy the requirement that the law provide for review of criminal convictions and sentences. He also considered the practice of the Inter-American Commission on Human Rights. On the question whether the applicant had waived his right to an effective review of his conviction and sentence by consenting to appear for trial before three appellate judges rather than before a single judge (from whom an appeal would have lain as of right)—a course of action which had been open to the applicant to choose under the law—Handley JA discussed cases on this point decided by the European Court of Human Rights, and referred also to the doctrine of the "margin of appreciation", which in his view made the provisions of Australian law conformable with the Covenant in the present instance. The third member of the court, Powell JA, found it unnecessary to discuss the Covenant at all.

(f) have regard to certificates, directions, or opinions of the executive branch of government on the meaning or the manner of application of the treaty?

It would be contrary to Australian juridical tradition for the courts to have regard to certificates, directions, or opinions of the executive on the meaning or manner of application of a treaty; nor would the executive proffer such advice. Executive certificates, as in British practice, are confined to "facts of State" which relate to evidentiary information within the knowledge of the government, such as dealings with foreign governments and States so as to constitute recognition, the date on which Australia became a party to a treaty, the names of other parties and the dates on which they became parties. On the other hand, if the Commonwealth is itself a party to the litigation in question it may make submissions (in the same way as any other party) on the meaning of the treaty; in which case, by reason of the special knowledge of the Commonwealth of such matters, courts are likely to accord such submissions special weight. It is possible in proceedings before any court for the Attorney-General to seek leave to intervene, under the provisions of Section 78B of the Judiciary Act 1903

(Cth), where issues involving a matter arising under the Constitution or its interpretation arise. There has been informal discussion of the possible desirability of adding a similar legislative provision allowing for intervention where a question of international law arises.

Question 10. When the relevant rule of international law is a rule deriving from custom, or otherwise from general international law, do the courts ascertain the validity, content, scope, and manner of application of that rule:

(a) from the court's own knowledge of international law?

Despite the continuing echoes of the dualist approach to international law heard in the Australian, as in the British, courts—conceiving international and municipal law as belonging to separate legal orders—Australian courts have always regarded themselves as competent to ascertain and apply international law when it is a relevant part of the law to be applied. Unlike foreign law, which, when applicable according to the rules of private international law, must be proved as a fact on the basis of expert evidence, principles and rules of public international law are ascertained essentially by the same processes, and with the same resources, as the courts employ in ascertaining and applying municipal law. These resources consist primarily of the material researched, collected, and presented to the court by counsel for the parties, to whom the courts always look for assistance. Judges may, of course, conduct their own supplementary researches.

(b) from the writings of jurists, textbooks, encyclopaedias, digests, or other writings?

All of these evidences of customary international law may, in principle, be received and considered by the Australian courts; and some of them—especially text writers of high standing—have been relied on in recent cases, as instances cited above show.

In the leading case in the High Court of Australia on the relationship between customary international law and municipal law, *Polites v Commonwealth*,[82] reliance for the posited rule of customary international law was placed entirely on a few English-language textbooks on international law. (It will be argued below that these texts were, in fact, misleading as to the true state of international law at the time.) That the High Court allowed such perfunctory proof of the posited rule can be explained partly by reason of the decision arrived at: that the clear provisions of a statute must be followed in preference to international law in any event; and also, perhaps, in part by reason of the relatively unsophisticated array of published material available to the courts in 1945. There has been no occasion since *Polites* in which one of the parties was relying entirely on the existence of a rule of customary international law and where the court needed proof of that rule's existence.

82 (1945) 70 CLR 60; 12 ILR 208.

In other courts, rules of international law have been examined in the light of published writings. One recent example is the case of *Minister for Foreign Affairs and Trade v Magno*, discussed earlier.[83]

(c) from the jurisprudence of other courts within the forum State?

In principle it is possible that courts in Australia will rely on the decisions of other courts within the Australian judicial system for authoritative or persuasive statements of the content of a rule of international law. But in fact no occasions are known where an issue of international law vital to the resolution of a case has been approached in this way. The main reason for the lack of such examples is that the issue so seldom arises.

In a hierarchical system of courts where the doctrine of *stare decisis* applies (that is that the decisions of courts higher in the hierarchy bind lower courts in their statements of the law) reference to municipal court decisions assumes a special importance. Would a lower court make an exception to the rule that it is bound by a higher court if it could be persuaded that the rule accepted and applied earlier no longer represented the current state of international law? In England Lord Denning, in the Court of Appeal, declared that in such an event the normally binding previous decision of the House of Lords would not apply.[84] That point has not arisen yet in Australia; whether Lord Denning's view would be followed is not easily predictable.

(d) from the jurisprudence of courts of other States?

Examples have already been cited above where the Australian courts have had regard to the jurisprudence of other countries in the interpretation of treaties, including those (such as the Refugees Convention) which may be regarded as representing customary international law.[85] Fewer cases have dealt with customary international law apart from treaty, and then not directly. For example, in considering the constitutionality of Australian war crimes legislation two members of the High Court of Australia examined the extent of universal war crimes jurisdiction under customary international law. They referred also to decisions of the US Military Tribunal and of courts in the United Kingdom, the United States, Canada, Israel, and the Netherlands.[86] In a foreign State immunity case, although the court did not purport to determine an issue of customary international law, cases from the United Kingdom, the United States, Germany, and Italy were referred to.[87]

(e) from the jurisprudence of international courts and tribunals?

Australian courts accept as persuasive a definitive pronouncement of the content of a rule of customary international by an international court or tribunal, and as highly persuasive—probably conclusive—a rule recognised by the International

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83 Above, Question 9(c)–(e).
84 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529.
85 Above, Question 9(c)–(e).
86 *Polyukhovich v R* (1991) 172 CLR 501 at 563–91 (Brennan J), 661–77 (Toohey J); 91 ILR 1 at 40–63 (Brennan J), 661–77 (Toohey J).
87 *Reid v Republic of Nauru* [1993] 1 VR 251.

Court of Justice. (Perhaps this is the meaning of the remark made by Lord Oliver in the *International Tin Council* case, referred to above.)[88]

Reference has been made to the decisions of international courts and tribunals by the High Court of Australia in a number of cases: in *Bonser v LaMacchia*[89] to the *North Sea Continental Shelf* cases; in *Raptis v South Australia*[90] to the *North Atlantic Coast Fisheries Arbitration* and to the *Anglo-Norwegian Fisheries* case; in the *Seas and Submerged Lands* case[91] to the decision of the International Court of Justice in the *North Sea Continental Shelf* cases on the juridical nature of the continental shelf which inheres *ipso facto* and *ab initio* to coastal states; in the *Tasmanian Dam* case[92] to the *Barcelona Traction* case on obligations *erga omnes*, to the Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations* on the relevance of *travaux preparatoires* to treaty interpretation, and to the Advisory Opinion on *Jurisdiction of the ICAO Council* on ascertaining legal obligations in treaty texts; in *Gerhardy v Brown*[93] to the Advisory Opinion on *Minority Schools in Albania* on the concept of discrimination; in *Polyukhovich v Commonwealth*[94] to *The SS Lotus* on the scope of national criminal jurisdiction, and to the decisions of international war crimes tribunals; in *Sykes v Cleary*[95] to the *Nottebohm* case on the concept of effective nationality in international law (but holding this not to be relevant to the interpretation of Section 44(i) of the Australian Constitution, which disqualifies foreign nationals from being elected members of Parliament); and in *Mabo v Queensland*, where the High Court overturned earlier judicial authority on the consequences for native land title of European settlement, Brennan J referred to the *Advisory Opinion on Western Sahara* on the meaning of *terra nullius*.[96] In the Full Federal Court, reference was made recently to the decision of the International Court of Justice in *USA v Iran* (the *Teheran Hostages* case) in order to support an interpretation of the provisions of the Vienna Convention on Diplomatic Relations relating to the protection of diplomatic premises.[97]

(f) from certificates, directions, or opinions of the executive branch of government?

This is not the practice in Australia. See also the answer to Question 9(f) above. There is also no equivalent in Australia of the "executive suggestion" practice in United States courts.

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88 Above, Part A.
89 (1970) 122 CLR 177 at 186, 214.
90 (1977) 138 CLR 346 at 377, 386, 387.
91 *New South Wales and Others v Commonwealth* (1975) 135 CLR 337; 51 ILR 89.
92 (1983) 158 CLR 1 at 222, 223, 226.
93 (1985) 159 CLR 70 at 129.
94 (1991) 172 CLR 501; 91 ILR 1, see especially the judgements of Brennan J and Toohey J.
95 (1992) 176 CLR 77.
96 (1992) 175 CLR 1 at 40–41.
97 *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 321 (French J).

Question 11. Are the courts permitted to hear expert evidence as to the content, meaning, scope, or application, of a treaty or of a rule of customary or general international law? Do the courts on occasion allow such experts to be called, or call them *proprio motu*?

If international law calls for application by the Australian courts it does so by virtue of its incorporation or its posited transformation into municipal law. It is therefore not a "fact" to be proved in evidence but part of the law itself. Thus, in principle, Australian courts would not call for such evidence or allow it to be given. See also the answer to Question 10(a) above.

Question 12. Give, if possible, some good examples of decisions where it is generally accepted that the courts correctly interpreted and applied:

(a) the provisions of a treaty;

It is considered that the High Court cases of *Thiel v Commissioner of Taxation*[98] and *Shipping Corporation of India Ltd. v Gamlen Chemical Co (Australasia) Pty Ltd,*[99] discussed above, are good examples. Another example is the interpretation by Justice Stephen of the High Court of Australia of the Refugees Convention 1951, as providing for no particular method of determining refugee status, and in particular as providing no recognition of the right of an applicant to representation before an eligibility determination committee.[100]

(b) a rule of customary or general international law.

For the reasons given above, the ascertainment and application of a rule of customary international law has not been a crucial issue for an Australian court in recent times. In two older cases dealing with the principles of customary international law concerning the extent of immunity from local jurisdiction of members of visiting armed forces, it is thought that the courts came to a correct conclusion.[101]

Question 13. Give, if possible, examples of decisions which have been criticised by jurists on the ground that the court failed correctly to interpret or apply:

(a) the provisions of a treaty;

No decision has been criticised on this ground.

(b) a rule of customary or general international law.

It is at least arguable that the High Court of Australia accepted a wrong view of the content of a rule of customary international law in the leading case *Polites v Commonwealth.*[102] In that case the applicants, Greek nationals permanently resident in Australia, sought a declaration that they were exempt from conscription into the Australian armed forces during World War II. The court

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98 Above, Question 5.
99 Above, Question 9(a).
100 *Simsek v Macphee* (1982) 148 CLR 636; 87 ILR 121.
101 *Wright v Cantrell* (1943) 44 SR(NSW) 45; 12 ILR 133; *Chow Hung Ching v R* (1948) 77 CLR 449; 15 ILR 147.
102 (1945) 70 CLR 60; 12 ILR 208, referred to above, Part A.

accepted citations from a small number of English-language textbooks dating between 1917 and 1939 as support for this unqualified proposition. But at least by the outbreak of World War II there was divergent opinion, and State practice had begun to recognise that resident aliens could be conscripted for service in the armed forces, provided that the national State consented or even in other circumstances where the alien was not required to serve against his or her own State.[103] In 1942, for example, Great Britain was already conscripting resident aliens, including Greek citizens whose country was under enemy occupation and whose government-in-exile was allied to Britain. This misreading of the law, however, made no difference to the result of the case, because the Australian legislation was held to be clear in its intention to call up resident aliens, and thus had to be applied by the court whether it was contrary to international law or not.

Question 14. Give, if possible, examples of cases where the courts failed to acknowledge the existence or relevance of a treaty or rule of international law in a case which, in the opinion of jurists, arguably required the application of the treaty provision or other rule of international law.

No example can be identified in which Australian courts have failed to acknowledge a treaty requiring application.

In relation to customary or general international law two "missed opportunities"—rather than mistakes—might be suggested.

In *R v Sharkey* (1949) the opportunity was missed by the High Court of Australia to rely on the international law rule that no State may allow its territory to be used in order to launch or incite attacks against other States with which it is at peace as a ground for establishing an "external affair" enlivening Commonwealth legislative powers under Section 51(xxix) of the Constitution. The High Court upheld the provisions of the Commonwealth Crimes Act 1914, under which the defendant was charged with sedition, on other grounds.[104]

A more recent example is the litigation in the Supreme Court of New South Wales and the High Court of Australia concerning the publication of a book *Spycatcher* written by a former officer of Great Britain's MI6.[105] The question of balancing freedom of expression with interests of State security was not argued by counsel, or treated by the courts, in such a way as to suggest that international law norms might furnish assistance.[106]

Question 15. Give, if possible, examples of cases where a court was bound to decide a case in accordance with municipal law (which made no reference to international law in its relevant provisions) but where it

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103 The change is acknowledged by the current editors of one of the textbooks relied on by the Court: Jennings R and Watts A (eds), *Oppenheim's International Law,* 9th ed (1992), vol 1, Parts 2–4, p 907 at n 12.

104 (1949) 70 CLR 121.

105 *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 10 NSWLR 86 (CA); confirmed by the High Court of Australia: (1988) 163 CLR 30.

106 As pointed out by Justice Kirby in his article, n 14 above.

nevertheless sought to justify its decision additionally by reference to international law.

This has not been a frequent practice by the Australian courts. The main examples would appear to be in the fields of law where international norms of human rights have relevance, and these form a relatively recent trend. Justice Kirby, President of the Court of Appeal of the Supreme Court of New South Wales, has figured prominently in this practice[107] which now appears to enjoy the support of the High Court of Australia.[108] These cases are discussed above, Part A(b)(ii). In a case calling for decision entirely under municipal law, being the course of the river boundary between the States of New South Wales and Victoria, the court examined analogies provided by decisions and State practice in relation to international boundaries.[109]

Question 16. Give, if possible, examples of cases where a court was free to decide a case on the basis of international law but preferred to arrive at the same solution under municipal law.

There is no clear-cut example of this, since by virtue of the constitutional relationship between international law and municipal law, discussed above in Part A, and whether the automatic incorporation or transformation (adoption) theories are preferred as explaining this relationship, international law is, or becomes, part of the common law.

The question then becomes rather one of the kind that the High Court decision in *Dietrich v R* [110] illustrates. That case, as Australia's Chief Justice has remarked extracurially, marks the present limits of the willingness of the High Court to have regard to international law norms of human rights.[111] The court noted that article 14(3)(d) of the International Covenant on Civil and Political Rights declares a right of an accused person in criminal proceedings to have legal assistance, without payment if the person has insufficient means. The common law did not, at the time of the hearing of the *Dietrich* case, recognise such a right. The judges, especially those in the higher courts, have the power to change the common law; and the High Court did so in *Dietrich* by declaring that a trial court must stay proceedings in serious criminal cases where the accused is not represented, whether at public expense or not. The court could not, of course, declare as a matter of law a direct right of persons to public funds; but indirectly pressure is thus put on governments as a result of the decision if the prosecuting authorities are to be allowed to proceed in such cases. The court expressly stated that it was exercising its power to declare the common law differently than previously; the international law norm provided at most a comparative yardstick.

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107 See the New South Wales cases, n 60 above.

108 See cases n 60 above, and the case of *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J with Mason CJ and McHugh J concurring).

109 *Hazlett v Presnell* (1982) 149 CLR 107 at 116, 126; 91 ILR 189 at 195–96, 204.

110 (1992) 67 ALJR 1; 109 ALR 385.

111 Sir Anthony Mason, Opening Address, in Shearer IA (ed), *International Law and the Australian Practitioner,* Martin Place Papers No 3, International Law Association, Australian Branch (1993), pp 1–5.

In cases involving the privileges and immunities of foreign States and foreign Heads of State, Australian courts have tended in the past not to use the opportunity to consider and apply principles and rules of customary international law, as part of the common law, but to rely instead on common law precedents.[112] These cases are relatively old; the same isolationist attitude would not necessarily prevail today.

Question 17. Give, if possible, examples of cases where a court considered whether to apply a principle or rule of international law and:

(a) did so in order to fill a gap in municipal law;

The more cautious approach of the High Court of Australia, evidenced in the *Dietrich* case discussed in the previous paragraph, may be contrasted with the approach of Justice Kirby in the line of cases referred to in answer to Question 5, above, and listed in footnote 60. The practical result of the two approaches may be the same, but Justice Kirby has overtly invoked the international law norms and "adopted" them into municipal law where that law is ambiguous or discloses a gap.

(b) decided that it was precluded from doing so by reason of the silence or contrary provisions of municipal law;

Silence, of itself, has not been a bar to the importation of international law norms by the courts to the extent evidenced in the cases discussed above. If the common law has been declared by the courts previously in terms contrary to international law then the common law may either be preferred, or be declared differently in terms consonant with international law, whether expressly invoking the international law principle or not (as in *Dietrich*). Where the contrary provisions of municipal law stem from statute, however, the clear duty of the courts is to apply the statute: *Polites v Commonwealth.*[113] See also the discussion by Justice Kirby in *Young v Registrar, Court of Appeal*[114] of the desirability of applying article 14.5 of the International Covenant on Civil and Political Rights to require an avenue of judicial review of a conviction and sentence for contempt of court, but the court's inability to do so in the face of the clear provisions of statutory law to the contrary.

(c) decided to disregard or overrule any contrary provisions of municipal law.

For the constitutional reasons already explained it would be impossible for an Australian court to disregard or overrule a statute, assuming that there was no ambiguity in the statute allowing for an interpretation consonant with the international law rule. There appears to be no example of an Australian court disregarding or overruling a common law rule in favour of an international law rule, unless *Dietrich* is regarded as being at least in part based on a desire by the

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112 *Van Heyningen v Netherlands Indies Government* [1948] QWN 22; 15 ILR 138; *United States of America v Republic of China* [1950] QWN 6; 17 ILR 168; *Grunfeld v United States of America* (1968) 3 NSWLR 36; *Green v Philippines Consulate-General* [1971] VR 12; *Kubacz v Shah* [1984] WAR 156.

113 (1945) 70 CLR 60; 12 ILR 208, discussed above, Part A(b).

114 Note 81 above.

judges that Australian law be seen to be in step with international law norms. As stated above, however, the High Court in that case disavowed an intention to apply international law directly.

Question 18. Has the issue arisen in the courts of reciprocity of application of treaties or rules of international law under constitutional or statutory provisions, or in the practice of the courts, as a condition of applying such treaties or rules in the municipal forum? (Cf the *exceptio non adimpleti contractus* in Roman Law).

No such issue appears to have arisen in Australia. While certain legislative schemes, for example, extradition, mutual assistance in criminal matters, and recognition and enforcement of foreign civil judgments depend upon treaties providing for reciprocity, none of that legislation assigns to the courts any power to inquire whether reciprocity is being observed. Nor could the courts assume any such power *proprio motu*.

Question 19. Do the higher courts have among their members judges who have previously engaged in higher studies, or practice, in the field of international law? If so, are they usually assigned to sit in cases involving international law?

The judges of Australia's higher courts are normally chosen from the ranks of senior counsel practising at the bar. They are therefore likely to have had wide experience in the law and will have achieved recognition by their peers and superiors of their eminence and suitability for judicial office. There is no specific career or training path for judicial office, as in some other countries. Higher studies in international law are therefore likely to be an accidental accomplishment of some judges rather than a deliberate step towards judicial office. In this manner there are some judges in Australia who are known to have engaged in higher studies in international law at some time, including one Justice of the High Court of Australia who holds the Diploma of the Hague Academy of International Law. The custom of the higher Australian courts of releasing their members for a period of study leave after five years of service is used by many judges to visit universities and other places of learning, where international law may be one of the interests pursued.

There is certainly no formal practice in any Australian court whereby judges especially knowledgable in international law are assigned to particular cases. Nor are examples known where benches have been composed, or judges specially designated, for the purpose of hearing matters involving international law, although this might be done informally at the instance of the chief justice of the court.