Chapter 2

Introduction to International Human Rights Law

1. Executive Summary

- The primary sources of international human rights law are treaties and customary international law.
- The *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* together form what is known as the 'International Bill of Rights.' There are also treaties that deal specifically with discrimination based on race and gender, torture, children, refugees, workers and migrant workers. However, human rights are interdependent and must be considered together when determining a state's human rights responsibilities.
- The two elements of customary international law are state practice and *opinio juris* (the existence of a belief held by states that an international norm is legally binding). Various sources, including those at the intergovernmental, governmental, and non-governmental levels are useful in ascertaining the existence of state practice and *opinio juris*.
- Subsidiary sources of international law include judicial decisions at both the domestic and international levels, 'teachings of the most highly qualified publicists', and the work of treaty committee bodies. A number of treaty committee bodies issue 'Concluding Observations' on state reports, 'Views' on individual complaints and 'General Comments' on the interpretation of the relevant treaty.
- The principles of international law interpretation are largely codified in the *Vienna Convention on the Law of Treaties* and include the following:
    - customary international law continues to exist even after the creation of a treaty-based norm;
    - a treaty must be performed in good faith in accordance with any particular understanding reached by the parties upon entering the treaty;
    - words in a treaty must be given their ordinary meaning, except where a special meaning has been agreed;
    - a treaty must be interpreted in context and in light of its object and purpose;
    - a treaty must be interpreted such that it has effective operation; and
    - a treaty must be interpreted in light of the circumstances prevailing at the time of the interpretation, rather than at the time of agreement.

2. Sources and Content of Human Rights Law

2.1 Introduction

It is well accepted that the sources of international law are enumerated in art 38(1) of the *Statute of the International Court of Justice* ('*ICJ Statute*').[1] They include:

- treaties;
- customary international law;
- the general principles of law recognised by civilized nations; and
- judicial decisions and the teachings of the most qualified publicists.

3. Treaties

Treaties, or international conventions, are the most commonly referred to source of international law and are the first enumerated source in art 38 of the *ICJ Statute*. A treaty is an instrument which imposes binding obligations on the states that become a party to it.[2] Treaties are similar to contracts in that they bind only those that are parties to them. Parties therefore bind themselves to act in a particular way and, via this process, create legal relationships with other parties. It is a basic principle of international law that treaties do not bind non-parties.[3]

3.1 Process of Treaty-Making

Treaties are made via several steps, which usually take several years to complete. The following description of this process is based on the Southern Africa Litigation Centre's practical guide to *International Treaty Obligations in Human Rights Cases*:

- **Pre-negotiations:** Particularly in cases of multilateral treaties, formal intergovernmental negotiations are often preceded by various 'soft-law' (non-binding) instruments such as declarations, resolutions, expert studies and drafts.

[1] Available at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

[2] See art 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'). However, as discussed in Chapter 4, the mere ratification of an international treaty by the executive branch of Australia's federal government does not mean that the treaty immediately becomes part of domestic Australian law. The incorporation of rights and duties under the treaty into domestic Australian law requires the enactment of specific domestic legislation, generally by means of the federal government using its external affairs powers under s 51(xxix) of the *Australian Constitution*.

[3] See Malcolm Shaw, *International Law* (5th ed, 2003) 88.

- **Negotiation:** Treaties involving only a few countries are generally developed through direct negotiations between the countries concerned. In contrast, multilateral negotiations involving many countries often take place under the auspices of an international organisation such as the UN or one of its agencies.
- **Adoption:** This is when the treaty text is finalised. Multilateral treaties negotiated through the UN are often "adopted" by the negotiation committee of the UN General Assembly before being opened for signature.
- **Signature:** Generally, signature of a treaty is merely a preliminary step in the process of becoming bound by a treaty, and does not confer binding obligations on a signatory state. A treaty may, however, provide that a signature itself expresses a state's consent to be bound (though this is generally only true of bilateral treaties). Where signature does not express such an intention to be bound, signatories to a treaty have only the limited obligation to refrain from acts that would 'defeat the object and purpose'[4] of the treaty. With a few exceptions (such as the President or Foreign Minister) a person signing a treaty must show that he or she has authority to do so.
- **Ratification:** Unless a treaty provides that signature expresses the state's consent to be bound, signatories must also ratify the treaty in order for its terms to become binding on that state. There is a different ratification process for each country and the process is frequently set out in a country's Constitution (although not in Australia's case).
- **Accession:** When a state accepts an offer or opportunity to become a party to a treaty that has already been negotiated and signed by other countries, then that state is said to have 'acceded' to the treaty. Accession has the same legal force as ratification and generally occurs after the treaty has entered into force.
- **Entry into force:** Bilateral treaties usually enter into force (ie become legally effective) after both sides have consented to be bound. Multilateral treaties may specify that a particular number of states must ratify or accede to the treaty in order for it to enter into force. After a treaty enters into force those states that have expressed their consent to be bound by the treaty (through signature, ratification or accession, as the case may be) are referred to as 'parties' to the treaty or 'states parties'.
- **Treaty termination and withdrawal:** Some treaties contain specific provisions addressing termination and withdrawal. If a treaty does not contain such provisions, the default rules in the *VCLT* apply. Grounds for termination and withdrawal include: mutual agreement (arts 38 and 59); material breach (art 60); supervening impossibility of performance (art 61); and fundamental change of circumstances (art 62).

[4] *VCLT*, above n 2, art 18.

- **Reservations:** In multilateral treaties, reservations have the effect of excusing a state from the application of a substantive provision of the treaty if that state has declared its intention not to be bound by the provision. As defined by the *VCLT*, a 'reservation' means

  > a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

  Where a reservation is made to a substantive provision in a bilateral treaty the effect will be that of a 'counter offer', requiring the renegotiation of the treaty. Lawyers should be aware of any reservations claimed by their government with respect to any of the human rights guarantees. Some provisions are considered to be so central to the object and purpose of the treaty in question that no reservations are permitted.

3.2 Key Multilateral Human Rights Treaties

There are nine key multilateral treaties relevant to human rights law:[5]

- *International Covenant on Civil and Political Rights*;[6]
- *International Covenant on Economic Social and Cultural Rights*;[7]
- *International Convention on the Elimination of all Forms of Racial Discrimination*;[8]
- *Convention on the Elimination of all Forms of Discrimination against Women*;[9]
- *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*;[10]
- *Convention on the Rights of the Child*;[11]

[5] The Office of the High Commissioner for Human Rights ('OHCHR') website lists all international treaties and instruments relating to human rights: http://www.ohchr.org/english/law/index.htm.

[6] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), available at http://www.ohchr.org/english/law/ccpr.htm.

[7] Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), available at http://www.ohchr.org/english/law/cescr.htm.

[8] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), available at http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

[9] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.

[10] Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987), available at http://www.ohchr.org/english/law/cat.htm.

[11] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), available at http://www.ohchr.org/english/law/crc.htm.

- *Convention relating to the Status of Refugees*;[12]
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*;[13] and
- *Rome Statute of the International Criminal Court*.[14]

These (and other) international treaties are interpreted and applied according to rules codified in the *VCLT*. Sometimes called 'the treaty on treaties', the *VCLT* is an authoritative source of law containing 'default' rules and principles of interpretation. It applies when a treaty is silent on an issue, but it is subordinate to the express provisions of other treaties.

This section outlines the important features of each of these treaties, as well as several other relevant international instruments. Subsequent chapters provide further detail as to how the rights contained in the various international instruments may influence and become part of the law in Australia[15] and as to the mechanisms by which these rights are monitored and may be enforced.[16]

From the outset, it is important to note that while the international human rights instruments are each independent, it is the stated intention of the United Nations that they be considered together when determining a state's human rights responsibilities.[17]

3.3 *Universal Declaration of Human Rights*

The *Universal Declaration of Human Rights* ('*UDHR*')[18] is not technically a treaty. It is a resolution of the General Assembly and so, unlike a treaty, is not formally legally binding (except by operation of customary international law[19]), but it enshrines a broad normative

[12] Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), available at http://www.ohchr.org/english/law/refugees.htm.

[13] Opened for signature 2 May 1991, 30 ILM 1517 (1991) (entered into force 1 July 2003), available at http://www.ohchr.org/english/law/cmw.htm.

[14] Opened for signature 17 July 1998, 37 ILM 999 (1998) (entered into force 1 July 2002), available at http://www.un.org/law/icc/index.html.

[15] See Chapter 4 – Implementation of Human Rights in Domestic Law and Courts.

[16] See Chapter 6 – International Human Rights Law Monitoring, Reporting and Complaints Mechanisms.

[17] OHCHR, *Fact Sheet No 30: The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, 20–1, available at http://www.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf.

[18] GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (1948), available at http://www.un.org/Overview/rights.html.

[19] There is now wide acceptance that certain provisions of the *UDHR*, for example the bans on torture and racial discrimination, are now rules of customary international law and are therefore binding on all nations,

platform of human rights which are widely agreed upon. It has considerable moral and rhetorical force as the first internationally agreed definition of human rights. Its force is enhanced by the fact that it was drafted in the aftermath of World War II, when so many of the rights the *UDHR* contains were so grossly violated.

The process of converting the *UDHR* into a legally binding form commenced immediately upon its adoption in 1948. The initial idea was to enshrine the *UDHR*'s rights in a single covenant as a means of preserving the interdependence of human rights, although this was subsequently abandoned in favour of multiple covenants. The rights enumerated in the *UDHR* were later given fuller form in the *ICCPR*,[20] the *ICESCR*[21] and other instruments. The *UDHR*, *ICCPR* and *ICESCR* together form what is often known as the 'International Bill of Rights'.

The first article of the *UDHR* provides that 'all human beings are born free and equal in dignity and rights'. Article 2 goes on to set out a non-exhaustive list of prohibited grounds for discrimination. These include, among others, religion, race or colour, and political or other opinion. Significantly, both the *ICCPR* and *ICESCR* also include the same list of prohibited grounds of discrimination. Australia has enacted legislation to implement some of these prohibited grounds of discrimination, including those in respect of race,[22] disability,[23] age[24] and sex.[25]

Article 3 declares a person's right to life, liberty and security of person. Articles 4 to 21 set out other civil and political rights such as the right to seek and enjoy asylum and the right to freedom of movement and residence.

Articles 22 to 27 detail a number of economic, social and cultural rights. Article 22 introduces this section of the *UDHR* and provides that a person is entitled to these rights 'as a member of society'. However, the article also recognises that the achievement of these aims is dependent upon the resources of individual states. This notion of 'progressive realisation' of economic, social and cultural rights is discussed further in Chapter 3. Examples of the rights enshrined in this part of the *UDHR* include the right to education and the right to equal pay for equal work.

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and not merely parties to international treaties. Some, though not all, commentators also suggest that the entire document has attained this legal status. See OHCHR, *Fact Sheet No. 30*, above n 17, 9.

[20] Above n 6.

[21] Above n 7.

[22] *Racial Discrimination Act 1975* (Cth) and *Racial Hatred Act 1995* (Cth). See also state and territory racial discrimination legislation, such as the *Racial and Religious Tolerance Act 2001* (Vic).

[23] *Disability Discrimination Act 1992* (Cth).

[24] *Age Discrimination Act 2004* (Cth).

[25] *Sex Discrimination Act 1984* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth); *Equal Opportunity for Women in the Workplace Act 1999* (Cth); *Human Rights (Sexual Conduct) Act 1994* (Cth).

Although the rights enumerated in the *UDHR* have been divided into two treaty instruments, the *ICCPR* and the *ICESCR*, the preambles and Parts I of the two Covenants are substantially the same in stating, among other things, that the different categories of human rights (that is, economic, social, cultural, civil and political) are interdependent,[26] and that all people have a right to self-determination.

For further information on the *UDHR*, see the following resources:

- OHCHR, *Fact Sheet No 2: The International Bill of Rights (Rev 1)*, available at http://www.ohchr.org/english/about/publications/docs/fs2.htm.
- OHCHR, *Fact Sheet No 30: The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, available at http://www.ohchr.org/english/about/publications/docs/fs30.pdf.
- Barend van der Heijden and Bahia Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (1998).

3.4 *International Covenant on Civil and Political Rights*

The *ICCPR* enshrines almost all of the civil and political rights contained in the *UDHR*. The main exception is the right to seek and enjoy asylum (which is implicitly contained in the *Convention relating to the Status of Refugees*[27]). However, the *ICCPR* also includes additional rights for detainees (art 10) and minorities (art 27).

Due in large part to its alignment with the liberal legal tradition of many western democracies, the *ICCPR* is perhaps the best accepted international human rights treaty, and has been less controversial than, for example, the *ICESCR*. This is reflected in the reluctance of most governments and legislatures to expressly pass laws to protect the so-called 'second generation' rights — that is, economic, social and cultural rights — as compared to the relative widespread implementation of the rights in the *ICCPR* into domestic legal systems.

Australia became a signatory to the *ICCPR* in 1972 and ratified the *Covenant* in 1980. While the *ICCPR* has not been comprehensively implemented in Australia, it is attached as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which empowers the Commonwealth Human Rights and Equal Opportunity Commission ('HREOC') to investigate alleged violations of *ICCPR* rights. However, HREOC has no powers of enforcement.

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[26] The interdependence of human rights has been affirmed by the UN General Assembly in 1986 in the *Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc A/RES/41/128 (1986) and more recently in the *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993).

[27] Above n 12.

Under art 2(2) of the *ICCPR*, states parties undertake to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the *ICCPR*. Article 2 of the *ICESCR* is expressed in similar terms. The implementation of human rights is discussed in Chapter 3.

Article 2(1) of the *ICCPR* contains a right to non-discrimination in the enjoyment of the rights contained in the *ICCPR*. This right is reiterated in art 26, though in the latter case it is a stand alone right to non-discrimination, and is therefore of broader application. Article 26 is discussed further below.

Aside from the right to non-discrimination, the substantive rights of the *ICCPR* are contained in Part III. Articles 6 to 11 are aimed at the protection of a person's life, liberty and physical security. These articles contain the prohibitions on torture and 'cruel, inhuman or degrading treatment or punishment' (art 7), the prohibitions on slavery and forced labour (art 8), and provisions that deal with the rights of a person who has been deprived of their liberty (for example, by arrest or other detention) (arts 9 and 10).

Articles 12 and 13 set out provisions that deal with the movement of people into, out of and within a state.

Articles 14 to 16 provide for the fair treatment of people by the judicial system. The right to a fair trial is covered by art 14 (an important provision given the right to an effective remedy enshrined in art 2), while arts 15 and 16 respectively prohibit retrospective punishment of crime and confer the right to be recognised as a person under the law.

Articles 17 to 22 enshrine various freedoms which should be enjoyed without unjustified intervention:

- the individual's right to privacy (art 17);[28]
- the freedom of thought and religion (art 18);
- the freedom of opinion and expression (art 19) (although art 20 places limits on this right in the context of expressions of national, racial or religious hatred, and advocacy of war);
- the right to peaceful assembly (art 21); and
- the right to freedom of association (notably including trade unions) (art 22).

Articles 23 and 24 deal with family issues and the rights of children.[29]

Article 25 enshrines the right to political participation, including the rights to vote and to be elected at genuine elections.

[28] This right is specifically protected in Australia under the *Privacy Act 1988* (Cth).

[29] The rights of children are given fuller form in the *Convention on the Rights of the Child*, above n 11, discussed below at Part 3.9.

Article 26, together with arts 2 and 14, is fundamental to the *ICCPR*. Article 26 gives the right to equality under the law, equal protection by the law, and non-discrimination. The UN Human Rights Committee — a body established to monitor the implementation of the *ICCPR* by states parties — has interpreted this provision as applying to all law, not just the provisions contained in the *Covenant*. It is therefore considered to be an autonomous right.[30] Article 27, the last article of Part III, guarantees ethnic, linguistic and religious groups the right to enjoy their own culture, to use their own language and to practice their own religion.

Part IV of the *Covenant* requires states parties to regularly report to the HRC. The HRC issues 'Concluding Observations' on these states' reports as well as 'General Comments' which are important sources of jurisprudence on the *ICCPR*.[31]

There are two supplementary Optional Protocols to the *ICCPR*. The first Optional Protocol (1966)[32] gives the right to an individual to petition the HRC. The *ICCPR* communications process is discussed further at Chapter 6.[33] Australia acceded to the first Optional Protocol in 1991. The purpose of the second Optional Protocol (1989)[34] is to promote the abolition of the death penalty. Article 1 of this Protocol requires states parties to ensure that no capital punishment is ever imposed on anyone anywhere in their territory, invoking art 3 of the *UDHR* and art 6 of the *ICCPR*, both of which refer to the right to life as a fundamental human right. Australia acceded to the second Optional Protocol in 1990.

For further information on the *ICCPR*, see the following resources:

- Sarah Joseph, Jenny Schultz and Melissa Castan, *The* International Covenant on Civil and Political Rights*: Cases, Materials and Commentary* (2nd ed, 2004).
- Alex Conte, Scott Davidson and Richard Burchill (eds), *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2004).

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[30] See HRC, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the* Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004); *Young v Australia*, HRC, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (6 August 2003) (concerning discrimination on the basis of sex or sexual orientation regarding entitlements under the *Veterans' Entitlements Act 1986* (Cth)).

[31] The Committee's General Comments and Concluding Observations, along with other useful information about the Committee, are available from http://www.ohchr.org/english/bodies/hrc.

[32] *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), available at http://www.ohchr.org/english/law/ccpr-one.htm.

[33] Chapter 6 discusses international human rights complaints, monitoring and reporting mechanisms.

[34] *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

- OHCHR, *Fact Sheet No 15: Civil and Political Rights: The Human Rights Committee (Rev 1)*, available at http://www.ohchr.org/english/about/publications/docs/fs15rev.1_en.pdf.
- UN Human Rights Committee homepage, available at http://www.ohchr.org/english/bodies/hrc.

3.5 *International Covenant on Economic, Social and Cultural Rights*

Australia signed the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[35] in 1972 and ratified the *Covenant* in 1975.

As with the *ICCPR*, the main substantive provisions are found in Part III of the *ICESCR*. Aside from the right to non-discrimination (which is detailed in art 2 within Part II), the key economic, cultural and social rights specified are the rights to:

- work (art 6);
- just and favourable conditions of work (art 7);
- form trade unions (art 8);
- social security (art 9);
- protection of the family (art 10);
- an adequate standard of living (art 11);
- health (art 12);
- education (arts 13 and 14); and
- participation in cultural life (art 15).

Each of these rights is explained in considerably more detail in the *ICESCR* than in the *UDHR*, as befits the *ICESCR*'s nature as a legally-binding treaty. For example, art 12 not only provides for a right to the highest attainable standards of health but also sets out several issues that should be addressed by states parties in realising this goal, including the improvement of all aspects of industrial and environmental hygiene. Similarly, the provision for the right to work in art 6 is accompanied by further detail as to health and safety, remuneration on public holidays, and equal promotion opportunities in art 7. The right to education contained in arts 13 and 14 is another example. Unlike the *UDHR*, the *ICESCR* specifies the obligation to secure compulsory primary education free of charge and to take steps towards achieving free secondary and higher education.

Unlike the *ICCPR*, the *ICESCR* makes allowance for states parties to gradually attain 'the full realization of the rights recognised in [the *Covenant*]',[36] reflecting the idea of

[35] Above n 7.

progressive development first articulated in the *UDHR*. This, along with other similar provisions in the *ICESCR*, recognises the different levels of resources available to states parties in pursuing the *Covenant*'s goals.[37] It does, however, impose an immediate obligation on states to take deliberate, concrete and targeted steps towards the full realisation of the rights of the *ICESCR*. The implementation of economic, social and cultural rights is discussed in Chapter 3.

Part IV requires all states parties to regularly report to the Economic and Social Council which, in 1985, created the Committee on Economic, Social and Cultural Rights ('CESCR')[38] to monitor the implementation of the *Covenant*'s terms.[39] The CESCR issues Concluding Observations on the reports of states parties as well as General Comments, which are important sources of jurisprudence on the *ICESCR*.[40] There is not, as yet, an Optional Protocol to the *ICESCR* establishing an individual complaints mechanism, although one has been drafted.

For further information on the *ICESCR*, see the following resources:

- M Magdalena Sepúlveda, *The Nature of the Obligations under the* International Covenant on Economic, Social, and Cultural Rights (2003).
- Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002).
- Center for Economic and Social Rights: http://www.cesr.org.
- OHCHR, *Fact Sheet No 16: The Committee on Economic, Social and Cultural Rights (Rev 1)*, available at http://www.ohchr.org/english/about/publications/docs/fs16.htm.
- UN Committee for Economic, Social and Cultural Rights homepage, available at http://www.ohchr.org/english/bodies/cescr/index.htm.

3.6 *International Convention on the Elimination of All Forms of Racial Discrimination*

Due in large part to the looming presence of the apartheid regime in South Africa at the time, the *International Convention on the Elimination of All Forms of Racial Discrimination*

[36] *ICESCR*, above n 7, art 2(1).

[37] See **Chapter 3** for a more detailed consideration of the implementation of economic, social and cultural rights.

[38] The CESCR was established on 28 May 1985 by resolution 1985/17 of the Economic and Social Council.

[39] See **Chapter 6** for a more detailed consideration of the monitoring process.

[40] General Comments of the CESCR are available at http://www.ohchr.org/english/bodies/cescr/comments.htm.

('*ICERD*')[41] was the first international human rights treaty to be formed, giving binding force to the relevant provisions of the *UDHR*.

Australia signed the treaty in 1966 and ratified it in 1975. The federal parliament has enacted the *Racial Discrimination Act 1975* (Cth) and the *Racial Hatred Act 1995* (Cth) to give effect, in part, to Australia's obligations under *ICERD*.

Article 1 of *ICERD* defines racism as

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Articles 2 to 7 then set out states parties' obligations, which include, among other things:

- not to engage in any act of discrimination against individuals or groups;
- not to sponsor, support or defend racial discrimination by people or organisations;
- to prohibit and stop such discrimination; and
- to ensure that individuals have access to effective protection and remedies against acts of racial discrimination.

In art 5, *ICERD* enumerates a number of specific human rights across civil, political, economic, social and cultural areas — most of which are highlighted in the *UDHR* — and states that they must be protected without racial discrimination. Examples include:

- the right to security of a person (art 5(b));
- political rights (art 5(c));
- economic, social and cultural rights, such as equal pay for equal work and just conditions of work (art 5(e)); and
- the right to facilities and services intended for the public (art 5(f)).

Part II establishes the Committee on the Elimination of Racial Discrimination and requires all participating states to report to it on a regular basis.[42] Article 14 also gives states the option to recognise the Committee's competence to hear complaints from individuals. Australia has recognised the Committee's competence under article 14. Australia has recognised the Committee's competence under article 14. The Committee issues General Comments (known by this particular Committee as General Recommendations), Concluding Observations on the reports of states parties and 'Views' in respect of individual complaints under art 14. Although not strictly binding, these are important

[41] Above n 8.

[42] See **Chapter 6** for a more detailed consideration of the monitoring process.

sources of jurisprudence on *ICERD,*[43] providing interpretative guidance on a binding legal instrument.

For further information on the *ICERD*, see:

- OHCHR, *Fact Sheet No 12: The Committee on the Elimination of Racial Discrimination*, available at http://www.ohchr.org/english/about/publications/docs/fs12.htm.
- UN Committee on the Elimination of Racial Discrimination homepage, available at http://www.ohchr.org/english/bodies/cerd/index.htm.

3.7 *Convention on the Elimination of all Forms of Discrimination against Women*

The *ICCPR* and *ICESCR* both prohibit discrimination on the basis of sex (among other things) in general terms. However, in 1979, the *Convention on the Elimination of all Forms of Discrimination against Women* ('*CEDAW*')[44] was adopted in order to specifically address this area. Australia signed the treaty in 1980 and ratified it in 1983. *CEDAW* is partly incorporated into domestic legislation through the *Sex Discrimination Act 1984* (Cth), the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth), and the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

CEDAW is generally based on the format of *ICERD* but contains a number of provisions which go beyond the scope of the racial discrimination treaty. Article 1, in almost identical terms to the corresponding article in *ICERD*, states that discrimination against 'women' (which includes women and girls) is

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

However, an important difference between the definitions in *ICERD* and *CEDAW* is that *CEDAW* is not limited to 'fields of public life' but extends into 'any other field' including the private sphere.

Again, as in *ICERD*, the following articles place obligations on states to both avoid discriminating on the basis of sex in their own right and to take steps to ensure that women have real equality. Specific examples of these provisions include a duty to take all appropriate measures to ensure that women are not discriminated against by

[43] The Committee's General Comments and Concluding Observations, along with other useful information about the Committee, are available from http://www.ohchr.org/english/bodies/cerd.

[44] Above n 9.

individuals or organisations and, if discrimination does occur, to ensure that women have access to effective legal remedies (art 2). Article 5 further provides that education programs should be directed at modifying social behaviours and values in accordance with the aims of the treaty.

Articles 6 to 16 of *CEDAW* move beyond the scope and level of obligations under the older *ICERD* and impose more specific obligations on states parties:

- regarding the issues of trafficking in women and forced prostitution (art 6);[45]
- to ensure that men and women may participate equally in public and political life (arts 7 and 8);
- to ensure equality in the right to a nationality and access to education (arts 9 and 10);
- regarding women's equal rights to employment, health services and other similar areas (arts 11 to 13);
- to address the problems peculiar to women in rural areas (art 14); and
- regarding women's rights to equality before the law and in relation to marriage and family (arts 15 and 16).

Part V of *CEDAW* requires all states parties to regularly report to the Committee on the Elimination of Discrimination against Women, which was established to supervise the adoption of the treaty provisions. An Optional Protocol exists which, like art 14 of *ICERD*, allows the Committee to hear complaints from individuals.[46] Australia has not adopted the protocol.

The Committee on the Elimination of Discrimination against Women issues General Comments and Concluding Observations on the reports of states parties, as well as on individual complaints under the Optional Protocol, which are important sources of jurisprudence on *CEDAW*.[47]

For further information on *CEDAW*, see:

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[45] Article 6 of the *CEDAW* is complemented by the *United Nations Convention Against Transnational Organised Crime* and the *Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children* (*'Trafficking Protocol'*) and the *Protocol Against Smuggling of Migrants by Land, Sea and Air ('Smuggling Protocol'),* both of which contain provisions designed to protect victims of trafficking or smuggling and also impose positive obligations on state parties to adopt protective and remedial measures.

[46] *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, GA Res 54/4, GAOR, 54th sess, 28th plen mtg, UN Doc A/RES/54/4 (1999), available at http://www.ohchr.org/english/law/cedaw-one.htm. The Optional Protocol opened for signature on 10 December 1999 and entered into force on 22 December 2000.

[47] The Committee's General Comments and Concluding Observations, along with other useful information about the Committee, are available from http://www.un.org/womenwatch/daw/cedaw/.

- OHCHR, *Fact Sheet No 22: Discrimination against Women: The Convention and the Committee* http://www.ohchr.org/english/about/publications/docs/fs22.htm.
- UN Committee on the Elimination of All Forms of Discrimination against Women homepage, available at http://www.un.org/womenwatch/daw/cedaw/.

3.8 *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*

Like *CEDAW* and *ICERD*, the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* ('*CAT*')[48] is aimed at, and further amplifies, the specific protection of certain human rights mentioned in other covenants. The right to freedom from torture exists in general terms in art 7 of the *ICCPR*, but *CAT* provides significantly more detail and creates a system for the prevention and punishment of torture and like practices.

Australia signed the *CAT* in 1985 and subsequently ratified the *Convention* in 1989. *CAT* is not fully implemented into Australian domestic law but some of its provisions are given effect by the *Crimes (Torture) Act 1988* (Cth).

Article 1 of the *CAT* defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

It is important to note that this definition of torture is more restrictive than that in the *ICCPR* as it covers only acts performed by persons acting in a 'public' or 'official' capacity.

Article 2 of *CAT* makes it clear that torture cannot be justified in any circumstances. Article 3 provides for '*non-refoulement*' — the principle that a person may not be forcibly returned or sent to another country where there are substantial grounds to believe that they would be subjected to torture.

Articles 4 to 9 set out an international system for the punishment of perpetrators of torture. These provisions give jurisdiction to a state whose citizens were responsible for or the subject of the alleged torture, or on whose territory the act occurred. To facilitate

[48] Above n 10.

this, the provisions also allow for extradition of alleged offenders from any country. The aim is to ensure that there is no hiding place for those who violate the treaty.

Articles 10 and 11 go to the education of law enforcement officers and provide for review of their behaviour. Articles 12 to 14 give rights to efficient and unbiased investigations into torture allegations, and fair compensation and rehabilitation for the victim. Article 16 provides that evidence garnered by torture cannot be used in a court. Article 17 places an obligation on states parties to prevent the other forms of behaviour alluded to in the *Convention*'s title — cruel, inhuman or degrading treatment.

Part II of the *Convention* establishes the Committee against Torture and requires states parties to report to it regularly. Articles 22 and 23, like art 14 of *ICERD*, allow states to recognise the competence of the Committee to hear complaints from individuals. Australia has recognised the competence of the Committee under arts 22 and 23 and individual complaints have been brought against Australia. The Committee against Torture issues General Comments and Concluding Observations on the reports of states parties, as well as Views on individual complaints under arts 22 and 23, which are important sources of jurisprudence on the *CAT*.[49]

For further information on the *CAT*, see:

- OHCHR, *Fact Sheet No 4: Combating Torture (Rev 1)* http://www.ohchr.org/english/about/publications/docs/fs4rev1.pdf.
- UN Committee Against Torture homepage, available at http://www.ohchr.org/english/bodies/cat/index.htm.

3.9 *Convention on the Rights of the Child*

Children are of course entitled to all of the rights and protections set out in other, more general, human rights treaties. However, the *Convention on the Rights of the Child* ('*CRC*')[50] focuses on these rights as they apply to the special circumstances of people under the age of 18 years. Both the *ICESCR* and *ICCPR* had already recognised a special need to protect children's interests (arts 10 and 24 respectively) but the CRC provides far greater detail.

Australia signed and ratified the *CRC* in 1990. The *CRC* has not been fully implemented into Australian domestic law. However, as is the case with the *ICCPR*, HREOC has power under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to investigate alleged breaches of the *CRC*, although it does not have any power to impose penalties.

[49] The Committee's General Comments and Concluding Observations, along with other useful information about the Committee, are available from http://www.ohchr.org/english/bodies/cat.

[50] Above n 11.

The Committee on the Rights of the Child has highlighted four principles in the *CRC* that should act as guiding values in implementing laws relating to children's rights:

- all children within a state should be able to enjoy the rights accorded to them under the *CRC* without discrimination (art 2);
- the best interests of a child should always be considered when making decisions affecting that child (art 3);
- regard should be had to a child's inherent right to life, survival and development (art 6); and
- due weight (according to the child's age and maturity) should always be given to the views of a child when making decisions affecting that child (art 12).[51]

Other examples of the detailed measures of protection set out in the *Convention* include provisions which confer on the child a right to identity (arts 7 and 8), and those which deal with the separation of children from their parents (art 9), reunification of families (art 10), and the protection of children from abuse (art 19). The particular circumstances of child refugees are considered at art 22. Recognising the particular vulnerabilities of children, the *CRC* also provides specific protections from economic exploitation (art 32), drug abuse (art 33), sexual exploitation (art 34) and abduction, sale or trafficking (art 35). Article 23 provides particularly for the care of children with disabilities. Article 38 reasserts states' obligations in armed conflict under international humanitarian law, and requires them neither to recruit nor, where possible, utilise children under 15 years of age as soldiers in conflict.

The *CRC* goes beyond simply elaborating the special protection to be accorded to children and sets out the archetypal civil, political, economic, social and cultural rights from the perspective of children. Thus, children are confirmed as enjoying the fundamental rights outlined in the *ICCPR* and *ICESCR*. Examples include the rights to privacy (art 16), access to health services (art 24), and social security (art 26).

There are two optional protocols to the *CRC*, one dealing with the involvement of children in armed conflict,[52] and the other aiming to prohibit and eliminate the worst forms of child labour (such as prostitution and pornography).[53] Australia signed the former protocol in 2002 and the latter in 2001, but it has only ratified the former (which it did in 2005).

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[51] Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7 (1 November 2005).

[52] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, GA Res 54/263, GAOR, 54th sess, 97th plen mtg, Annex I, UN Doc A/RES/54/263 (2000), available at http://www.ohchr.org/english/law/crc-conflict.htm. The Optional Protocol was opened for signature on 25 May 2000 and entered into force on 12 February 2002.

[53] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, GA Res 54/263, UN GAOR, 54th sess, 97th plen mtg, Annex II, UN Doc

Concluding Observations and General Comments of the Committee on the Rights of the Child are important sources of jurisprudence on the *CRC*.[54]

For further information on the *CRC*, see:

- OHCHR, *Fact Sheet No 10: The Rights of the Child (Rev 1)* http://www.ohchr.org/english/about/publications/docs/fs10.htm.
- UN Committee on the Rights of the Child homepage, available at http://www.ohchr.org/english/bodies/crc/index.htm.

3.10 *Convention relating to the Status of Refugees*

The *Convention relating to the Status of Refugees* ('*Refugee Convention*')[55] is the central multilateral treaty defining who a refugee is and the obligations of states parties in relation to refugees.

Australia ratified the *Refugee Convention* on 22 January 1954. Australia has made reference to the *Refugee Convention* in the *Migration Act 1958* (Cth). However, in recent years, many of the protections to which refugees are entitled have been eroded by legislative amendments.

In the determination of refugee status, there are two key articles in the *Refugee Convention*: arts 1 and 33.

Article 1(A) sets out the legal definition of a refugee, providing that a refugee is:

- a person who is outside his /her country of nationality or habitual residence; and
- has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and
- is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution.

It is important to note that, to satisfy the refugee definition under art 1(A), the causal nexus between a well founded fear of persecution and one of the five Convention grounds needs to be satisfied.

Article 1(C) identifies the circumstances in which a person ceases to be a refugee, and recognises that protection under the *Refugee Convention* applies for as long as it is required, which may not be indefinitely. Arts 1(D) and 1(E) set out circumstances in

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A/RES/54/263 (2000), available at http://www.ohchr.org/english/law/crc-sale.htm. The Optional Protocol was opened for signature on 25 May 2000 and entered into force on 18 January 2002.

[54] The Committee's General Comments and Concluding Observations, along with other useful information about the Committee, are available from http://www.ohchr.org/english/bodies/crc/index.htm.

[55] Above n 12.

which a person is not entitled to protection under the *Refugee Convention*. Art 1(F) outlines the grounds on which a person may be excluded from protection on account of, for example, serious non-political crimes, war crimes or crimes against humanity.

Article 33 spells out the key obligation of '*non-refoulement*', under which a state party must not

> expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The obligation of *non-refoulement* is also enshrined in art 3(1) of the *CAT* (which provides that no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that person would be in danger of being subjected to torture) and art 7 of the *ICCPR* (which has been interpreted to provide that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement).[56]

The *Refugee Convention* also includes a number of important provisions outlining states parties' protection obligations. These include:

- the requirement that states parties must apply the provisions of the *Refugee Convention* to refugees without discriminating on the basis of race, religion or country of origin (art 3); and
- the requirement that states parties must treat refugees within their territories in a manner at least as favourable as their nationals with respect to freedom of religion and religious education of their children (art 4);
- the right of access to the courts (art 16);
- rights to gainful employment (arts 17-19), welfare (arts 20-24), free movement and non-penalization for illegal entry (arts 26 and 31), and naturalization (art 34).

For further information on the *Refugee Convention*, see:

- UN High Commissioner for Refugees, *UNHCR — The UN Refugee Agency*, http://www.unhcr.org/cgi-bin/texis/vtx/home.
- E Feller, V Türk, and F Nicholson, *Refugee Protection in International Law* (2003).
- Guy S Goodwin-Gill, *The Refugee in International Law* (1996).
- James C Hathaway, *The Law of Refugee Status* (1991).

[56] Human Rights Committee, *CCPR General Comment No 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)*, [9], UN Doc HRI/GEN/1/Rev.5 (2001).

3.11 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

Like the *CRC*, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ('*ICRMW*')[57] is aimed at protecting the rights of a particular group of people — migrant workers and their families. The *ICRMW* is also the most recent of the key human rights treaties.

The *Convention*'s provisions cover the entire migration process: from the time before departure from the state of origin, through the departure and transit, to the period of stay in a receiving state and the return to the sending state. Most of the obligations and rights created by the *ICRMW* relate to the receiving state but some are specific to the sending state.

Articles 1 and 7 of the *Convention* outline the usual prohibition of discrimination against people exercising rights under the *Convention*. Article 2 defines a migrant worker to be 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.

The *Convention* then proceeds to identify rights of migrant workers in two separate parts. Part III applies to *all* migrant workers and members of their families regardless of whether or not they are of official status. Part IV of the *ICRMW* applies to *documented* migrants and their families. The rights outlined in Part IV are to be enjoyed in addition to those found in Part III. This distinction has enabled the priority of overcoming the problems of irregular migration to be maintained while at the same time ensuring that the rights of undocumented migrant workers are recognized.

The sections of the *Convention* dealing with civil and political rights are couched in very similar terms to those in the *ICCPR*. Many of the relevant articles are restatements of *ICCPR* provisions with an emphasis on the special circumstances of migrant workers. Examples include the right to notification of relevant consular officials upon arrest of a migrant worker (art 16), and a prohibition on collective expulsion of migrant workers and their families (art 22).

Cultural, economic and social rights of migrant workers and their families are enumerated according to the particular status and/or class of the person concerned. All migrant workers, for example, are entitled to a minimum level of emergency health care equivalent to that which would be provided to a national of the receiving state (art 28). Similarly, art 30 provides that the children of all migrant workers, regardless of status, are entitled to the basic right of access to education. Documented migrant workers and their families are given additional rights such as equivalent treatment to nationals of the receiving state in the context of access to social and health services, education and

[57] Above n 13.

participation in cultural life (arts 43 and 45). By virtue of Part V, these additional rights vary according to the particular class of migrant worker involved (as defined in art 2).

Part VII of the *ICPRW* establishes the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and requires that states parties report regularly to the Committee. Articles 76 and 77 of the *Convention* allow the Committee to hear complaints by individuals or other states parties provided the state party involved accepts the competence of the Committee to do so.

At the time of writing Australia had not become a party to the *ICRMW*.

For further information on the *ICRMW*, see:

- OHCHR, *Fact Sheet No 24: The* International Convention on Migrant Workers *and its Committee (Rev 1)*, available at http://www.ohchr.org/english/about/publications/docs/fs24rev1.pdf.
- UN Committee on Migrant Workers homepage, available at http://www.ohchr.org/english/bodies/cmw/index.htm.

3.12 Reading the Treaties as a Whole[58]

As mentioned earlier, human rights are interdependent. It therefore follows that a full understanding of a state's obligations under the above treaties is only possible by reading all the human rights treaties to which a state has become party together as a whole. Rather than being separate, free-standing treaties, the treaties complement each other, with a number of principles binding them together.

Read together, it becomes clear that each treaty incorporates, explicitly or implicitly, the basic principles of non-discrimination and equality, obligations to ensure effective protection against violations of rights, and obligations to implement special measures of protection for the particularly vulnerable. An understanding of the human being as being an active and informed participant in the public life of the state in which he or she is located and in decisions affecting him or her, rather than a passive object of authorities' decisions, is also incorporated.

All of the treaties, based on these common principles, are interdependent, inter-related and mutually re-enforcing, with the result that no rights can be fully enjoyed in isolation, but depend on the enjoyment of all other rights. This interdependence is one reason for crafting a more coordinated approach by the human rights treaty bodies to their activities, in particular by encouraging states to see implementation of the provisions of all of the treaties as part of a single objective.

[58] This section is based largely on OHCHR, *Fact Sheet No 30*, above n 17.

These UN treaties are not a definitive list of a state's human rights obligations. Other treaties, including the ILO Conventions — such as *ILO Convention 182 on the Worst Forms of Child Labour*, or ILO *Convention 169 on Rights of Indigenous Peoples* — are instruments with obvious and important human rights dimensions. All of these international legal obligations should be considered together when evaluating a state's responsibility to protect human rights.

3.13 International Criminal Law — The *Rome Statute* and the International Criminal Court

Australia has been bound since 2002 by the *Rome Statute of the International Criminal Court* ('*Rome Statute*').[59] The *Rome Statute* establishes the International Criminal Court ('ICC'), which enjoys permanent jurisdiction in relation to what are considered criminal breaches of human rights law, irrespective of where they may occur.

Shortly prior to its ratification of the *Rome Statute*, Australia enacted the *International Criminal Court Act 2002* (Cth), which established procedures to enable Australia to comply with requests for assistance from the ICC. Australia also enacted the *International Criminal Court (Consequential Amendments) Act 2002* (Cth), which amended the *Criminal Code Act 1995* (Cth) to create Australian offences 'equivalent to' the crimes of genocide, crimes against humanity and war crimes under the *Rome Statute*.

The crimes which fall within the jurisdiction of the ICC are generally considered to be the most heinous of international crimes — those which in the words generally attributed to the Dutch scholar Grotius, 'shock the conscience of humanity', words now contained in the preamble to the *Rome Statute*. These crimes are:

- genocide,[60] which means the doing of certain acts with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group;
- crimes against humanity,[61] which refers to systemic breaches of human rights including mass or systematic rape, displacement of peoples, enslavement, enforced disappearance and apartheid;
- war crimes,[62] which in general terms refers to grave breaches of the *Geneva Conventions*; and
- crimes of aggression, once detailed provisions are agreed between the states parties.[63]

[59] Above n 14.

[60] Ibid art 6.

[61] Ibid art 7

[62] Ibid art 8

In order for the ICC to have jurisdiction in relation to a trial concerning an individual, either the accused's state of nationality[64] or the state in which the alleged crime occurred[65] must be a party to the *Rome Statute*.

The ICC has four limitations which must be noted.

First, the ICC only has jurisdiction over natural persons, not corporations or other legal entities.[66]

Secondly, the ICC is not afforded retrospective jurisdiction,[67] and therefore does not have jurisdiction over crimes alleged to have been committed before June 2002 (the time at which the *Rome Statute* came into force).

Thirdly, states have primary jurisdiction over the alleged crimes.[68] This means the ICC will only have jurisdiction if the relevant state is unwilling or unable to exercise jurisdiction.

Fourthly, the UN Security Council has the power to stop a prosecution by passing a resolution.[69] Members of the Security Council then have the power to veto that resolution, in accordance with art 27(3) of the *Charter of the United Nations*.

A detailed explanation of the intended role and function of the ICC, and the likelihood of it becoming an effective forum for the international pursuit of justice, is beyond the scope and purpose of this Manual. Currently, the type of case most likely to be brought against an Australian national before the ICC would be in relation to members of the Australian Defence Force, or possibly government ministers, for offences committed in conflict situations abroad.

The *Rome Statute* enshrines a principle of 'complementarity', which means the ICC will only have jurisdiction where national courts are unwilling or unable to investigate or prosecute a case. The ICC has no jurisdiction over any Australian court. Accordingly, even if a case over which the ICC would have jurisdiction could be brought by or against an Australian national, that person is more likely to be tried for the alleged crimes in Australia under Australian law given that art 17 preserves the primary jurisdiction of the state party.

For further information regarding the *Rome Statute* and the ICC, see the following resources:

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[63] See ibid art 5(2).

[64] Ibid art 12(1)

[65] Ibid art 12(2)

[66] Ibid art 25(1).

[67] Ibid art 11

[68] Ibid art 17

[69] Ibid art 16.

- Philippe Sands, Ruth Mackenzie and Yuval Shany (eds), *Manual on International Courts and Tribunals* (1999).
- Mahnoush Arsanjani, 'The *Rome Statute of the International Criminal Court*' (1999) 93 *American Journal of International Law* 22.
- Gillian Triggs, 'Implementation of the *Rome Statute for the International Criminal Court*: A Quiet Revolution' (2003) 25 *Sydney Law Review* 507, available at http://austlii.law.uts.edu.au/au/journals/SydLRev/2003/23.html.
- International Criminal Court homepage, available at http://www.icc-cpi.int/home.html&l=en.

3.14 Workers' Human Rights and the International Labour Organisation

Since it was established under the 1919 Treaty of Versailles, the the International Labour Organisation ('ILO') has sought to promote social justice and internationally recognised human and labour rights. The ILO's principal activity has been the formulation of international labour standards and their effective implementation. As outlined above, the human rights of workers are articulated in the instruments that comprise the International Bill of Rights.[70] The ILO has expanded upon these rights in 185 conventions aimed specifically at the protection of labour rights.

From the ILO conventions, it is possible to ascertain four key labour rights, which are in turn protected in eight core ILO conventions:

(a) freedom of association and the right to organise and bargain collectively, as detailed in, for example:

- *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No 87); and
- *Right to Organise and Collective Bargaining Convention*, 1949 (No 98);

(b) freedom from forced or compulsory labour, as detailed in, for example:

- *Forced Labour Convention*, 1930 (No 29);[71] and
- *Abolition of Forced Labour Convention*, 1957 (No 105);

(c) freedom from discrimination in employment, as detailed in, for example:

[70] *UDHR*, above n 18, arts 20, 23 and 24; *ICCPR*, above n 6, arts 21 and 22; *ICESCR*, above n 7, arts 6, 7 and 8.

[71] Article 1 of which defines forced labour as labour for the purpose of political coercion, education/punishment for different ideological views, or mobilising and using labour for economic development.

- *Discrimination (Employment and Occupation) Convention*, 1958 (No 111); and
- *Equal Remuneration Convention*, 1951 (No 100);[72] and

(d) freedom from harmful child labour, as detailed in, for example:

- *Minimum Age Convention*, 1973 (No 138);[73] and
- *Worst Forms of Child Labour Convention*, 1999 (No 182).[74]

While Australia is party to 58 of the ILO's 185 conventions, it has not ratified the two core conventions on child labour.

The four key labour rights (as protected in the eight core ILO conventions) are further protected by the *ILO Declaration on Fundamental Principles and Rights at Work* (1998) ('*DFPRW*'), art 2 of which provides that even if members to the *DFPRW* have not ratified the eight core ILO conventions, they have obligations based on their membership to the ILO to respect, promote and realise the fundamental rights enshrined in the conventions.

The ILO has three supervisory bodies:

- the Committee of Experts on the Application of Conventions and Recommendations ('CEACR'), which monitors and reports on ILO member states' compliance with the ILO Conventions;[75]
- the Conference Committee on the Application of Standards, which conducts further, public examinations of serious cases already reviewed by the CEACR; and
- the Committee of Freedom of Association ('CFA'), which hears complaints of states' alleged violations of freedom of association principles. The CFA's jurisdiction to hear such complaints is based on the *ILO Constitution*.[76] Therefore, a state need only be an ILO member, and need not have ratified the freedom of association conventions to have a complaint brought against it.

Various pieces of federal and state legislation are designed to regulate the employer/employee relationship in Australia. These include the *Workplace and*

[72] Article 2 of which states that men and women are to be paid equal remuneration for equal work.

[73] Article 2(3) of which protects children from working until they are able to leave school, or at a bare minimum, until they are 15 years old.

[74] Article 3 of which protects children under the age of 18 from working as slaves, prostitutes, or in illicit activities or work which is likely to harm their health, safety or morals.

[75] Further information on the Committee can be found at http://www.ilo.org/public/english/standards/norm/applying/committee.htm.

[76] See arts 24 to 29 of the *ILO Constitution*.

Employee Relations Act 1996 (Cth),[77] as well as state and federal anti-discrimination laws and equal opportunity legislation. From an international human rights perspective, there are some areas of concern with Australia's labour laws, including the failure to overcome indirect discrimination against women and indigenous people in the labour force,[78] and (given the private ownership of prisons) the regulation of the work performed by prisoners.[79] In addition, the implementation of WorkChoices has increased the individualisation of employment relations in Australia.[80] The threat WorkChoices poses to freedom of association and the right to collectively bargain is serious.

For further information on workers' human rights and the ILO, see the following resources:

- Jean-Michel Servais, *International Labour Law* (2005).
- CCH Australia, *Understanding WorkChoices: A Practical Guide to the New Workplace Relations System* (2006).
- International Labour Organisation homepage, available at http://www.ilo.org.

4. Customary International Law

4.1 Elements of Customary International Law

Customary international law has a crucial role to play in international human rights law, and has played a significant role in international humanitarian law.[81] In addition to being the second of the four major sources of international law listed in art 38(1) of the *ICJ Statute*,[82] the concept of customary international law, or custom, is referred to in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*[83] and in the

[77] Unless an exception applies, all matters within the employee/employer relationship come under the federal scheme: *Workplace and Employee Relations Amendment (Work Choices) Act 2005* (Cth) s 7C(1). ('WorkChoices'). Therefore, state workplace laws are now largely insignificant.

[78] Andrew Stewart, *The Work Choices Legislation: An Overview* (2006).

[79] Ibid.

[80] Ibid.

[81] See International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2005).

[82] Above n 1.

[83] *Statute to the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/927 (1993) art 3, available at http://www.un.org/icty/legaldoc-e/index.htm.

definitions of 'war crimes' under the *Rome Statute*[84] and the *Statute of the Iraqi Special Tribunal.*[85]

The *ICJ Statute* describes customary international law as 'evidence of a general practice accepted as law',[86] but does not set out any specific criteria for assessing what might be considered a 'general practice', or how to determine whether a state accepts that compliance with that practice is required as a matter of law.

Two criteria for customary international law were identified by the ICJ in the *North Sea Continental Shelf Cases*: state practice (an objective element) and *opinio juris* (a subjective element).[87]

(a) State Practice

State practice includes the various acts, omissions and statements of state representatives and entities. There is no fixed rule as to how much of this material constitutes sufficient evidence of state practice to support the existence of a customary rule. It must, however, be 'extensive and virtually uniform'.[88]

There are several sources of information that can be used as evidence of state practice. They can be broken down into intergovernmental sources, government sources, and non-government sources. Intergovernmental sources include the documents and proceedings of institutions such as the UN. The UN Bibliographic Information System ('UNBISNET')[89] and the UN Documentation Centre[90] are particularly useful. Available materials include:

- the proceedings of international conferences;
- documents related to sessions or meetings of the various UN organs (including the General Assembly, Security Council, and Economic and Social Council);
- state submissions;
- country reports;
- speeches made in the various UN organs;

[84] Above n 14, art 8.

[85] Article 13, available at http://www.iraqispecialtribunal.org/en/about/statute.htm.

[86] *ICJ Statute* art 38(1)(b).

[87] [1969] ICJ Rep 3.

[88] Ibid [74].

[89] See http://unbisnet.un.org.

[90] See http://www.un.org/documents.

- Security Council resolutions;[91] and
- General Assembly resolutions (including, for example, the *Universal Declaration of Human Rights*).[92]

On the domestic front, legislation,[93] case law,[94] policy papers, government media releases and declarations, and other government papers can be useful indicators of state practice.[95] It may also be helpful to consider the domestic legislation and government practices of other common law jurisdictions, such as the United Kingdom, New Zealand, Canada, South Africa, and the United States , all of which have some form of bill of rights protection.[96]

Finally, newspapers and other media, academic publications, online databases, and the output of non-governmental organisations such as Amnesty International (http://www.amnesty.org) and Human Rights Watch (http://www.hrw.org) also provide relevant information.[97]

There will be many instances in which potentially relevant information simply is not published or otherwise available, particularly in relation to developing states.

(b) Opinio Juris

Opinio juris (short for *opinio juris sive necessitatis*) is the second element of customary international law and refers to the existence of a belief held by states that an international norm is legally binding. The belief needs to be 'so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it'.[98] This can be very difficult to prove given its infamously circular nature.

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[91] See http://www.un.org/docs/sc.

[92] See http://www.un.org/ga.

[93] Lawlex facilitates an integrated search of all Australian federal, state and territory legislation and bills databases: see http://research.lawlex.com.au.

[94] Austlii provides databases of the decisions by most Australian federal, state and territory courts and tribunals: see http://www.austlii.edu.au.

[95] See, eg, the human rights section of the Department of Foreign Affairs and Trade (http://www.dfat.gov.au/hr) and the HREOC website (http://www.humanrights.gov.au). At the state level, see the Victorian Equal Opportunity Commission website (http://www.equalopportunitycommission.vic.gov.au/index.asp).

[96] Worldlii is a good starting point for researching the domestic legislation of other jurisdictions such as the United Kingdom, New Zealand, Canada, South Africa, and the United States: see http://www.worldlii.org.

[97] See also, eg, the Civil Rights Network (http://www.civilrightsnetwork.org), Save the Children UK (http://www.savethechildren.org.uk), Human Rights First (http://www.humanrightsfirst.org/index.asp) and Oxfam (http://www.oxfam.org.uk).

[98] Gillian Triggs, *International Law: Contemporary Principles and Practice* (2006) 48.

The distinction between state practice and *opinio juris* is not always obvious and it is not easy to separate them. Many of the sources outlined above in relation to state practice can also be used to establish the existence of *opinio juris*.

Opinio juris can be useful where evidence of state practice is lacking but the norm in question is compelling. This is particularly important when it comes to human rights. The right to freedom from torture, for example, is violated by a great many states on a daily basis, but contrary state practice does not necessarily mean that it is not considered a legally binding norm.[99] There is little doubt, however, that even the states violating this right are aware of the widely accepted right to freedom from torture. In fact, state practice which might on an initial view appear to contradict the existence of a customary rule may instead serve to strengthen it. If the derogation is condemned by other states, or if the state in question denies or attempts to justify or excuse the conduct in question, this may serve as evidence that a rule is generally recognised as being binding.[100]

4.2 The Persistent Objector

Some commentators argue that states that persistently object to an emerging customary rule are not bound by that rule due to their sovereign status.[101] Such assertions would need to be backed up by a consistent history of state practice opposing the rule or denying its existence or validity.

4.3 Jus Cogens

Generally, where a conflict arises between the principles of customary international law and treaty law provisions, the treaty law will prevail.[102] However there are some fundamental principles of international law, called *jus cogens*, or peremptory norms, which are customs that have become so well-accepted that no derogation is permitted. Article 53 of the *VCLT*[103] expressly recognises this prohibition, although it fails to specify any *jus cogens* norms itself.

Commonly accepted *jus cogens* norms relating to human rights include:[104]

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[99] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep [1986] 14, 98.

[100] Ibid.

[101] Triggs, above n 98, 55.

[102] Of course, a state which is not party to the relevant treaty law will not necessarily be bound by the treaty law.

[103] Above n 2.

[104] For further discussion, see Triggs, above n 98, 450; Henry Steiner and Philip Alston, *International Human Rights Law in Context* (2nd ed, 2000) 225, 230.

- the prohibition of torture;
- the prohibition of apartheid;
- the prohibition of genocide;
- the prohibition of aggression;
- the right to self-determination;
- the prohibition of racial discrimination;
- the prohibition of slavery; and
- the prohibition of piracy.

The *Restatement (Third), Foreign Relations Law of the United States* also includes the following:

- 'the murder or causing the disappearance of individuals';
- 'prolonged arbitrary detention';
- 'systematic racial discrimination'; and
- 'a consistent pattern of gross violations of internationally recognized human rights'.[105]

The list is not exhaustive and may continue to evolve.

4.4 Treaties and Custom

Customary law and treaty law are deeply interrelated and should be considered together. In doing so, it is important to be mindful of the differences between the two. While treaties require signature and ratification before a particular state is bound, customary law automatically applies to all states (including newly emerging states) except arguably to persistent objectors. Also, customary law is not affected by the uncertainties surrounding when a treaty becomes binding, or the extent to which it is binding, which can depend on the treaty's history of signature, ratification, accession, implementation and reservation. However, customary law is less certain and in some ways it is harder to monitor and enforce compliance with its principles. While treaties may provide for the creation of institutions or enforcement mechanisms, customary law depends on a much more precarious foundation of discovery and interpretation.

Custom may be influential when treaties are being drafted. The interpretation of treaty law is also affected by the existence of custom. Conversely, a widely ratified, frequently referenced and generally supported treaty can be powerful evidence of state practice

[105] *Restatement (Third) of the Foreign Relations Law of the United States* (1987) Vol 2, § 702; Steiner and Alston, above n 104, 230.

pointing to the formation of a new custom. This is explicitly provided for in art 38 of the *VCLT*, which proclaims that:

> Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

The International Court of Justice in the *Israeli Wall Case*[106] considered this to have already happened to the *Hague Regulations* and there is a lively debate over whether the provisions of the major human rights treaties have attained customary status.

It is important to note that treaty law does not necessarily supplant customary law. In some cases treaties are considered to codify existing custom. For instance, in the Nuremberg trials following World War II the *Hague Convention of 1907* was considered declaratory of customary international law, the provisions of which were therefore applicable and binding on non-signatory states.

4.5 Customary International Law in Australia

Most of the above discussion relates to the status of customary international law in the international system. This will be relevant in supporting arguments made before international institutions such as the UN Human Rights Committee.

Generally, customary international law does not have any formal legal status in the Australian legal system,[107] but its principles may be useful in making arguments relating to the interpretation of human rights when making submissions to bodies such as HREOC, the various parliamentary scrutiny of legislation committees, or state bodies such as the Victorian Equal Opportunity Commission.

4.6 Further Resources

For further information about customary international law, see the following resources:

- Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (1999).
- Anthony D'Amato, *The Concept of Custom in International Law* (1971).
- Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).

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[106] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2003] ICJ Rep [89].

[107] See **Chapter 4** for a more detailed consideration of the relationship between domestic and international law.

- Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed, 1997).
- Karol Wolfke, *Custom in Present International Law* (1993).

5. Jurisprudence

5.1 Judicial Decisions and the Teachings of the Most Highly Qualified Publicists

In addition to treaties and international custom, art 38 of the *ICJ Statute* also prescribes 'judicial decisions and teachings of the most highly qualified publicists' as a subsidiary source of international law.

5.2 Judicial Decisions

Judicial decisions do not occupy the same position in international law as they do in domestic Australian law. There is no doctrine of *stare decisis* — the rule that prior decisions are authoritative and binding and must be followed — although in practice international courts frequently refer to earlier decisions and attempt to maintain consistency.

The decisions of international courts, tribunals and quasi-judicial bodies are highly influential as evidence of state practice, even though they do not constitute state practice themselves. They bind the particular states concerned in the dispute, influence the future conduct of other states, and provide persuasive evidence that a rule they consider to exist actually does exist.

Decisions of the International Court of Justice[108] and its predecessor, the Permanent Court of International Justice,[109] are now available online. Other important institutions in this regard include:

- the European Court of Human Rights,[110]
- the Inter-American Court of Human Rights,[111]
- the African Court on Human and Peoples' Rights,[112]
- the International Labour Organization,[113] and

[108] See http://www.icj-cij.org.

[109] See http://www.icj-cij.org/icjwww/idecisions/icpij.

[110] See http://www.echr.coe.int/echr.

[111] See http://www.corteidh.or.cr/index_ing.html.

[112] See http://www.achpr.org/english/_info/news_en.html.

- the WTO Appellate Body.[114]

The International Court of Justice is empowered under Chapter IV of its *Statute* to provide advisory opinions to any body authorised by the UN to request them. Article 96 of the *UN Charter* gives this authority to the General Assembly and the Security Council. The General Assembly may also authorise other UN organs and specialised agencies to request advisory opinions 'on legal questions arising within the scope of their activities'.

Generally, international judicial decisions do not have any significant weight in the Australian legal context. Notably however, Brennan J's oft-cited decision in the *Mabo v Queensland (No 2)* judgment provides:

> 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.[115]

Similarly, in the recent case of *Royal Women's Hospital v Medical Practitioners Board of Victoria*,[116] Maxwell P of the Supreme Court of Victoria:

> informed counsel for both sides that the court would be assisted, on the hearing of the appeal, by submissions dealing with the relevance of international human rights conventions, and the associated jurisprudence, to the questions before the court.[117]

For further information about judicial decisions as a source of international human rights law, see the following sources:

- Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence* (2002).

5.3 Publicists

Historically the 'teachings of the most highly qualified publicists'[118] have held a much more lofty position in the hierarchy of international legal sources than they have domestically. Writers such as Grotius, Vattel and Oppenheim have all been widely quoted as authority for various international law propositions. However with the

[113] See http://www.ilo.org.

[114] See http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

[115] (1992) 175 CLR 1, 234.

[116] [2006] VSCA 85.

[117] [2006] VSCA 85, [70]. See **Chapter 4** for a more detailed discussion of the relationship between domestic and international law.

[118] *ICJ Statute* art 38(1)(d).

development of an increasing body of case law, the stabilisation of multilateral institutions, and the increasing multiplicity of opinions manifesting themselves in international legal writing, the role of the publicist at least in the development of law appears to be diminishing.[119]

5.4 Treaty Bodies

The complaints mechanisms attached to the committees set up under the various human rights treaties allow the committees to generate their own 'jurisprudence', even though they are not technically judicial bodies. They include:

- the Human Rights Committee (see the *First Optional Protocol to the International Covenant on Civil and Political Rights*);[120]
- the Committee on Economic, Social and Cultural Rights (see the *Optional protocol to the Covenant on Economic, Social and Cultural Rights*);[121]
- the Committee against Torture (see art 22 of the *CAT*);[122]
- the Committee on the Elimination of Racial Discrimination (see art 14 of the *ICERD*);[123]
- the Committee on the Elimination of Discrimination against Women (see the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*);[124] and
- the Committee on Migrant Workers (see art 77 of the *ICPMW*, although note that this article has yet to come into effect).[125]

There is currently no individual complaint mechanism that directly relates to the Committee on the Rights of the Child. However, drafting has begun on an individual complaint mechanism for the CRC.

As well as the complaints jurisprudence, the committees periodically issue General Comments on particular aspects of their respective treaties, which provide useful insights into the interpretation of rights and their practical application.

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[119] See Triggs, above n 96, 93–4.

[120] See above n 31; http://www2.ohchr.org/english/bodies/hrc.

[121] http://www2.ohchr.org/english/bodies/cescr.

[122] See above n 48; http://www2.ohchr.org/english/bodies/cat.

[123] See above n 43; http://www2.ohchr.org/english/bodies/cerd.

[124] See above n 46; http://www.un.org/womenwatch/daw/cedaw/.

[125] See http://www2.ohchr.org/english/bodies/cmw.

5.5 Further Resources

There are numerous useful guides for researching international human rights jurisprudence:

- Marci Hoffman and Jill McC. Watson (eds), *ASIL Guide to Electronic Resources for International Law* (2003) http://www.asil.org/resource/home.htm.
- Kent McKeever, Columbia Law School, *Researching Public International Law* (2006) http://www.law.columbia.edu/library/Research_Guides/internat_law/pubint.
- Silke Sahl, Columbia Law School, *Human Rights Research — Frequently Asked Questions* (2006) http://www.law.columbia.edu/library/Research_Guides/internat_law/humrts.
- *University of Minnesota Human Rights Library* (2005) http://www1.umn.edu/humanrts/index.html.

6. Principles of International Human Rights Law Interpretation

6.1 Introduction

As discussed at Section 3.12 above, there is a principle that the international human rights treaties should be 'read as a whole' so as to promote the interdependence, indivisibility and mutually reinforcing nature of human rights.

In addition to this principle, the general public international law principles of treaty interpretation also apply to the interpretation of international human rights treaties and instruments.

The primary source of principles for the interpretation of international treaties is the *VCLT*,[126] which codifies long-accepted norms of treaty interpretation. Australia has been a party to the *VCLT* since 1974. While the *VCLT* has not been ratified by all states, the International Court of Justice has ruled that it now holds the status of customary international law and thus even states not party to it are bound by its provisions.[127]

There are two important articles in the *VCLT* for the interpretation of human rights treaties: arts 31 and 32.

[126] Above n 2.

[127] *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep 6; *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 6.

6.2 Article 31 — General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practices in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

6.3 Article 32 — Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

The remainder of this section of the manual discusses the specific principles that emanate from these provisions.

It is useful to note from the outset that a foundational principle of treaty interpretation is that customary international law continues to exist even after the creation of a treaty-based norm.[128]

6.4 Principle of Interpretation in Good Faith

The principle of interpretation in good faith flows as a direct consequence of the codification of the principle of *pacta sunt servanda* in art 31(1) and more specifically in art 26 of the *VCLT*, which provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'

The principle requires that where a treaty is entered into on the understanding that it will be applied or construed in a particular manner, parties may not resile from the agreed application or construction.

6.5 Principle of Ordinary Meaning

Articles 31(1) and 31(4) together provide that words in treaties are to be given their 'ordinary meaning', except where a 'special meaning' has been agreed upon by the parties.

The commentary suggests that the use of 'ordinary meaning' in art 31 does not import a strict 'plain meaning' requirement into the interpretation of treaties, as is demonstrated by the emphasis placed on contextualisation. Accordingly, the Inter-American Court of Human Rights in the *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art 64 American Convention on Human Rights) (Advisory Opinion)* judgment emphasised that an 'ordinary meaning' should not be restricted beyond the limits naturally implied in the language employed. The Court held that where 'a restrictive purpose was not expressly articulated, it cannot be presumed to exist.'[129]

6.6 Principle of Interpretation in Context

The principle that a treaty provision must be interpreted in context and 'in the light of its objects and purpose' emanates from arts 31(1), 31(2) and 31(3). It is similar to the domestic Australian law principle that statutes should be read in accordance with the intent of the legislature.

The purpose and objects of a treaty may be determined by reference to:

[128] See the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [78], [84].

[129] OC-1/82, 24 September 1982, [37].

- the text of the treaty, including its preamble and annexes (art 31(2));
- an agreement made between the parties in connection with the conclusion of the treaty, that relates to the treaty (such as a protocol) (art 31(2)(a));
- an instrument made by one or more of the parties in connection with the conclusion of the treaty that is accepted by the other parties as related (art 31(2)(b));
- a subsequent agreement between the parties regarding interpretation or application (including a supplementary treaty) (art 31(3)(a));
- subsequent state practice among the parties establishing agreement about interpretation (art 31(3)(b));
- relevant principles of public international law (art 31(3)(c)); and
- where necessary to confirm or clarify the meaning resulting from an application of art 31, the preparatory work of the treaty (the *travaux préparatoires*) and the circumstances of its conclusion (art 32). Note, however, that the *travaux préparatoires* are only a supplementary source of information in interpreting treaties, in the same way that explanatory memoranda are used to interpret Australian domestic legislation.

This purpose-driven approach has been confirmed by the European Court of Human Rights, which held in *Wemhoff v Germany* that it is incumbent on the court 'to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty'.[130]

The process of determining purposes and objects in respect of human rights treaties must also take into account the special nature of human rights treaties. This was identified by the International Court of Justice in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, where the Court noted that the states parties to a human rights treaty generally do not gain any advantage for themselves by entering the treaty, but rather incur obligations and grant particular rights to individuals not party to the agreement.[131] The implication of this for treaty interpretation is that parties to such treaties are taken to have a common interest or purpose in entering the treaty.

6.7 Effectiveness Principle

It is implicit in the purpose-driven approach required by art 31 that treaties must be interpreted in a manner such that they have effective operation. This was enunciated by the European Court of Human Rights in *Soering v United Kingdom* in respect of the

[130] (1968) 1 EHRR 55, [8].

[131] [1951] ICJ Rep 15, 23.

European Convention on Human Rights, where it was stated that 'the object and purpose of the *Convention* as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective'.[132] Thus, for example, in *Airey v Ireland*, the European Court held that art 6 of the *Convention*, which guarantees the right to a fair trial, 'may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.'[133]

Considerations of effectiveness must therefore affect any judicial conclusion as to the practical effect of a human rights treaty provision.

6.8 'Dynamic Interpretations' Principle

The 'dynamic interpretations' principle, like the effectiveness principle, flows from the art 31 requirement that treaties be interpreted according to their 'objects and purposes'.

Under this principle, the standards against which rights are assessed are not static, and thus the most effective interpretation of them will necessarily be dynamic and adjusted to conditions at the moment of interpretation. This was expressed by the European Court of Human Rights in the case of *Tyrer v United Kingdom*, where treaties were described as 'living instruments which … must be interpreted in the light of present day conditions'.[134] The *Tyrer* case concerned whether the corporal punishment of prisoners constituted cruel, inhuman or degrading treatment or punishment contrary to art 3 of the *European Convention on Human Rights*, with the Court holding that judicial corporal punishment was institutionalised violence (*Tyrer*, para 33) and an assault on the recipient's dignity and physical integrity.[135]

The Court has regularly reiterated this idea. Moreover, the International Court of Justice has also stated that treaties must be read and applied in the international legal environment prevailing at the time of the interpretation, rather than at the time of agreement.[136]

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[132] (1989) 11 EHRR 439, [87]. See also *Airey v Ireland* [1979] ECHR 3 (9 October 1979) [24].

[133] *Airey v Ireland* [1979] ECHR 3 (9 October 1979) [26].

[134] (1978) 2 EHRR 1, [16].

[135] (1978) 2 EHRR 1, [33].

[136] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) (Advisory Opinion)* [1971] ICJ Rep 16, 31.

The dynamic nature of treaty instruments is perhaps one reason why the preparatory materials associated with treaties are relegated to a secondary role in interpretation in art 32. Accordingly, courts have been willing to intentionally depart from the intentions of drafters in order to give full effect to the object of particular treaties. For example, the European Court of Human Rights stated in *Loizidou v Turkey*:

> That the *Convention* is a living instrument which must be interpreted in the light of present day conditions is firmly rooted in the Court's case-law … It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.[137]

6.9 Other Interpretation Issues

Treaty interpretation is far from an exact science. However, when interpreting human rights treaty provisions, courts and practitioners can at least find guidance in arts 31 and 32 of the *VCLT* and the customary law principles that contextualise them. The unique nature of human rights instruments means that it is also vitally important to evaluate their provisions with a view to practical implementation and their continual evolution.

6.10 Further Resources

For further information about the principles of international human rights law interpretation, see the following resources:

- Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48.
- Peter McRae, 'The Search for Meaning: Continuing Problems with the Interpretation of Treaties' [2002] *Victoria University of Wellington Law Review* 8.

7. Further Online Human Rights Law Resources

Office of the UN High Commissioner for Human Rights

www.ohchr.org

The OHCHR contains useful information about, and full text links to, international human rights law and jurisprudence, the various UN treaty monitoring bodies, and a significant library of reports and publications.

[137] (1995) 20 EHRR 99, [71].

INTERIGHTS

www.interights.org

INTERIGHTS aims to enforce human rights through law; to strengthen human rights jurisprudence and mechanisms through the use of international and comparative law; and to empower legal partners and promote their effective use of law to protect human rights. The website includes a searchable database of international and Commonwealth human rights law and jurisprudence.

Bayefsky.com

www.bayefsky.com

Bayefsky.com includes a searchable database of international human rights jurisprudence, including by state, by category, by treaty, by treaty article, by theme or subect and by key word.

University of Minnesota Human Rights Library

www1.umn.edu/humanrts/

The University of Minnesota Human Rights Library houses one of the largest collections of more than twenty-five thousand core human rights documents, including several hundred human rights treaties and other primary international human rights instruments. The site also provides access to more than four thousands links and a unique search device for multiple human rights sites.

American Society of International Law Guide to Electronic Resources for Human Rights Law

http://www.asil.org/resource/humrts1.htm

This Guide contains links to electronic sources on human rights law. The Guide also includes general tips for doing research as well as for locating necessary documents and materials. The scope of the Guide encompasses both primary and secondary sources (including documents from non-governmental organizations).

American Society of International Law Guide to Research on Treaties

http://www.asil.org/resource/treaty1.htm

Treaties are among the primary sources of international law. This Guide gives guidance on how to go about treaty research, with a particular emphasis on electronic resources.

International Human Rights Research: Guide to Selected Sources

http://www.hku.hk/ccpl/research_resources/humanrightsguide/index.html

The purpose of this Research Guide is simply to point you in the direction of some research guides, reference works, major primary sources, treatises, and websites that may assist you in finding what you need for a particular purpose.

World Legal Information Institute

www.wordlii.org

The World Legal Information Institute contains legislation and cases from 86 countries and 21 international databases.

Kate Eastman's Webpage

http://www.kateeastman.com/humanrights/humanrights.htm

Kate Eastman is a NSW human rights barrister. Her webpage contains useful information about international human rights law in Australia, including summaries of, and hyperlinks to, individual communications to the HRC, CAT and CERD and periodic reports submitted by Australia.

Human Rights & Equal Opportunity Commission

http://www.humanrights.gov.au/human_rights/index.html

HREOC is Australia's national human rights institution. Its functions under the *Human Rights and Equal Opportunity Commission Act* include promoting human rights in Australia.

Equal Opportunity Commission Victoria

http://www.equalopportunitycommission.vic.gov.au/index.asp

The Equal Opportunity Commission Victoria is an independent statutory authority created under the *Equal Opportunity Act 1995* (Vic) to administer two of Victoria's key pieces of human rights legislation, the *Equal Opportunity Act* and the *Racial and Religious Tolerance Act 2001* (Vic). The EOCV will also have monitoring and reporting functions under the *Victorian Charter of Human Rights and Responsibilities*.

Australian Human Rights Centre

http://www.ahrcentre.org/

The Australian Human Rights Centre is an inter-disciplinary research and teaching institute based in the Faculty of Law at the University of New South Wales. The AHRC aims to increase public awareness about human rights procedures, standards and issues within Australia and the international community. The Centre undertakes research projects on contemporary human rights issues and provides accessible information on developments within the field.

Australian Lawyers for Human Rights

http://www.alhr.asn.au/

Australian Lawyers for Human Rights (ALHR) is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia.

Castan Centre for Human Rights

http://www.law.monash.edu.au/castancentre/

The Castan Centre was established to meet the need for, and interest in, the study of human rights law, globally, regionally and in Australia. It seeks to bring together the work of national and international human rights scholars, practitioners and advocates from a wide range of disciplines in order to promote and protect human rights. The Centre's key activities are research, teaching, public education (lectures, seminars, conferences, parliamentary submissions, internships and media presentations), applied research, advice work and consultancies.

Alternative Law Journal

www.altlj.org

The *Alternative Law Journal* is a quarterly refereed law journal which focuses on social justice, human rights, access to justice, progressive law reform and legal education. The Journal has a diverse readership among legal practitioners, judges, policy makers, law students and legal studies students.

Australian Journal of Human Rights

www.austlii.edu.au/au/journals/AJHR/

The *Australian Journal of Human Rights* is a publication of the Australian Human Rights Centre (AHRC). The Journal is devoted exclusively to the publication of articles, commentary and book reviews about human rights developments in Australia and the Asia-Pacific region.

Australian Department of Foreign Affairs and Trade Human Rights Unit - www.dfat.gov.au/hr

Amnesty International

www.amnesty.org

Human Rights Watch

www.hrw.org