I - INTERNATIONAL LAW IN GENERAL

International law in Australian foreign policy - application of Western principles of law in Asia-Pacific region - self-determination - statehood - basic rights and freedoms - sovereign immunity - compulsory third party settlement of disputes - negotiating styles - environmental law - speech by Australian Foreign Minister

On 30 March 1989, the Minister for Foreign Affairs and Trade, Senator Gareth Evans, addressed the Australian Branch of the International Law Association in Sydney on "International Law and Australia's Interests". Part of his speech was as follows:

> As far as Australia is concerned, the particular international legal tradition we have inherited and which we practise is Western, and a great deal of it is British. We attach great importance to fundamental norms such as "pacta sunt servanda" (the principle that agreements between States are to be respected); international customary rules governing international responsibility for breaches of international law and liability to pay compensation for injury and damage; traditional territorial sea and high seas rights and obligations; concepts of adverse possession in the acquisition of territory; the criteria of statehood; and notions of territorial sovereignty, aggression, self-defence, neutrality and humanitarian intervention. We have subscribed to a variety of human rights treaties, particularly in the anti-discrimination area, and are one of the few countries to have adopted the compulsory jurisdiction of the International Court of Justice without reservations. We have been very active in the negotiation of treaties, declarations and resolutions on disarmament, conservation and the protection of the environment.
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> Above all, we take our international obligations very seriously. I do not wish to be understood by this to say that other countries in the region do not. But we take pains to observe to the full rules of international customary law and, once we subscribe to a treaty, we abide by its requirements in every detail.
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> This purist view is part of our legal heritage. In some other parts of the world, and our region, international legal instruments are seen more as a statement of intent than a legally binding obligation. This is not to say that these states consider themselves free to ignore treaties or agreements. Rather, their view of problem-solving is not to appeal to the fine print of treaties so much as to work out a solution with which all parties can live. In short they place much less authority than we might on what a treaty says, and tend to the view that there are no legal answers to problems, only political answers in the broad sense of that term.
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> To Australian governments, the international legal order is an essential element in relations between states. It provides a framework for promoting peace, order and predictability in international relations, and for promoting cooperation between nations and the adoption of new international and

national standards to meet common challenges. We have criticised foreign states, including close allies, when that order has been violated, even when such violations have not involved Australia as a party principal (eg Australia voted in favour of the UN resolutions critical of the United States' invasion of Grenada in 1982 and the US refusal, last November, to give Yasser Arafat access to the United Nations as required under the Headquarters Agreement). We protest vigorously against abuses of human rights, whether they occur in our region or elsewhere. In other words, we treat violations of international law as matters of international concern.

We have a clearly defined interest in being, and being seen to be, a good international citizen. As I have already argued in an ANU address last December, part of the Government's role involves the projection into foreign policy of basic values of the Australian community: values which are at the core of our sense of self and which the population at large expects its Government to pursue. It is proper, if for no other reason than to maintain our own sense of worth in pursuing ends that are inherently valuable, to seek to improve standards world wide in human rights and equal opportunity; to work for an end to apartheid in South Africa and racial intolerance everywhere else; to try to remove the inhumanity of the death penalty; to eliminate weapons of mass destruction; to develop new international legal regimes to protect our common environment; and to assist through substantial aid programs the economic and social development of countries struggling with debt, poverty, or national calamity.

The evolution of just and tolerant societies brings its own international returns – in higher standards of international behaviour, and in the contribution that internal stability makes to international stability and peace. Moreover countries that contribute actively to that process do reap on balance reputational rewards that can be helpful in pursuing less obviously selfless interests.

Putting all this in another way, the promotion of an international legal order and of an effective multilateral system is essential for our strategic, trade and humanitarian concerns and interests.

While it is thus unquestionably in our interest to press for the promotion of an effective international legal order, one that reflects our values and priorities, the question is still whether there are areas where we can be more responsive to the legal preoccupations of countries in our region. Conversely, we might also ask what opportunities exist for us to influence the thinking and approach of our regional neighbours to international legal issues.

As I have already mentioned, *self-determination* has been a major issue for many developing countries including, of course, those in our region. Successive Australian governments have been strong supporters of the principle of self-determination not only in word but also in deed. I need only mention Australia's role in securing self-determination and independence for Indonesia and for Papua New Guinea, Zimbabwe and Vanuatu, our past work

on the Committee of Twenty Four in New York, and our policies in regard to self-determination in New Caledonia.

There is a shared philosophy here between ourselves and our regional neighbours. But at the same time, while we have been amongst the foremost Western nations in pursuing the full and universal application of self-determination as it arises in the context of colonisation, as the age of decolonisation draws to a close we have also sought on appropriate occasions to remind all governments that the principle is not exhausted by a single act, but remains a central pillar of the international regime of human rights, whereby individuals and peoples have the right to choose governments which truly represent them.

Similarly, we have taken a strong stand on *racial discrimination* and apartheid. Although our committed advocacy of racial equality has at times led to friction with significant neighbours, such as Fiji, we believe, as I have said, that equality is not only an essential means to the promotion of peaceful relations, both regionally and internationally, but also a valuable end that must be pursued for itself.

We subscribe to Western criteria of what constitutes *"statehood"* but have tempered our legal views on the subject in regard to the freely associated states. We have treated the Federated States of Micronesia and the Marshall Islands as full members of the regional community by moving quickly to establish diplomatic relations with them, and strongly supporting their candidature for membership of certain intergovernmental organisations, such as ICAO and the ADB, despite the fact that they are freely associated states and not sovereign independent states in the traditional sense of that term.

There are important differences of emphasis, however, between some of our regional neighbours and ourselves concerning the observance of some *other basic rights and freedoms*. I refer, of course, to abolition of capital punishment and cruel and inhumane treatment, freedom of speech and of the press and various criminal procedural rights. I do not deny that much of the misunderstanding and friction in these areas arise from differences between a liberal democracy, on the one hand, and countries where individual rights have no strong foundation in the national culture, on the other.

It is important to appreciate the cultural context from which our regional neighbours assess questions of individual rights, although there is a big difference between understanding and endorsing. If we judge that certain rights are fundamental and universal then there is an obligation on us to defend those rights. After all, we are not dealing here with rights that exist only within a particular cultural context but with rights which are enshrined in the Universal Declaration of Human Rights and in widely ratified, legally-binding Covenants and Conventions.

Nor should we forget that a right not defended is a right easily lost, and that responsible representations – which often means quiet representations – can have some effect. And we should also encourage others to see the upholding of human rights as in their own interest – a point which I think has now been

appreciated by Mr Gorbachev and others. In international law – as in international relations generally – we should not be shy of appealing to self interest because no rule of customary international law or international treaty will long survive if a significant number of those who subscribe to it do not see some benefit in it for them.

Another area where there are important differences of approach between ourselves and a significant number of our neighbours is the question of *sovereign immunity* from the jurisdiction of national courts and from execution of judgment.

Many developing countries' governments have taken the view that they are immune from legal processes in the courts of other countries. We believe, on the other hand, that in a world where governments are increasingly involved in commercial transactions, immunity must be relative and not absolute. The list of countries that have abandoned absolute immunity is growing, though rather slowly, and I am hopeful that one day there will be more common ground between Western countries and other regional groups on this issue. Certainly, Australian lawyers can, in their contacts with their professional colleagues in the region, highlight the advantages of treating states, companies, and individuals on a more equal footing in commercial transactions and investment arrangements.

It would be a mistake, of course, to assume that our approach to international law is always appropriate in dealings with our neighbours. There are issues and occasions when it may well behove us to adopt a more flexible approach in some areas of international law.

There may, for instance, be room for greater flexibility in our approach to *compulsory third party settlement of disputes*, given the strong reservations which South Pacific countries and some major civilisations to our north – including China and Japan – have to the strict application of the law and litigation. As I have said, such countries do regard law more as a framework for discussion to achieve mutually satisfactory objectives than something that has to be applied strictly. There would be advantage from our point of view in looking to alternative mechanisms for settling disputes, such as mediation and conciliation. I should add that this is entirely consistent with the general non-confrontationist approach to problem solving which this Government from the outset has taken, in international relations just as in the domestic sphere. We may need to examine more imaginative means of resolving perceived legal conflicts so as to ensure, without prejudice to our own real interest, that all the parties to a dispute can save face, rather than have a system that produces "winners" and "losers". This, of course, is a recipe for effective diplomacy more generally.

There is also the question of *negotiating styles*: we have inherited a Western tradition of negotiation which is perceived, rightly or wrongly, by some, as being adversarial and sometimes offensive. Anyone who has dealt with Japanese or South Pacific negotiators will know how different their styles are from that of our own. Patience, repetition and a search for harmony and unity

are important characteristics of these styles. We need to understand these differences and respond to them appropriately.

On the other hand, the fact that we are a country with a Western tradition situated in the South Pacific has enabled us on occasion to play the role of "honest broker" between major Western powers with interests in the South Pacific and our regional neighbours. This happened, for example, in the protracted negotiations that led to the adoption in 1986 of the South Pacific Regional Environment Convention, where Australia played a major role in convincing the United States and France of the importance to South Pacific countries of adopting in the Convention strong anti-pollution standards and accepting a provision banning the sea dumping of all radioactive wastes. We have taken a similar approach on the South Pacific Nuclear Free Zone Treaty - so far without success, although I was pleased to have confirmed to me by Secretary of State Baker during my recent visit to Washington that the new US Administration will undertake a review of its position on the Treaty.

One aspect of the Western international law tradition which has not proved especially helpful, in dispute resolution or anywhere else, is the jargon which lawyers are so fond of. Some of this, particularly when it is in Latin, must be incomprehensible to other lawyers, let alone the public. Better use of language might facilitate better communication. In this respect I think that the drafters of the South Pacific Nuclear Free Zone Treaty deserve some credit for crafting a document that is simple to read despite the complexity of the issues that it addresses. The treaty is a testament not only to the consensus politics of the "Pacific way" but also to the capacity to express such consensus by uncluttered eloquence.

The evolution of international law presents the legal practitioner with both a challenge and an opportunity. The challenge to respond to new needs, new priorities, new technological advances. The opportunity to participate creatively in the evolution of new norms of international law. The developing international *environmental law* is an important case in point.

The protection of the environment, and more particularly of the atmosphere, is becoming a major global issue. Industrialised countries are widely perceived by developing countries as being the major polluters. Some deft diplomacy will be required to convince developing countries that it is just as much in their interest to put in place effective mechanisms to preserve the environment as it is for the richer countries. The task ahead will be to persuade countries in our region that environmental concerns transcend national sovereignties and that every country has a responsibility to protect the environment for future generations.

I represented the Prime Minister earlier this month at a summit meeting, in the The Hague, of twenty four Heads of State and Government (or, as in my case, their representatives) which adopted a Declaration designed to give political impetus to urgent international efforts to tackle the problems of climate change and to chart a program of innovative measures to deal with the unprecedented global threat posed by the greenhouse effect, the depletion of the

ozone layer and related phenomena. The signatories to the Declaration have acknowledged and agreed to promote a number of principles, including:

- the development, within the UN framework, of new institutional authority (if necessary through a new organisation) to combat further global warming of the atmosphere;
- the development by this authority of new instruments and standards;
- the adoption of appropriate measures to promote the effective implementation of and compliance with the decisions of this authority, the decisions of which will be subject to "control" by the International Court of Justice; and
- fair and equitable assistance to compensate countries bearing an abnormal or special burden as a result of decisions taken to protect the atmosphere, especially where their responsibility for atmospheric degradation has been marginal.

Clearly, the negotiation of the necessary new international legal regimes foreshadowed by the Hague Declaration will require a careful balancing between national interest and international responsibilities. Australia will have the opportunity of playing a crucial role in these negotiations and will need to work closely with its Asian and Pacific neighbours on matters of common concern.

There will be large costs involved for all countries in meeting their new environmental responsibilities if the world as we know it is to prosper. Developing counties cannot be expected to share this burden alone and unaided. The adjustment burden will have to be equitably shared by all of us, and in a way that recognises the interconnection of this problem with a number of other major problems – of international trade, debt, development and equity – that press upon so many members of our international community.

On environmental issues – as on other issues of global concern – regional action can complement international efforts. The Hawke Government, more so than any of its predecessors, has placed a high value on regional cooperation, including in the treaty-making field. We have complemented our global support for nuclear non-proliferation with our initiative in proposing the South Pacific Nuclear Free Zone Treaty. We have built on our involvement in the negotiations on a global Chemical Weapons Convention by taking the lead to raise the level of awareness of chemical weapons issues in the region. In these ways and others, we are making a contribution to the elaboration of regional agreements and to the region's capacity to have its perspective reflected in international discussions and treaty-making negotiations.

Let me conclude by returning to the central question of those I posed at the beginning: does international law serve us and our regional interests? The answer in my view is clearly yes, provided we are sufficiently sensitive and skilful in preserving and strengthening the broader acceptance and authority of the law while using it in the pursuit of those interests.

Obviously, some countries in the region are more receptive to our views of international law than others. This is to be expected in a region as vast and diverse as our own. As we move to a position of greater interdependence with

our Asian and South Pacific neighbours, we will be presented with further opportunities to develop effective legal frameworks to regulate trade, investment, environmental and other concerns. The continuing negotiation with Indonesia of an innovative legal regime to govern a "Zone of Cooperation" for the exploitation of petroleum resources in the disputed boundary area known as the Timor Gap is both a test of our skill and sensitivity in that respect, and an encouraging symbol of the way in which legal problems can be approached in a practical and co-operative manner, with all the benefits that can afford for bilateral relationships more widely.

We must be fully aware of the different traditions and values in our region. While each case must be considered on its merits, it is in general unlikely to be in our interest to take a rigid and aggressive approach on international legal issues if we are to consolidate and build on regional support for the creation of effective international legal regimes.

International relations and Australian courts - whether issues of foreign relations are "justiciable" - whether the Australian Government acted in excess of the executive power with respect to foreign relations - challenge to extradition from Germany to Australia

On 3 June 1988 Mr Justice Gummow of the Federal Court of Australia handed down judgment in *Re Ditfort; ex parte Deputy Commissioner of Taxation (NSW)* 83 ALR 265. In proceedings for the annulment of bankruptcy of a person extradited to Australia from the Federal Republic of Germany, there arose the question whether or not allegations that statements made by the Australian Government to the German Government were false or misleading were "justiciable". The judge held that they were. Part of His Honour's judgment on the point (284-289) is as follows:

> It has recently been observed in this court that issues arising out of international relations have been widely regarded as "non-justiciable", and that, in particular, the courts have disclaimed entitlement to adjudicate upon decisions by the executive concerning the exercise of its treaty-making power: *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 at 253. On the other hand, in an influential judgment of the United States Supreme Court (*Baker v Carr* (1962) 369 US 186 at 211) the subject was approached somewhat differently. Brennan J, in delivering the opinion of the court, said (at 211):
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> "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognisance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political

branches, or its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

The term "case or controversy" was taken by Brennan J from Art III, s 2(1) of the United States Constitution. The term "matter" in Ch III of the Australian Constitution was selected with the intention of ensuring that the content of federal jurisdiction in Australia was at least as wide as that given by the term "case or controversy": *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 33 ALR 465; 148 CLR 457 at 507, per Mason J; see also *Crouch v Commissioner for Railways (Queensland)* (1985) 62 ALR 1; 159 CLR 22 at 37–8, per Mason, Wilson, Brennan, Deane, Dawson JJ.

What then is meant by this concept of "Non–justiciability" in the setting presented by the Australian Constitution?

The expression "non–justiciable", when used in relation to international relations conducted by Australia, identifies several distinct legal rules or principles. First, "non–justiciability" has special application with regard to the law of evidence. While the courts are entitled to take judicial notice of the course of open and notorious international events of a public nature, in some cases of doubt they accept as conclusive statements provided to the courts by the executive Government: *Ffrost v Stevenson* (1937) 58 CLR 528 at 549; *Bradley v Commonwealth* (1973) 128 CLR 557 at 562; *Attorney–General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 78 ALR 449, per Brennan J; cf *Corporate Affairs Commission v Bradley* [1973] 1 NSWLR 382 at 393. The statements so received have dealt with such questions as the extent of foreign territory, the existence of a state of war, belligerency or neutrality, the existence of foreign States and the identity of persons constituting the governments of recognised States. The statements provided by the executive certify that the Australian Government "recognises" a particular state of affairs: see the terms of the certificate in *Corporate Affairs Commission v Bradley* (at 390). The terms of such certificates are subject to interpretation by the courts but, once so construed, the certificates are "conclusive". The expression "conclusive" is used not only in the sense that evidence is not admissible to contradict the certificates (*Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No 2) [1967] 1 AC 853 at 901) but also, it seems, in the sense that the certificates cannot be questioned in proceedings for judicial review under s 75(v) of the Constitution or 39B of the Judiciary Act: cf *R v Secretary of State: Ex parte Trawnik, The Times*, 21 February 1986, which involved a certificate issued pursuant to statute, not the prerogative; and see also Warbrick, "Executive Certificates in Foreign Affairs: Prospects for Review and Control" (1986) 35 ICLQ 138.

In the present case, the respondent does not rely on "non–justiciability" in this sense. However, I should at this stage emphasise that British decisions upon "non–justiciability" or the "unreviewability" of decisions made by the British Government are to be viewed with some care before what there is said is treated as applicable in this country. In *Attorney–General v Nissan* [1970]

AC 179 at 237, and in *CCSU v Minister for Civil Service* [1985] 1 AC 374 at 418, Lords Pearson and Roskill respectively spoke of the exercise of various prerogative powers of the Crown in right of the United Kingdom (including the treaty making power) as of such a nature and subject matter as not to be amenable to the judicial process. However, even in Britain, the threshold question of whether an act in question was done under the prerogative power will be for the court to decide, the point being that if it was, the court may then decide it will not inquire further into the propriety of that act: *Attorney-General v Nissan; CCSU v Minister for Civil Service*; Cane, "Prerogative Acts, Acts of State and Justiciability" (1980) 29 ICLQ 680. To decide whether a question is "non-justiciable" is not to decide the alleged non-justiciable question itself.

In Australia, with questions arising in federal jurisdiction, one looks not to the content of the prerogative in Britain, but rather to s 61 of the Constitution, by which the executive power of the Commonwealth was vested in the Crown. That power extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth and enables the Crown to undertake all executive action appropriate to the spheres of responsibility vested in the Commonwealth. One such sphere is the conduct of relations with other countries, including the acquisition of international rights and obligations, and in this sphere the executive power of the Commonwealth is exclusive of that of the States: the Australia Act 1986 (Cth) s2; *R v Burgess: Ex parte Henry* (1936) 55 CLR 608 at 643–4; Zines, *The High Court and the Constitution*, 2nd ed, pp 224–5, 244–5; Zines, "The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth" in Zines (ed) *Commentaries on the Australian Constitution,* Ch 1.

The result is that a question as to the character and extent of the powers of the executive Government in relation to the conduct of relations with other countries may give rise to a matter which arises under or involves the interpretation of s 61 of the Constitution and will so affect the interests of a plaintiff as to give the necessary standing. These circumstances will provide a subject matter for the exercise of federal jurisdiction pursuant to Ch III of the Constitution. In such a case no question of "non-justiciability" ordinarily will arise. In Britain, putting to one side any questions that may arise consequent upon membership of the European Economic Community, there will be no directly comparable situations.

The position in Australia is illustrated by the litigation in *Barton v Commonwealth* (1974) 131 CLR 477; 3 ALR 70. There, the High Court entertained proceedings instituted by prospective deportees from Brazil in which they sought a declaration that a request to that country for their detention there pending a request for their extradition to Australia was "*ultra vires* and beyond the executive Government of Australia". It may be observed that the plaintiffs plainly had an immediate concern in the outcome, so there was no question of lack of standing.

Additional considerations appear where the issue is not one of alleged lack of constitutional power, but rather one of the propriety of the conduct by the executive Government of the Commonwealth of relations with foreign governments within the scope of its constitutional powers in that behalf. The plaintiff will, as in the case with claims put forward on constitutional grounds, still have to possess the necessary standing to claim the relief sought. But there being no question arising under the Constitution or involving its interpretation, where are the disputed rights supplying the necessary content of a "matter" within the meaning of Ch III of the Constitution? Dealings between Australia and foreign States will not normally, in the absence of legislation, create rights in or impose obligations upon Australian citizens or residents: *Ingram v Commonwealth* (1980) 54 ALJR 395; *Simsek v Macphee* (1982) 148 CLR 636; 40 ALR 61. A breach of Australia's international obligations of itself will not be a matter justiciable at the suit of a private citizen: *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270 at 274; 42 ALR 51.

However, the taking of a step in the conduct of international relations, whilst of itself neither creating private rights nor imposing such liabilities, may be a step in a process which as a whole may have that effect. In such cases, the process may give rise to matters justiciable at the suit of an individual. The cases dealing with "disguised extradition" provide examples: see *Schlieske v Minister for Immigration and Ethnic Affairs* (Full Court, 4 March 1988 [84 ALR 719]). Another example may be provided by *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218. The Cabinet decision there in question (to make a nomination for inclusion in the World Heritage List established under the World Heritage Convention) meant that the area in which the first respondents held mining interests became "identified property" within the meaning of s 3(2) of the World Heritage Conservation Act 1983 (Cth). This gave rise to the possibility that a proclamation might be made by the Governor-General with the effect of making mining operations unlawful. Thus, it might be said that there was standing to seek judicial review (under s 39B of the Judiciary Act, which reflects the terms of s 75(v) of the Constitution) of the Cabinet decision, on the grounds of want of procedural fairness and unreasonableness.

The decision of the Full Court in the *Peko-Wallsend* case, that nevertheless the complaints made were "non-justiciable", reflects another element in the constitutional concept of a "matter". This is that, even if the plaintiff has standing in respect of the complaint sought to be agitated before a court exercising federal jurisdiction, nevertheless there will be no matter if the plaintiff seeks an extension of the court's true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions. Such non-justiciable issues include agreements and understandings between governments within the federation (*South Australia v Commonwealth* (1962) 108 CLR 130 at 141) and between the Australian and foreign governments (*Gerhardy v Brown* (1985) 159 CLR

70 at 138–9; 57 ALR 472). Those issues do not give rise to "matters" in the sense necessary for the exercise of federal jurisdiction.

Another such issue would appear to arise where a foreign Government sued in an Australian court exercising federal jurisdiction and in substance sought to enforce outside its territory a claim arising out of acts of that State in the exercise of powers peculiar to government (*Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 78 ALR 449, a case which was not approached on the footing that the State court was exercising federal jurisdiction, and where the principle propounded was characterised primarily as a common law rule of private international law, exemplified by *Huntington v Attrill* [1893] AC 150 at 156).

In *Gerhardy v Brown*, Brennan J referred to the United States decisions, notably *Baker v Carr, supra*, which treat "political questions" as lying outside the constitutional concept of "cases" and "controversies". The "political question" doctrine has attracted considerable criticism, not the least in its application to the conduct of foreign affairs: Henkin, "Is There a 'Political Question' Doctrine?" (1976) 85 *Yale LJ* 597; Wright, *Law of The Federal Courts*, 4th ed, (1983) 14. An alternative path, though not always clearly marked as such in the United States decisions, has been that which emphasises the discretionary nature of equitable relief (by way of injunction and declaration). The result is that there may be a case or controversy properly before a United States federal court, but equitable relief may none the less be withheld: see the authorities discussed in *Ramirez de Arellano v Weinberger* (1984) 745 F 2d 1500 at 1521–3, 1560–6 (remanded by the Supreme Court on other grounds, (1985) 86 L Ed 255).

Nor, in the United States, has the position been simplified by the so-called "act of State doctrine". This provides, as a defence, the principle (propounded by Fuller CJ in *Underhill v Hernandez* (1897) 168 US 250 at 252) that: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the Government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

We have it on the authority of Dr F A Mann (*Foreign Affairs in English Courts* (1986), pp 164, 175) that no doctrine in such a wide form exists in the civilian States of western Europe. Further, in its recent manifestations in the United States, the doctrine has been modified. Some authority suggests the foreign act of State doctrine is best seen as a species of the same genus which also includes the "political question" doctrine: *International Association of Machinism v OPEC* (1981) 649 F 2d 1354 at 1358–9; *Sharon v Time Inc* (1984) 599 F Supp 538 at 547–8. Other authority sees the doctrine as requiring a factual inquiry in each case as to whether a decision by the court will adversely affect the conduct of foreign relations or pass judgment on the laws, conduct or motives of a foreign State: *Airline Pilots Association v Taca International*

Airlines SA (1981) 748 F 2d 965 at 969–70; *Ramirez de Arellano v Weinberger, supra*, at 1534.

Nevertheless, the adoption into English law of the doctrine in its pristine form as propounded by Fuller CJ in 1897 seemingly now has the imprimatur of the House of Lords in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. That decision is roundly criticised by Dr Mann throughout his recent work *Foreign Affairs in English Courts*. It has not yet been necessary finally to decide if any such doctrine exists in this form in Australia, although support for it is apparent in the joint judgment in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd, supra*, at 455–6, 457–8. In any event, the present case does not involve the doctrine. The applicant in these proceedings complains not of failings of the German Government, but of alleged shortcomings of the Australian Government.

However, it may be noted that many of the decisions in which the foreign act of State doctrine was invoked as a defence were actions to try torts committed in that State or to ascertain the title to moveables once situated there. In such cases, an effect of a foreign act of State may be to render lawful what would otherwise be a tortious act committed on its territory, or to pass title to moveables situated there: Mann, *Studies in International Law*, pp 458–60; Cheshire and North, *Private International Law*, 11th ed, pp 121–3. The Australian rules of private international law dealing with foreign torts and title to moveables may of their own force give effect to the foreign act of State without recourse to any doctrine of that name: Cheshire and North, *Private International Law*, 10th ed, p 139. Indeed, some recent United States authority treats the foreign act of State doctrine as a "super choice of law rule" which obliges the lex fori to apply foreign law as the *lex causae* where it otherwise would not do so under its rules of private international law: *Callejo v Bancomer SA* (1985) 764 F 2d 1101 at 1113–14.

What does follow from what has been said is that it is no sufficient answer to any attempt by the applicant to call into question the observance by the Australian Government of statements made or assurances offered to the German Government in relation to his extradition, to state merely that such questions are "non-justiciable". Within that phrase, as I have attempted to show, lie several concepts.

In so far as the applicant asserts that the Commonwealth acted in excess of the executive power with respect to foreign relations, within the meaning of s 61 of the Constitution, then, if he has standing in respect of the matter (which I will later discuss) there is a justiciable matter. In so far as he asserts some deficiency or failing on the part of the Commonwealth in the conduct of its relations with Germany, but no lack of constitutional power, the question becomes (a) does this give rise to a "matter" in the sense I have described, and (b) if so, does the applicant have standing with respect to it?

I have already described the nature of the proceedings brought by the applicant. As that description shows, the debtor applicant is not seeking judicial review of the decisions of the Australian Government with respect to

its dealings with a foreign State. He does not allege in these proceedings the existence of grounds upon which relief is sought against officers of the Commonwealth pursuant to s 75(iv) of the Constitution or 39B of the Judiciary Act. Nor does he seek to assert with the authority and on behalf of the foreign State, and in proceedings in a municipal court, any rights flowing to the foreign State against Australia by reason of what took place: cf *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270; 42 ALR 51. Nor does he assert that the dealings between Australia and Germany produced personal rights which provide a cause of action enforceable by him in proceedings in an Australian court against the Australian Government: cf *Simsek v Macphee* (1982) 148 CLR 636; 4 ALR 61.

Rather, the conduct of relations between Australia and Germany enters into consideration by the court, because in the course of dealing with the matter in respect of which the court has jurisdiction (viz the application by the bankrupt for annulment under s 154 of the Bankruptcy Act) it is necessary to construe the terms of ss 43 and 52 of the Bankruptcy Act which repose discretions in the court. In my judgment, the issues which the applicant agitates would have been properly taken into account by the court in the exercise of those discretions. Therefore, they are to be considered in deciding, under s 154, whether the sequestration order ought not to have been made. I note that in another context the Full Court has indicated that on its proper construction, the discretion given by statute to a decision-maker permitted him to have regard to particular treaty obligations of Australia: *Gunaleela v Minister for Immigration and Ethnic Affairs* (1987) 74 ALR 263 at 280; cf Mann, *Foreign Affairs in English Courts,* pp 94-6.

The applicant, in my view, plainly has the necessary standing to agitate the issues in question, they being steps in the chain of reasoning by which he seeks to make out his case under s 154 of the Bankruptcy Act. It also follows from what I have said that the issues are elements of the "matter" in respect of which the court has jurisdiction and are not to be classified as "non-justiciable" in the sense discussed in the Australian authorities: *Commonwealth v South Australia, supra; Gerhardy v Brown, supra*. The matter touches foreign relations, but that does not place the matter, as to any part of it, beyond the cognisance of the court: cf *Baker v Carr, supra,* at 211; *Fiocconi v Attorney-General* (US) (1972) 462 F 2d 475 at 480.

International law in Australian courts - The enforcement of foreign penal or public laws in Australian courts - attempted enforcement by a foreign State of an obligation of confidentiality on the part of a former member of its security service - United Kingdom Government attempt to protect a governmental interest in an Australian court - the "*Spycatcher*" case

On 6 June 1988 the High Court of Australia handed down its judgment in the *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* 78 ALR 449. This was a case in which the appellant, with the support of the Australian Government, had sought to prevent publication in Australia of a book

entitled "Spycatcher", written by a former member of the British security services. The High Court dismissed the appeal. Following is an extract (455–461) from the judgment of the majority of the Court (Mason CJ, Wilson, Deane, Dawson, Toohey, and Gaudron JJ; Brennan J, in a separate judgment, expressed "general agreement" with the majority):

The principle that domestic courts will not enforce a foreign penal or public law is sometimes described as a rule of public international law, and, at other times, as one of private international law. Dicey and Morris, *The Conflict of Laws*, 11th ed (1987), vol 1, pp 100–101, state the principle in these terms:

"English courts have no jurisdiction to entertain an action:

(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; ..."

The rule is associated with a principle of international law, which has long been recognised, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory. The statement of Fuller CJ in *Underhill v Hernandez* (1897) 168 US 250 at 252 that " ... the courts of one country will not sit in judgment on the acts of the Government of another done within its own territory" has been repeated with approval in the House of Lords *(Buttes Gas & Oil Co v Hammer* [1982] AC 888 at 933) and he Supreme Court of the United States (*Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398 it 416). The principle rests partly on international comity and expediency. So, in *Oetjen v Central Leather Co* (1918) 246 US 297 the Supreme Court said (at 304):

"To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'."

As Lord Wilberforce observed in *Buttes Gas & Oil Co v Hammer* (at 931–2), in the context of considering the United States decisions, the principle is one of "judicial restraint or abstention" and is "inherent in the very nature of the judicial process".

The associated rule with which we are presently concerned has traditionally been expressed as a bar to jurisdiction, although the rule might now be more correctly described as one rendering a claim unenforceable. The rule had its foundation in the notion "that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed": *Huntington v Attrill* [1893] AC 150 at 156, per Lord Watson. His Lordship went on to point out that the rule applied to a civil action which has for its object the enforcement by the State, directly or indirectly, of punishment imposed for such breaches by the *lex fori*.

The jurisdictional origins of the rule are well illustrated by the distinction which underlies the line of cases concerning title to, or possession of, property the subject of confiscation or seizure by a foreign Government. The principle denies jurisdiction in a court to determine a claim of title to the property based

on the operation of a statute or executive act of the foreign State to the property outside the territory of the foreign State. It is otherwise when the claim of title is based on an exercise of sovereign authority with respect to the property within the territory of the foreign State: see the discussion of the cases by Lord Denning MR in *A-G, (NZ) v Ortiz* [1984] AC 1 at 21-4; see also *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368, at 428-9, 431, 433.

Whether the principle extends to proscribe the enforcement of foreign public laws as well as foreign penal laws has been a contentious question. In *Ortiz*, despite Lord Denning's affirmative answer, Ackner LJ was inclined against it, though his Lordship concluded that the rule of "public international law" applied because the action was an action by the State "to vindicate the public justice" (at 33), concerning, as it did, "a public right" rather than "a private right" at the suit of an individual (at 33-4). Neither O'Connor LJ nor the House of Lords on appeal, dealt with the question. Earlier the House of Lords had decided in *Government of India v Taylor [*1955] AC 491 that English courts would not enforce the revenue laws of a foreign State. This extension of the principle has not remained immune from criticism: see Carter "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 Br *Year Book of Int Law* 111; Mann, "The International Enforcement of Public Rights" (1987) 19 NYU *J Int L & Pol* 603. With the nature of that criticism we are not presently concerned, except to note that it is indicative of the difficulty of identifying the foreign laws or rights that fall within the rule.

This difficulty has been evident in the endeavours to explain why the principle applies to actions for the enforcement of public laws other than penal and revenue laws. The expression "public laws" has no accepted meaning in our law. Nevertheless Dr Mann, at 607 in the article to which we have just referred, appears to equate "public laws" and "public rights", an expression which he treats as synonymous with "prerogative rights". The transition from "laws" to "rights" sits somewhat uncomfortably with the long-standing formulation of the rule in its application to "penal laws". It would be more apt to refer to "public interests" or, even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government.

Lord Denning is not the only judge who considers that the rule extends to foreign public laws. In *R v Governor of Pentonville Prison; Ex parte Budlong* [1980] 1 WLR 1110; [1980] 1 All ER 701, Griffiths J (WLR at 1125; All ER at 714-5) considered that the rule prevented the enforcement of foreign public laws as well as foreign penal and revenue laws. In *Re State of Norway's Application* [1987] 1 QB 433 Kerr LJ (at 478) described it as "a principle of general international acceptation". International practice certainly supports this view. Extradition treaties and conventions provide for exceptions from the obligation which they impose in the case of offences against public laws. So do treaties relating to the enforcement of foreign judgments.

The argument against this view of the principle is that it is an unnecessary and undesirable limitation on the jurisdiction of the courts of the forum, that it unduly restricts the remedies available to a foreign State and that a limitation on the enforcement of foreign public laws or rights is "of uncertain meaning and of possibly dangerous width": Carter, *supra* at 121–2. However, if the effect of the rule is merely to prevent enforcement outside the territory of the foreign sovereign of claims based on or related to the exercise of foreign governmental power (cf (1977) 57(11) *Annuaire de l'Institut de Droit International* 329), the operation of the rule is neither unsatisfactory nor uncertain.

It is instructive to refer to an explanation of the rule given by Learned Hand J in *Moore v Mitchell* (1929) 30 F(2d) 600 which differs from that given by Lord Watson in *Huntington v Attrill*. Learned Hand J said (at 604): "To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of a court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour ... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

This explanation of the rule, which calls to mind the explanations given of the companion rule in *Underhill v Hernandez, Oetjen v Central Leather Co* and *Buttes Gas & Oil Co v Hammer*, was taken up by Kingsmill Moore J in *Peter Buchanan Ltd v McVey* [1954] Ir R 89 (noted at [1955] AC 516). Kingsmill Moore J considered (Ir R at 106–7; AC at 528–9) that, just as it was necessary for the domestic court to reserve the right to reject the foreign law on the ground that it conflicted with public policy or affronted the morality of the domestic forum in cases between private persons, so it was also necessary to reserve an option to reject the foreign law when the action sought to enforce "governmental claims". He continued (Ir R at 106; AC at 529):

"... if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications."

So he concluded (Ir R at 107; AC at 529): "Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance."

The explanation of the rule given by Learned Hand J and Kingsmill Moore J has been criticised on the ground that it goes too far in denying judicial enforcement of a foreign law even when the validity or the morality of the foreign law is not in issue: Mann, *supra*, at 610. True it is that there are some claims to enforce a foreign State's governmental interests that will not involve the risks mentioned by Learned Hand J and Kingsmill Moore J. But there are some claims in which the very subject matter of the claims and the issues which

they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign. These risks are particularly acute when the claim which the foreign State seeks to enforce outside its territory is a claim arising out of acts of that State in the exercise of powers peculiar to government in the pursuit of its national security.

The most obvious examples of such a claim are those arising out of the relationship between a foreign State and members of its military forces engaged in hostilities against another State in circumstances where this country is not directly involved. It would be a source of potentially vast detriment to Australia's national interests and foreign relations if our courts were under a common law obligation effectively to exercise jurisdiction at the suit of the first State to enforce legal rights against a member of its armed forces to prevent disclosure of information or desertion to the other State.

The attempted enforcement by a foreign State of an obligation of confidentiality on the part of a member or former member of its security service is but another, even if slightly less, obvious example of such a claim.

No doubt an Australian court in appropriate circumstances will enforce an obligation of confidentiality on the part of a member of the Australian Security Intelligence Organisation (ASIO), that organisation having been established for the purpose of protecting Australia's security. But even in such a case the court may be called upon to consider whether the Australian public interest in publication overrides the interest in preserving confidentiality: see *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39; 32 ALR 485. Likewise, if an action to enforce an obligation of confidence owed by a member or former member of a foreign State's security service were to lie in the courts of this country, an Australian court could be called upon to determine whether the Australian public interest in disclosure of the relevant information required publication since the public interest in freedom of information and discussion is a material factor to be considered when a restraint on publication is sought. A question would then arise whether the Australian court should inquire into and determine what, if any, damage to the foreign State had been or would be caused by disclosure, including any detriment to its public interest. Such an inquiry might require an Australian court to resolve an issue which it could not appropriately entertain or competently determine, namely, what was, on balance, in the public interest of the foreign State. Moreover, if the Australian court were to decide that disclosure would be detrimental to the public interest of the foreign State but in the public interest of this country, the invidious task would remain of determining whether detriment to the foreign State should be given any, and if so what, weight against the local public interest. Even if one were to ignore questions of damage to, and the public interest of, the foreign State, the Australian court would be required to resolve the question whether the public interest of this country should prevail over the prima facie right of the foreign State to prevent disclosure. A situation in which an Australian court could be called upon to determine whether the *prima facie* rights of a foreign State should be overridden by a superior Australian public

interest in disclosure would inevitably involve a real danger of embarrassment to Australia in its relationship with that State.

Spycatcher contains material concerning the operations of the British Security Service which might well sustain a finding that publication is in the Australian public interest. By way of illustration there is material which, if true, indicates that the freedom of Service operations from political control and supervision should be qualified, that the Service has been penetrated by foreign agents and that the Service engages in unlawful activities when the means are thought to justify the ends. These are matters of public interest to Australia because ASIO has a close and cooperative relationship with the British Security Service.

The appellant argues that the obligations sought to be enforced here are private, not public, obligations in that they have their source in equitable principle, the fiduciary relationship and the common law of contract. Moreover, it is said that a member of the British Security Service would come under an obligation of confidence regardless of the provisions of the Official Secrets Act. Thus the appellant argues that the imposition of duties and obligations by the Act and the acceptance of them by Wright in the terms of s 2 of that Act do not give the United Kingdom Government's claim the character of a claim to enforce governmental interests. The appellant's arguments to that effect do not, however, withstand close examination.

For the purposes of the principle of unenforceability under consideration the action is to be characterised by reference to the substance of the interest sought to be enforced, rather than the form of the action: cf *Buchanan (Ir R* at 104,107; AC at 527, 529); *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* at 439. Thus, to concentrate on the private law character of the causes of action or grounds for relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action. That interest is to ensure the continued secrecy of the operations of the British Security Service by enjoining disclosure of information relating to those operations and by discouraging revelations by others. As a security organisation whose charter evidently includes clandestine counter-espionage activities, the Service has a responsibility to protect the national security of the United Kingdom. These days the collection of intelligence is generally considered to be a vital element in the maintenance of national security and the continued cooperation of intelligence sources is an essential feature of the collection of intelligence. Accordingly, the United Kingdom Government has a strong interest in preserving the secrecy of the Service's operations and the appearance of confidentiality. Absent that appearance, potential sources of information might become uncooperative and uncommunicative.

Viewed in this light, the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign State. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service as "part of the defence forces of the country". The claim for relief made by the appellant in the present proceedings

arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of the national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable.

It is perhaps tempting to suggest that, because of the close relationship between the United Kingdom and Australia, an exception should be made to enable the United Kingdom to enforce in our courts an obligation of the kind now in question. But what if a less friendly or a hostile State were to resort to our courts for a similar purpose? Our courts are not competent to assess the degree of friendliness or unfriendliness of a foreign State. There are no manageable standards by which courts can resolve such an issue and its determination would inevitably present a risk of embarrassment in Australia's relations with other countries.

It is not an acceptable answer to this objection to suggest that the courts might act on an Executive certificate to the effect that a foreign plaintiff is a friendly State. That solution would require the Executive to make invidious comparisons which might well lead to embarrassment in Australia's foreign relations. More to the point, under that proposal, the enforceability of a claim by a foreign State would depend on the discretion of the Executive. Quite apart from the likelihood of international embarrassment, it would be subversive of the role of the courts and of the constitutionally entrenched position of the judicature in this country if the enforceability of a claim were made, by a general rule of the common law, to depend on an Executive decision whether a particular plaintiff should be able to obtain the judicial relief which it seeks.

In any event the principle of law renders unenforceable actions of a particular kind. Those actions are actions to enforce the governmental interests of a foreign State. There is nothing in the statement of the principle, nor in the underlying considerations on which it rests, that could justify the making of an exception or qualification for actions by a friendly State. The friendliness or hostility of the foreign State seeking to enforce its claims in the court of the forum has no relevant connection with the principle.

Street CJ was, as we are, conscious that there may be significant consequences for Australian national security interests in bringing an action of the present kind by a friendly State for an injunction or an account of profits within the reach of the principle of international law. His Honour, after taking account of the Australian Government's positive support for the enforcement of the appellant's claims and Mr Codd's evidence that enforcement of the claim would serve the public interest of Australia, concluded that the local sovereign could decide on an ad hoc basis the extent of the assistance to be rendered to the foreign sovereign. The local sovereign could do this "by lifting the jurisdictional fetter on the local courts". There are two answers to this approach. First, the notion that effective access to the courts should depend on a decision of the Executive is as unacceptable as the related notion that the enforceability of a claim should depend on an Executive decision that the claim should be able to

succeed. Secondly, the possibility of detriment to Australia's national security interests cannot transmogrify the character of the claims. So far as friendly States are concerned, the remedy, if one is thought to be desirable, is to be found in the introduction of legislation.

For the foregoing reasons we would dismiss the appeal.

International law in Australian courts – implementation of obligations under the Convention for the Protection of the World Cultural and Natural Heritage – Proclamation under the World Heritage Properties Conservation Act 1983 – wet tropical rainforests of north-east Australia – nature of an "international duty"

On 30 June 1989 the High Court of Australia handed down its judgment in *Queensland v Commonwealth* 86 ALR 519. Queensland had sought a declaration of invalidity of a proclamation under Commonwealth legislation protecting certain rainforests in Queensland. The proclamation had been issued under the World Heritage Properties Conservation Act 1983, which provided the legislative framework for giving effect to Australia's obligations under the Convention for the Protection of the World Cultural and Natural Heritage. The Court considered whether or not the Commonwealth had an international duty to protect the particular property. It concluded that it did, and that the proclamation was therefore valid. Following is an extract (523–526) from the judgment of the Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) on the point:

> The validity of the proclamation depends in the first instance on whether the protection or conservation of the property is an international duty. If there be such an international duty, the requirements of s 6(2) are satisfied, a proclamation under s 6(3) may be made so as to apply s 9 to the property and a regime of control under the Act may be prescribed. Given the existence of such an international duty, the prescription of such a regime is within the legislative power of the Commonwealth, being supported by s 51(xxix) of the Constitution. The defendants submit that the inscription of the property in the World Heritage List by the Committee is sufficient and conclusive to establish that there is an international duty to protect and conserve it; the plaintiffs contest that submission, arguing that the conclusion of the property in the World Heritage List is not conclusive of its status as part of the natural heritage.
>
> When the constitutional support for an impugned law depends upon some matter of fact, a court must decide, in determining the law's validity, whether the fact exists: *Richardson v Forestry Commission* (1988) 77 ALR 237; 164 CLR 261 at 294, 341, and the cases there cited. Therefore, to determine the constitutional question whether the regime of control over the property imposed under the Act is supported by 51(xxix) of the Constitution, it is necessary to decide whether an international duty to protect or conserve the property exists. The same issue determines the corresponding statutory question whether one or more of the paragraphs in s 6(2) is satisfied. The existence of such an international duty must be decided as a matter of fact, though this court has no jurisdiction the exercise of which can affect the

existence under international law of any purported obligation imposed on Australia. In *Secretary of State for India v K B Sahaba* (1859) 13 Moo PCC 22 at 75; 15 ER at 28–9 Lord Kingsdown said: "The transactions of independent States between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

See also *Cook v Sprigg* [1899] AC 572 at 578. Although municipal courts do not administer international law, they take cognisance of international law in finding facts and they interpret municipal law, so far as its terms admit, consistently with international law. Regard may therefore be had to the terms of the Convention in deciding whether an international duty of protection and conservation exists, but the existence or otherwise of the duty is not necessarily concluded by the municipal court's construction of its terms or by its opinion as to the Convention's operation. The existence of an international duty depends upon the construction which the international community would attribute to the Convention and on the operation which the international community would accord to it in particular circumstances. The municipal court must ascertain that construction and operation as best it can in order to determine the validity of a law of the Commonwealth, conscious of the difference between the inquiry and the more familiar curial function of construing and applying a municipal law.

Articles 3 and 4 of the Convention cast on each State Party the responsibility of identifying and delineating properties on its own territory which are part of the cultural heritage or natural heritage. To discharge this responsibility, an evaluation must be made of the qualities of properties in order to ascertain whether there are properties of "outstanding universal value" in the territory of the State Party. In one sense, the status of a particular property as one of outstanding universal value forming part of the cultural heritage or natural heritage is an objective fact, ascertainable by reference to its qualities; but, as evaluation involves matters of judgment and degree, an evaluation of the property made by competent authorities under the Convention is the best evidence of its status available to the international community. The competent authorities to make an evaluation for the purposes of the Convention are, in the first place, the State Party on whose territory a property is situated and, if the State Party submits a property in an inventory under Art 11 para 1, the Committee under Art 11 para 2. Not all properties which are part of the cultural heritage or natural heritage may be included by the Committee in the World Heritage List but, under Art 11 para 2, all property included in the World Heritage List must be part of the cultural heritage or natural heritage and must also meet the special criteria for listing established by the Committee. Unless the Committee is satisfied on both aspects, the property is not included in the World Heritage List. By including a property in the World Heritage List, the Committee declares its satisfaction that the property is part of the cultural heritage or natural heritage. As the procedures for evaluation adopted by the Committee are extensive, the Committee's decision to include a property in the

World Heritage List assures the international community that the property has outstanding universal value as part of the cultural heritage or natural heritage. Article 12 of the Convention provides expressly what would otherwise be implied, namely, that the fact that a property has not been included in the World Heritage List does not determine that the property does not have "an outstanding universal value" for purposes other than those "resulting" from inclusion in the List. The phrase "purposes other than those resulting from inclusion" is not easily understood but it excludes the purposes which may be served by inclusion of a property in the World Heritage List. Listing entitles a State Party to call on other States Parties to give their help in the identification, protection, conservation and preservation of property under Art 6 para 2 and authorises a grant by the Committee of international assistance for the protection, conservation, presentation or rehabilitation of the property under Art 13: see Arts 20, 22 and 23. These articles are the only articles of the Convention which state the consequences of including a property in the World Heritage List or in the "List of World Heritage in Danger" (which in turn includes only properties that have been included in the World Heritage List: Art 11 para 4).

Although the status of a property as part of the cultural heritage or natural heritage follows from its qualities rather than from their evaluation either by the relevant State Party or by the World Heritage Committee (as Gaudron J recognised in *Richardson v Forestry Commission* CLR at 341), a State Party which evaluates a property as part of the cultural heritage or natural heritage and submits it to the Committee for listing thereby furnishes the international community with evidence of that status. And inclusion of the property in the World Heritage List is an international acknowledgment by the Committee of that status which carries with it the benefits of help by other States Parties and the prospect of the grant of international assistance.

From the viewpoint of the international community, the submission by a State Party of a property for inclusion in the World Heritage List and inclusion of the property in the List by the Committee are the means by which the status of a property is ascertained and the duties attaching to that status are established. The State Party's submission of a property is some evidence of its status but the Committee's listing of a property is conclusive, for the benefits of listing are available only to properties having the status of being part of the cultural heritage or natural heritage. We respectfully agree with Deane J in the *Tasmanian Dam* case who attributed this operation to the Convention (CLR at 263; ALR at 808):

"... the provisions of the Convention impose real and identifiable obligations and provide for the availability of real benefits at least in respect of those properties which have, in accordance with the procedure established by the Convention, been indisputably made the subject of those obligations and identified as qualified for those benefits by being entered, upon the nomination of the States in which they are situated, on the World Heritage List."

In the international community a decision by a municipal court that a property does not have that status cannot prevail over an evaluation made by

the Committee which results in the property's inclusion in the World Heritage List. So long as a property is included in that List, the State Party on whose territory the property is situated and who submitted an inventory including the property as part of the cultural heritage or natural heritage is under an international duty to protect and conserve it.

The plaintiffs' submission that a municipal court can decide for itself as an issue of fact whether the wet tropical rainforest of north-east Australia is part of the natural heritage does not answer the question whether there is an international duty on Australia to protect and conserve that property. The existence of Australia's international duty is determined by the inclusion of the property in the World Heritage List consequent on Australia's nomination of the property for inclusion in the List, for the listing of the property determines its status for the international community. There is no suggestion of bad faith either in the nomination or in the listing. As the inclusion of the property in the List is conclusive of its status in the eyes of the international community, it is conclusive of Australia's international duty to protect and conserve it. Its inclusion is therefore conclusive of the constitutional support for the proclamation of 15 December 1988 ...

International law in Australian courts – illegality of nuclear weapons – Nuremberg principles – application of rules of international law in the absence of legislation – whether such rules provide a defence to a criminal charge of trespass

On 27 November 1989 the Court of Appeal of the Supreme Court of the Northern Territory delivered judgment in *Limbo v Little* 65 NTR 19. The appellant had been charged with having trespassed, without lawful excuse, on the Pine Gap Joint Defence Space Research Facility. He claimed, as a defence to the charge, that international law imposed on him a personal responsibility to prevent a crime against peace or a war crime or a breach of the rules of war, which he believed was being committed or planned on the US–Australia Joint Facility. The Court (Martin J, with whom Kearney and Rice JJ agreed) held that, in the absence of legislation, there was no such defence. Following is an extract (42–46) from the judgment of Martin J:

Nuclear weapons: illegality

In 1961, the United Nations General Assembly declared the use of nuclear weapons to be "a direct violation of the Charter of the United Nations"; and in 1972 declared the use of such weapons permanently prohibited.

We were not referred to any treaty or convention which expressly addresses the legality of the development and stockpiling of nuclear weapons. There are some treaties which limit the use of such weapons such as the Antarctic Treaty, the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. Reference might also be made to the Nuclear Non-Proliferation Treaty and the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under

Water. Without having examined these treaties in detail, it seems to me that they implicitly acknowledge the existence of nuclear weapons and are directed to limiting their use.

The proposition as to the illegality of nuclear weapons is advanced upon the application of the following (for example):
(1) Declaration of St Petersburg 1868, which stated that combatants in war may not use weapons to "uselessly aggravate the suffering to disabled men". (2) Fourth Hague Convention 1907 which reaffirmed that the right of belligerents to adopt means to injure the enemy was not unlimited and that causing "unnecessary suffering" was impermissible. Some commentators include the concept of "indiscriminate" within "unnecessary". (3) Geneva Gas Protocol of 1925, nuclear radiation and atomic fall-out being equated with poisonous gases. (4) Hague Draft Rules on Aerial Warfare 1923, the Geneva Protocol on Humanitarian Law applicable in Armed Combat and the Geneva Convention 1949 concerning the protection of noncombatants. (5) International law prohibiting violation by belligerents of the territory of neutral states. (6) Genocide Convention, authorised to be ratified by Australia pursuant to the Genocide Convention Act 1949, confirming that genocide is a crime under international law. (I take these examples from the many articles from a variety of sources relied upon by the appellant. They are not intended to be exhaustive.)

Whatever may be the merits of these arguments, we were not directed to any statute of Australia declaring the illegality of nuclear weapons, or of any strategy for war involving their use.

I pause to mention that serious legal questions arise in this type of debate going to the possible excuse for the use of nuclear weapons in circumstances of military necessity, reprisals and self-defence, using, perhaps, a nuclear device designed to limit fall-out against a legitimate military target in an area where there are no non-combatants.

Nuremberg principles

Reference has been made to the appellant's reliance on what he terms "the Nuremberg principles" ("Nuremberg" is the spelling I will adopt since it appears to be the latest English language version of the name of that German city. Other versions commencing from 1050 AD include Nuremberg, Nurburg, Nürnberg and Nurenberg). In vol 2 of the *Yearbook of the International Law Commission* for 1950 appears a lengthy report by special rapporteur, J piropoulas, entitled "Formulation of Nurnberg principles". The author traces the history lying behind the attempts of the Commission, at the direction of the General Assembly of the United Nations, made in 1946, "to treat as of primary importance plans for the formulation in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nurnberg Tribunal and in the judgment of the tribunal". By the same resolution the General Assembly had affirmed the principles of international law recognised by the Charter and the judgment. It noted that similar principles had been

adopted in the Charter of the International Military Tribunal for the trial of major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946. On the Nuremberg Charter and trial see generally "Nuremberg" by M Lippman in *Law in Context,* 1988, vol 6(2).

[His Honour quotes the Principles proposed by the ILC, and continues:]

The alleged duty of a person having knowledge of illegal activity to take affirmative measures to prevent it, is nowhere expressed in the draft text. The appellant relies heavily upon that obligation, both as providing a lawful excuse for his trespass, and as the foundation for the courts' powers for which he contends. According to the article by Mr Frank Lawrence, "The Nuremberg Defence", in *Hastings Law Journal,* vol 40, January 1989, it was the Tokyo War Crimes Tribunal which introduced this concept. The author says that the statement is dicta, but nevertheless argues that it is evidence of how expansively individual responsibility may be interpreted. In his papers the appellant asserts that the Nuremberg concept is that any person "with actual knowledge that a crime against humanity (or war crime or crime against peace) is being committed, and, having such knowledge, was 'in a position to shape or influence the policy that brings about initiation or "continuation" of the crime' to the extent of his ability ... will be responsible if he could have influenced such policy and failed to do so". He cites *Trials of War Criminals Before the Nuremberg Tribunals* 1946–1949, vol 11, pp 448–9. Unsuccessful attempts have been made to locate that cited source. No other material available to me indicates that this concept has found its place in international law.

Ryan J in his book *International Law in Australia*, 2nd ed, commencing p 175, traces the so far unsuccessful attempts to have the Draft Code of Offences Against the Peace and Security of Mankind progress through the United Nations. There is no Commonwealth legislation supporting the appellant's claim that he has a right or duty to trespass upon Pine Gap.

It may well be that crimes against peace, war crimes and breaches of the rules of war are recognised under both customary international law and treaty law. Australia acceded to the agreement relating to the Nuremberg trials on 5 October 1945, and enacted its own War Crimes Act in that year, which made provision for the trial and punishment of"... violations of the laws and usages of war" committed during the Second World War (Ryan p 157). However, on the material available to me I am not prepared to hold that there is any rule of international law which places a personal responsibility upon an individual, who knows that any such crime is being committed or planned, to do everything possible to prevent it. A *fortiori,* if the person only suspects, even on reasonable grounds, that such circumstances exist, I would not be prepared to read into the personal responsibility concept upon which the appellant relies an obligation that he trespass upon prohibited land, or a privilege from prosecution for doing so, contrary to Australian domestic law.

If, contrary to that view, the appellant is obliged by international law to do whatever is within his power by way of positive measures to prevent the commission of such a crime against international criminal law, then he will be

able to put what he did to the international court or tribunal trying him, and it will be up to that body to determine whether the alleged crime was being planned or committed and whether what the appellant did operated so as to discharge him from criminal responsibility under international law.

Application of international law in Australia

Though it is not necessary for me to do so, I refer briefly to various authorities of the High Court of Australia which indicate to me that if a defence to a domestic criminal charge is said to arise under international law then, absent competent legislation, such a defence will not be recognised in Australian courts.

First, *Polites v Commonwealth* (1945) 70 CLR 60. Although "every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law ... all the authorities in English law also recognise that courts are bound by the statute law of that country, even if that law should violate a rule of international law" (per Latham CJ at 68).

"The law of nations, as I understand it, considers that all persons or things within the territory of a State fall under its territorial supremacy and are subject to its jurisdiction, legislative, administrative and judicial": per Starke J at 75; see also McTiernan J at 79.

In *Chow Hung Ching v R* (1948) 77 CLR 449 at 478 Dixon J adopted the opinion, with certain exceptions which do not apply here, that a treaty has no legal effect upon the rights or duties of the subjects of the Crown. Barwick CJ and Gibbs J did not dissent from that view in *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; 1 ALR 241; and it was adopted by Stephen J in *Simsek v MacPhee* (1982) 40 ALR 61; 148 CLR 636 at 642:
" ... it is for Parliament, and not for the executive to make or alter municipal law."

... Frequent mention was made by the appellant of the International Covenant on Civil and Political Rights, especially Art 14(3), relating to the minimum guarantees of a person facing a criminal charge. Standing alone the Declaration does not provide remedies under Australian domestic law if it is alleged any of the guarantees have been offended. There is no power in this court to enforce the guarantees to be found in the Declaration and we were not referred to any domestic legislation incorporating any of the guarantees which it was suggested had been broken, or which provided a means whereby they might be enforced.