Book Reviews

H Reicher (ed), *Australian International Law — Cases and Materials*, Sydney: Law Book Company Information Services, 1995.

> "The publication of this work marks something of a milestone in the annals of international law publishing in Australia, as it represents the first indigenous Australian casebook ever produced."
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> Harry Reicher, Philadelphia October 1995

International law has had, and continues to have, a major impact on Australia's foreign relations, political debate and domestic law. Harry Reicher and a team of expert contributors have produced a text which reflects the significance of public international law[1] in Australia. Until now the subject has seemed somewhat arcane and removed. Students have had to rely on a number of texts, most of which have drawn on foreign materials.

The beauty of Reicher's casebook is that it encourages the reader to develop an appreciation of the fundamental concepts of public international law in the Australian context. All the treaties and conventions extracted are those to which Australia is a party, just as the international documents included bear some particular significance for Australia. Cases are extracted from decisions of Australian courts, or international tribunals in cases to which Australia was a party. Statements of government

[1] Public international law refers to the law of nations, as opposed to private international law, also known as conflict of laws, which operates when the elements of a civil matter extend across jurisdictional borders.

ministers are those of Australian politicians. Academic extracts are drawn from the writings of Australian publicists. Furthermore, the materials draw on the standard international law texts published by Australian international jurists: Professor Ivan Shearer, D P O'Connell, James Crawford and D W Greig.

Harry Reicher makes the point that there is a wealth of material from which to draw, owing to Australia's increasing involvement in developments on the international scene. Australia appeared before the International Court of Justice in the *Nuclear Tests Case*, the *Case Concerning Certain Phosphate Lands in Nauru* and the *East Timor Case*. A number of Australians currently preside on international bodies: Professor Christopher Weeramantry on the International Court of Justice, Sir Ninian Stephen on the Appeals Chamber of the International Tribunal dealing with the prosecution of serious human rights crimes in Rwanda and the former Yugoslavia, Justice Elizabeth Evatt on the United Nations Human Rights Committee, Philip Alston on the United Nations Committee on Economic, Social and Cultural Rights and James Crawford on the International Law Commission. Australia has been an active participant in international conferences such as the Third United Nations Conference on the Law of the Sea. There is increasing reference to issues of international law in our domestic courts, particularly in the High Court and at appellate court level. Commonwealth legislation regularly draws on international legal obligations for its constitutional validity.

Issues of international law often arise in Australian courts and politics. Several developments have received widespread publicity recently: the *Toonen* case dealing with gay rights in Tasmania, human rights in East Timor, French nuclear testing in the Pacific and international co-operation in protection of the ozone layer. Rights and obligations at international law have also been central to our war crimes legislation, the Mabo debate and domestic cases concerning an accused's right to a fair trial. Australia's peace-keeping role in Somalia and Kuwait was founded on principles of international law. Claims against Britain for compensation for damage resulting from nuclear tests at Maralinga rest on rights under international law. Australia's participation in the Cambodian peace plan has been possible because of the existence of international organisations legitimised by the international legal system. These are but a sample of the current events from which the materials have been drawn in *Australian International Law — Cases and Materials*.

Harry Reicher's new release is the product of the combined effort of a cross-section of Australians prominent in this field. Juliet Behrens, Hilary Charlesworth, Christine Chinkin, J-P L Fonteyne, Gerald McGinley, Leighton Morris, Gerry Simpson and B Martin Tsamenyi draw on distinguished academic careers. Jonathan Brown, Henry Burmester, Gregory French and Peter Lawrence bring with them years of experience in the foreign service. Mandi Haynes, Timothy McCormack and Harry Reicher draw on a variety of experience in academia, government and legal

practice. This team of academics, diplomats and practitioners combines depth of knowledge, breadth of practical experience and insight into contemporary events.

The variety of contributors also allows the reader access to an unusual range of materials. This new text includes extracts from Hansard, conference papers, government policy statements, the Gazette, intergovernmental correspondence and even an end of year university exam paper. Of particular interest are extracts from Australian memorials submitted to the International Court of Justice in cases to which we have been party.

The volume is divided into five parts, each consisting of a number of chapters. All of the fundamental concepts of international law are presented. Each part is prefaced by a short outline of the material to follow. This is particularly useful for the uninitiated in placing the readings in context. It should also prove a handy reference for practitioners skimming the text for particular issues.

Part 1 sets out the basic elements of the international legal system. The first chapter is essential reading for those critics of international law who dispute its validity as a legal system. It illustrates that international law is a distinct system of law with identifiable sources, and surveys the process of its development. Chapter two examines the relationship between the international legal order and Australian domestic law. Highly topical issues are canvassed, including the impact of treaties on the evolution of the common law. In this area there are extracts from *Jago*[2], *Re Jane*[3] and *Teoh*[4] and the Commonwealth Government's response to the "legitimate expectation" argument. The third chapter deals with legal personality under international law. It begins with the nation state, moves on to the recognition of international organisations and concludes with the rise of the individual as a direct subject of international law. This last topic is illustrated with some fascinating material on the individual's responsibility at international law for war crimes and genocide.

Part 2 covers jurisdiction. Chapter four considers the basis of Australia's sovereignty and includes extensive extracts from the Mabo debate. Extra-territorial jurisdiction is covered, followed by extension of jurisdiction by agreement. At this point the materials focus on the law of extradition, before moving to attempts by other states to extend their jurisdiction into Australia. Chapter five comprises 128 pages of materials relating to the law of the sea, an area of crucial significance to our island

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2 *Jago v District Court of New South Wales* (1988) 12 NSWLR 558: NSW Court of Appeal case concerning an application for a stay of criminal proceedings for an alleged abuse of process arising from delay in bringing the proceedings to trial.

3 *Re Jane* (1988) 94 FLR 1: Family Court of Australia case concerning an application to authorise sterilisation of a mentally incompetent 17-year-old girl.

4 *Minister of State for Immigration and Ethnic Affairs v An Hin Teoh* (1995) 128 ALR 353: High Court of Australia case concerning recourse to the *UN Convention on the Rights of the Child* in the exercise of discretion by a departmental officer determining an application for resident status.

continent. There follows a chapter on Antarctica which looks at sovereignty, scientific endeavours, mineral activities and conservation. Chapter seven concludes the jurisdictional issues with coverage of international air law. Included is a discussion of the Achille Lauro hijacking and the purported right of states to interfere with an aircraft in flight over the high seas.

Part 3 deals with constraints on the exercise of jurisdiction. First there is a presentation in chapter eight of the traditional privileges and immunities accorded to states under international law. This involves an analysis of the position of heads of state, special missions, diplomatic representatives, consulates, conference representatives, foreign forces and international organisations. Some of these are illustrated with topical case studies such as the shooting at the Yugoslav Consulate-General in Sydney in 1988. There is extensive presentation of international human rights law in chapter nine, which challenges readers to consider whether there is a distinctive Australian approach in this field. There is a special section on individual communications under the *Optional Protocol to the ICCPR* with extracts from the *Toonen*[5] case before the UN Human Rights Committee. Australian implementation of obligations under anti-discrimination treaties is covered in depth and there is particular focus on the rights of indigenous peoples under international law. The chapter concludes by looking at how Australian courts refer to international human rights norms in decision making, as illustrated in *Re Marion*[6] and *Dietrich.*[7] Chapter ten deals with international environmental law in the Australian context. Topics include obligations attaching to hazardous waste, preservation of biological diversity and world heritage areas and protection of the ozone layer.

Part 4 comprises one chapter which analyses the procedural dimension of treaties. There are over 100 pages of materials allowing substantial treatment of subjects such as the nature of treaties, their formation and implementation in Australia, as well as ratification, interpretation, invalidity and termination. Reservations to treaties are dealt with in some detail, owing to their importance in Australian federal-state relations. Extracts from the *Tasmanian Dams*[8] case and related materials survey the use of travaux préparatoires as an aid to interpretation of treaties.

Part 5 looks at the settlement of disputes, initially by peaceful means and then by use of force. Readers are presented with a broad spectrum of documents resulting from Australia's involvement in international dispute resolution, from negotiated treaties to decisions of the International Court of Justice. Jurisdiction and admissibility of claims before the ICJ,

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5 *Toonen v Australia* (4 April 1994) UN DOC CCPR/C/50/D/488/1992

6 *Re Marion* [1991] FLC 92-193 at 78301: Family Court of Australia case concerning sterilisation of an intellectually disabled girl.

7 *Dietrich v The Queen* (1992) 109 ALR 385

8 *Commonwealth v Tasmania* (1983) 158 CLR 1

for example, are canvassed in extracts from written submissions from Australia in the *East Timor*[9] and *Nauru*[10] cases. The final chapter focuses on the use of force in international relations, and related prohibitions and exceptions thereto. The materials chosen should inspire lively debate as to the merits of intervention by invitation, humanitarian intervention and peacekeeping operations.

All the major Australian domestic cases are extracted, from *Re Burgess; Ex parte Henry*[11] to *Mabo*[12] and *Teoh*.[13] Seventy-nine cases in total are extracted at some length. All of them are well chosen to correspond with the surrounding materials, allowing the reader to focus on the relevant issues and develop a comprehensive understanding of each topic. The wide range of selected text and journal extracts provides a wealth of references for further reading. The final product is a series of thought-provoking readings.

It is a measure of the significance of international law in Australia that a casebook has finally been produced from entirely Australian materials. The volume is aimed primarily at the student of international law, but should not be overlooked by practitioners confronted with an international law problem.

An eminent conflicts jurist was once challenged by a private practitioner who commented that he had never come across an international law problem in years of practice. The Professor is said to have smiled and replied that the practitioner had most certainly come across many international law problems. It had only been his misfortune that he had not been able to recognise them as such. The comment may have referred to private international law, but is just as applicable to public international law. Its principles impact increasingly on Australian law, yet students and practitioners are generally unfamiliar with its workings. The misfortune of ignorance is no longer an excuse following the release of this excellent publication.

Alissa Moen

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[9] *East Timor (Portugal v Australia) Counter-Memorial of the Government of Australia* [1995] ICJ Pleadings, *East Timor*: International Court of Justice adjudication concerning alleged breaches of international law by Australia in concluding *Timor Gap Treaty* with Indonesia on the basis that Indonesia's occupation of East Timor in 1975-1976 was unlawful.

[10] *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia): Preliminary Objections* [1992] *ICJ Reports* 240: International Court of Justice arbitration concerning rehabilitation of certain phosphate lands mined prior to Nauru's independence whilst under Australian administration.

[11] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608

[12] *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1

[13] See above n 4.