

# INTERNATIONAL CODIFICATION: CHALLENGES AND PERILS

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*This tribute to Professor Emeritus Tony Smith considers the codification of international law, particularly international criminal law, given Tony's long-term commitment to criminal law. It also evaluates the codification of international law in other areas, addressing success and failure.*

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## **I INTRODUCTION**

Professor Tony Smith, in the course of a very productive scholarly life, has given a great deal of attention to the codification of law, especially criminal law.<sup>1</sup> In this tribute, I examine the challenges and perils of the codification of international law, giving some attention to international criminal law. While some of that law is implemented at the international level through international criminal courts and tribunals,<sup>2</sup> I emphasise the roles played by national executives, legislatures and courts and states in negotiating treaties.

I also discuss other areas of international law. In one case the failure of the international legislative process has been resolved by judicial processes; in the others, the legislative process has been a complete failure. I conclude with questions about the influence of texts, some of them scholarly, which on their face are not binding, but which may have greater significance than codes or other written law in the day-to-day operation of legal systems and also in a fundamental way.

International law gets established in a variety of ways. Here I mention those methods with which this article is primarily concerned. Article 13(1)(a) of the Charter of the United Nations requires the General Assembly to initiate studies and make recommendations for the purpose of promoting cooperation in the political field and to encourage the progressive development of international law

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1 ATH Smith "Codification of the Criminal Law: The Case for a Code" [1986] Crim LR 285; and ATH Smith "Criminal Law: The Future" [2004] Crim LR 971.

2 Although its contentious jurisdiction is limited to disputes between states, the International Court of Justice has also had a role in international criminal law matters and not only through its advisory jurisdiction: see for example KJ Keith "The International Court of Justice and Criminal Justice" (2010) 59 ICLQ 895.

and its codification. In 1947 it established the International Law Commission (ILC) to help undertake that second role. It consists of independent experts elected to a five-year term on a regional basis.<sup>3</sup> But as will soon appear, the General Assembly and indeed other bodies within the UN family have never seen the ILC as having a complete monopoly in the area of progressive development and codification of international law.<sup>4</sup>

In terms of criminal responsibility, at the international level, I need to introduce another actor. The International Committee of the Red Cross (ICRC) has, since 1864, been involved in the preparation of the Geneva Conventions for the protection of the victims of war. The four Geneva Conventions of 1949 and their additional protocols of 1977 impose criminal responsibility on individuals.<sup>5</sup> The ILC at its first session held at Lake Success, New York, from April to June 1949, decided not to include the law of war on its agenda.<sup>6</sup> Over the same period a diplomatic conference, held under the auspices of the Swiss Government and the ICRC, was, as one ILC member recognised, preparing the four Geneva Conventions. That conference added one to protect civilians during armed conflict. (The draft, prepared in Tokyo, on that matter had been scheduled for adoption at a conference to be held in 1940. Disastrous timing! The ICRC attempted, but without success, to have the states primarily involved in the Second World War to adopt its principles on an ad hoc basis.)

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3 *Establishment of an International Law Commission* GA Res 174 (1947), amended by *Enlargement of the International Law Commission: amendments to articles 2 and 9 of the Statute of the Commission* GA Res 36/39 (1981).

4 Compare the view of Sir Cecil Hurst, former foreign office legal adviser and judge and President of the Permanent Court of International Justice, who anticipated that a body like the International Law Commission (ILC) would have a monopoly: Cecil Hurst "A Plea for the Codification of International Law on New Lines" (1946) 32 *Transactions of the Grotius Society* 135, reprinted in Cecil Hurst *International Law: The Collected Papers of Sir Cecil Hurst* (Stevens, London, 1950) 129.

5 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950).

6 *6th Meeting – Planning for the codification of international law: survey of international law with a view to selecting suitable topics for codification* [1949] vol 1 YILC 46 at 51–53. The Commission was working through the initial *Survey of International Law in Relation to the Work of Codification of the International Law Commission* UN Doc A/CN.4/1/Rev.1 (10 February 1949). That Survey was prepared by Professor Hersch Lauterpacht.

Those conventions and the protocols to them, adopted in 1977 along with the Hague Conventions of 1899 and 1907, state the law applicable once an armed conflict has begun.<sup>7</sup> They do not prohibit the use of armed force and declare the limits on that prohibition, matters addressed by the Kellogg-Briand Pact of 1928,<sup>8</sup> the Charter of the United Nations and other actions discussed later. In terms of the Latin tags, the focus of The Hague/Geneva law is on *ius in bello* rather than *ius ad bellum*.<sup>9</sup>

For almost the next two decades the United Nations took very little interest in that body of law. That changed as the result of the Teheran Conference marking the 20th anniversary of the Universal Declaration of Human Rights, a conference held at the height of the Vietnam War. What, the question arose, of the human rights of those, especially civilians, affected by armed conflict?<sup>10</sup> The Hague Conventions, from the turn of the century, stated some broad principles, but they had not anticipated, for instance, the development of aerial warfare. And internal armed conflicts, civil wars, which had become much more prominent, were regulated by just one article common to the four Conventions. From that United Nations process, and at the initiative of the Swiss Government and the ICRC, the foundations were laid for the negotiation and adoption in 1977 of the two additional protocols, one on international armed conflicts and the other on non-international armed conflicts, to the 1949 Geneva Conventions, following four very challenging sessions.<sup>11</sup>

## II PIRACY AS AN INTERNATIONAL CRIME AND ITS LIMITS

The international law prohibiting the crime of piracy is long established. How is that crime to be defined? The great codifiers of the late 19th century, including Sir James Fitzjames Stephen, on whose

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7 A convenient source is the International Committee of the Red Cross *Handbook of the International Red Cross and Red Crescent Movement* (14th ed, Geneva, 2008) at 33–397. The 1949 Geneva Conventions (see above n 5) and their additional protocols are scheduled to the Geneva Conventions Act 1958.

8 General Treaty for Renunciation of War as an Instrument of National Policy 94 LNTS 57 (signed 27 August 1928, entered into force 24 July 1929) [Kellogg-Briand Pact].

9 The Hague/Geneva law is the law applicable when armed conflict has begun (*ius in bello*), while the Charter prohibits the threat or use of force in international relations against the territorial integrity of any state, unless in individual or collective self-defence or under Security Council authority (*ius ad bellum*).

10 *Final Act of the International Conference of Human Rights* Un Doc A/CONF.32/41 (22 April–13 May 1968) at 13 "Resolution XIII: Co-operation with the United Nations High Commissioner for Refugees". That resolution led to two other resolutions (*Respect for human rights in armed conflicts* GA Res 2444 (1968); and *Respect for human rights in armed conflicts* GA Res 2597 (1969)) and two valuable Secretariat reports (*Respect for Human Rights in Armed Conflicts: Report of the Secretary-General* UN Doc A/7720 (20 November 1969); and *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General* UN Doc A/8052 (18 September 1970)).

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978).

work our honorand has drawn, were reluctant to try to settle the detail of that law. In the light of recent practice, they thought that no definition would be satisfactory which is not recognised as such by other nations. The text they proposed, adopted in the New Zealand Criminal Code Act 1893 and repeated in the Crimes Acts of 1908 and 1961, did no more than declare that the crime of piracy was any act that amounted to piracy by "the law of nations".<sup>12</sup> They referred to discussions in the courts of the United States, and the result there appeared to justify the course they took. They would have had in mind the 1820 decision of the United States Supreme Court which rejected the argument that a statutory definition of the crime of piracy written in similarly general terms was unconstitutional.<sup>13</sup>

In 1934 the Judicial Committee of the Privy Council in a superb opinion given by Viscount Sankey LC in response to a reference arising from a Hong Kong decision, having reviewed a very wide range of material, ruled that robbery was not an essential element of "piracy".<sup>14</sup> In resisting a call to state the detail of the crime, and following the lead of Stephen and his colleagues, the Lord Chancellor showed similar caution to that of the 19th-century codifiers. He quoted a passage from M Portalis, one of those involved in the preparation of the Napoleonic Code:<sup>15</sup>

We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. ... A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic.

The 1961 Act did not take advantage of the definition established by the 1958 Geneva Convention on the High Seas (to which, to be fair, New Zealand did not become party).<sup>16</sup> That Convention drew on very extensive work done by a group assembled by Harvard Research in International Law in the 1930s when the League of Nations was engaged in early attempts to codify international law.<sup>17</sup> The ILC, in preparing what became the Convention on the High Seas, acknowledged that it depended

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12 Criminal Code Act 1893, s 104; Crimes Act 1908, s 121; and Crimes Act 1961, s 92. For a fuller account, see my 2000 Dethridge Address, Kenneth Keith "Frank Stuart Dethridge Memorial Address 2000: Piracy and Other Perils: Can the Law Cope?" (2002) 16 *MLAANZ Journal* 7.

13 *United States v Smith* 18 US 153 (1820). The relevant passage of the 1879 report of the Commissioners is quoted in Keith, above n 12, at 12.

14 *Re Piracy Jure Gentium* [1934] AC 586 (PC).

15 At 600.

16 Convention on the High Seas 450 UNTS 11 (opened for signature 29 April 1958, entered into force 30 September 1962).

17 Harvard Research in International Law "Draft Convention on Piracy with Comments" (1932) 26 *AJIL Supplement* 749.

heavily on that work.<sup>18</sup> The Privy Council had also drawn on it.<sup>19</sup> The diplomatic conference adopted the text proposed by the Commission. That text defined piracy as any illegal acts of violence, detention or any act of depredation committed for private ends on the high seas, or any other place beyond national jurisdiction, by the crew or passengers of a ship or aircraft against persons or property on another vessel. The definition has been carried over into the 1982 United Nations Convention on the Law of the Sea and in 2013 a United States court was able to go directly to the detail of the definition and to apply it to prohibit Sea Shepherd's attempts to disrupt Japanese whaling.<sup>20</sup> The contrast in judicial method from the 1820 decision of the United States Supreme Court and especially the 1934 Privy Council opinion, with all its citations and extensive discussion, could not be starker. This is a clear demonstration of the merits of codification.

But the limits placed on the definition of piracy by the Conventions required the elaboration through a governmental negotiation, with no ILC assistance, of treaty texts. The first was a convention for the suppression of unlawful acts against the safety of maritime navigation (following the Achille Lauro incident) followed by protocols, including those protecting the safety of fixed platforms on the continental shelf.<sup>21</sup>

### **III ASYLUM FOR THOSE CHARGED WITH "POLITICAL OFFENCES"**

Another recurring issue of international criminal law relates to the right of alleged offenders to seek asylum when they face requests for their extradition. Both extradition treaties and the national legislation implementing them, from at least the 19th century, exempt from transfer those charged with "political offences" or if the request has been made with a view to try a person for an offence of a political character. How are those expressions to be understood? That question does not arise if that ground of refusal is excluded, as it is in multilateral conventions criminalising genocide, terrorist bombings, acts of nuclear terrorism, the financing of terrorism and unlawful acts relating to international civil aviation.<sup>22</sup>

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18 *Report of the International Law Commission covering the work of its eighth session* [1956] vol 2 YILC 253 at 282. For the definition in each convention, see Convention on the High Seas, above n 16, art 15; and United Nations Convention on the Law of the Sea 1833 UNTS 3 (signed 10 December 1982, entered into force 16 November 1994) [UNCLOS], art 101.

19 *Re Piracy Jure Gentium*, above n 14.

20 *Institute of Cetacean Research v Sea Shepherd Conservation Society* 708 F 3d 1099 (9th Cir 2013). See also Trevor Ryan "Sea Shepherd v Greenpeace? Comparing Anti-whaling Strategies in Japanese Courts" (2009) 7 NZYIL 131; and UNCLOS, above n 18, art 101.

21 See the Convention and the three protocols implemented by and scheduled to the Maritime Crimes Act 1999.

22 A convenient source for the terrorism treaties is Ben Saul *Terrorism: Documents in International Law* (Hart Publishing, Oxford, 2012) at 17–124.

The political character of an offence also arises, in a reciprocal way, in the context of claims for refugee status. Excluded from refugee status under the 1951 Convention on the Status of Refugees are those with respect to whom there are serious reasons for considering that they have committed a serious "non-political" crime outside the country of refuge.<sup>23</sup> In a major decision, given in 1996, three of the panel of five in the House of Lords saw that provision as raising the same issue as the extradition provisions.<sup>24</sup> All five agreed that the appeal by the person seeking refugee status was to be rejected. They decided that the crime he was alleged to have committed was "non-political" and that finding defeated his claim to refugee status.

One of the two who did not agree with the equating of the two legal standards began his judgment with these words:<sup>25</sup>

... during the 19th century those who used violence to challenge despotic regimes often occupied the high moral ground and were welcomed in foreign countries as true patriots and democrats. Now, much has changed.

The so-called political exception, he continued, was a product of Western European and North American liberal democratic ideals. (He might also have included South America where asylum is frequently guaranteed by treaty, something recognised in some of the multilateral penal conventions.) The courts must now, he said, struggle to apply a concept which is out of date. Later he called attention to:<sup>26</sup>

... the whole trend of the more modern decisions and writings ... towards an acceptance that certain acts of violence, even if political in a narrow sense, are beyond the pale, and that they should not be condoned by offering sanctuary to those who commit them.

That Judge listed the conventions that he claimed had excluded the "political crime" exception: those criminalising torture, the taking of hostages, crimes against internationally protected persons, and attacks on the safety of aircraft, aerodromes, ships and marine installations.

The extradition cases from the late 19th and the early 20th century on which the three Judges relied certainly do involve very different acts. For instance, in an early case decided in England, dissatisfaction with the government of a canton in Switzerland had developed to such a point that a number of citizens seized the town's arsenal and one of their number, with a rifle taken from the

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23 Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954). See also its 1967 protocol which gave the Convention much wider temporal and geographic extent: Protocol relating to the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967).

24 *T v Immigration Officer* [1996] AC 742 (HL).

25 At 752.

26 At 755.

arsenal, shot and killed a member of the state council of the canton. The Court, one of the members of which was Sir James Fitzjames Stephen, who referred in his judgment to his experience of drafting many Acts of Parliament and to his own history of criminal law, held that the alleged offence was incidental to and formed part of political disturbances and was accordingly an offence of a political character with the consequence that the alleged offender could not be surrendered.<sup>27</sup> His work, with others, provided the basis for the 1893 New Zealand criminal code, with its definition of the crime of piracy discussed earlier.

#### ***IV "ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS"***

The 1951 Refugee Convention contains a ground of exclusion raising similar issues. Even if a person is held to have a well-founded fear of being persecuted for reasons of race, religion, membership of a particular group (a test which has received a widening interpretation and application) or political opinion, they may fail to be recognised as a refugee because there are serious grounds for believing they have "been guilty of acts contrary to the purposes and principles of the United Nations".<sup>28</sup> How is that expression to be understood? In 1998 the courts in Canada considered the claim to refugee status of a person who had been convicted of conspiracy to traffic in a narcotic; he was a member of a group in possession of heroin with a street value of \$10,000,000. Was that offender guilty of such acts?

The lower federal courts found against him, but the Supreme Court reversed and granted him refugee status.<sup>29</sup> Two Judges dissented. The majority acknowledged that although international trafficking in drugs is an extremely serious matter, as the United Nations had made clear, there was not a sufficiently clear designation by that body that trafficking was an act contrary to UN principles and purposes. Further, the Court itself was unable to characterise the trafficking as serious, sustained and systematic violations of fundamental human rights. The majority also considered that the Federal Court of Appeal had erred in dismissing the objects and purposes of the Convention and in according virtually no weight to the indications provided in the travaux préparatoires.

The minority, by contrast, gave much more weight to the major harm, internationally as well as nationally, that drug trafficking was causing:<sup>30</sup>

... it cannot be the case that the interpretation of an exclusion must be forever restricted. As international law develops, the content of a phrase such as "acts contrary to the purposes and principles of the United Nations" must be capable of development. The expansion of the exclusion ... should not be undertaken

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27 *Re Castioni* [1891] 1 QB 149 (DC).

28 Convention relating to the Status of Refugees, above n 23, art 1.

29 *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

30 At [128].

lightly, but where there is compelling evidence suggesting that it should be interpreted in a certain way, a court is not precluded from adopting that interpretation.

Those Judges had spelled out in detail the costs in deaths and addiction and to economies, and related international action in the United Nations, in treaties from 1912 to the present day, and in other actions.

That case was considered by the United Kingdom Supreme Court in 2012 in an appeal by two claimants seeking refugee status, both of whom had been involved in terrorist acts.<sup>31</sup> While not explicitly mentioned, the events of 11 September 2001 must have been in everyone's mind. Although the Court did not say so, it may be seen as supporting the two dissenters in the Canadian case. In one of the two cases before the Court, it included international terrorist acts within the scope of the treaty phrase. It did that by drawing on UN treaties and General Assembly and Security Council resolutions, all adopted long after 1951. In one of the two cases, one of the terrorist acts was directed at the International Security Force which was operating in Afghanistan under a Security Council mandate allowing it to engage in armed combat. That Force was established in ways not contemplated by those who prepared the UN Charter, nor by its terms or practice under it before 1951. The appeal was dismissed but with the case being remitted to the immigration tribunal. In the second case, the Court was not able to determine whether there was an international element in the acts of terrorism and, for that reason and others, that case also was remitted to the tribunal.

## V THE CRIME OF AGGRESSION

A further challenge to international criminal law which has been present since at least 1928, when the Kellogg-Briand Pact was signed,<sup>32</sup> is the definition of the unlawful use of force or aggression. The issue arose in the prosecutions at Nuremberg and Tokyo when several of the German and Japanese prisoners were charged with crimes against peace. Both tribunals, although with dissent in the Tokyo tribunal, had no real difficulty in finding that those were crimes for which individuals could be prosecuted and held responsible. In the London Agreement setting up the Nuremberg tribunal, "crimes against peace" is defined very briefly: "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances".<sup>33</sup>

The United Nations General Assembly, just two months after the Nuremberg decisions were handed down, noting the London Agreement setting up the Tribunal and that similar principles had

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31 *Al-Sirri v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening)* [2012] UKSC 54, [2013] AC 745. For an account of more recent developments relating to the political offences exception, see Julia Jansson *Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition* (Routledge, Oxford, 2020); and the list of treaties in *Measures to eliminate international terrorism: Report of the Secretary-General* UN Doc A/76/201 (21 July 2021) at 24–27.

32 Kellogg-Briand Pact, above n 8.

33 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 82 UNTS 279 (signed and entered into force 8 August 1945) at "Charter of the International Military Tribunal", art 6(a).



been adopted for the Tokyo tribunal, affirmed the principles of international law recognised by the Charter of the Tribunal and the judgment of the Tribunal.<sup>34</sup> It did not attempt to spell out the principles, instead giving that task to the International Law Commission in 1947 along with the preparation of a Draft Code of Crimes against the Peace and Security of Mankind.<sup>35</sup> In 1948 the Assembly added to the tasks of the Commission the question of international criminal jurisdiction, looking to the establishment of an international court with jurisdiction over individuals who could be charged for genocide (the 1948 Convention on the Prevention and Punishment of Genocide contemplated the establishment of such a court)<sup>36</sup> or other crimes in respect of which jurisdiction was conferred by a convention.<sup>37</sup> In 1950 the Assembly referred to the Commission the question of defining aggression, which it considered along with the Code of Crimes.<sup>38</sup> But in 1952 the Assembly decided to deal with that matter through a committee of member states, a process which led to the Definition of Aggression adopted by consensus as late as 1974.<sup>39</sup> That definition was directed at states and was for the assistance of the Security Council in making determinations under art 39 of the UN Charter. The definition, extending over more than two pages, declared that it was not exhaustive and that the Security Council might make a finding of aggression on another basis. Others have commented on the confusion which arises when a number of different bodies are all addressing the same issues.<sup>40</sup>

The substance of the definition, in this case directed at individuals, was finally incorporated, 36 years later, into the Statute of the International Criminal Court, but with the qualification that the

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34 *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal* GA Res 95 (1946).

35 *The Work of the International Law Commission* (8th ed, United Nations, New York, 2012) vol 1 at 88–89 and 85–86.

36 See Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951), art 9.

37 *The Work of the International Law Commission*, above n 35, at 89–92.

38 At 94–97.

39 *Definition of Aggression* GA Res 3314 (1974).

40 See for example Richard R Baxter "The Effects of Ill-Conceived Codification and Development of International Law" in *Faculté de Droit de l'Université de Genève Recueil d'Études de Droit International en Hommage à Paul Guggenheim* (Institut Universitaire de Hautes Études Internationales, Geneva, 1968) 146, in which he also refers to the process then underway to prepare the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, the Definition of Aggression and the adoption by the General Assembly of the Declaration on Non-Intervention, one of the matters subject to the friendly relations process. See similarly his account of the early attempts to codify the law of state responsibility: RR Baxter "Reflections on Codification in light of the International Law of State Responsibility for Injuries to Aliens" (1964) 16 *Syracuse L Rev* 745.

determination by another body that aggression had occurred was not binding on it.<sup>41</sup> The contrast between those very lengthy definitions and the extensive labour that went into preparing them, and into the process of incorporating them into the Rome Statute, on the one side, and, on the other, that in the London Agreement along with the rapidity of its drafting, could not be sharper.

In the 1980s, at the direction of the General Assembly, the ILC had returned to the questions of the Code of Crimes against the Security and Peace of Mankind and international criminal jurisdiction. In 1996 it completed draft articles on the first and a draft statute for an international criminal court, texts which contributed to the work of the Diplomatic Conference which in 1998 adopted the Rome Statute of the International Criminal Court.<sup>42</sup>

## **VI INTERNATIONAL TERRORISM**

The judgments referred to earlier, given by the top courts in the United Kingdom in 1996 and 2012, list conventions relating to terrorism.<sup>43</sup> The 19 conventions which have worldwide application date from 1963 and, as indicated in those judgments, cover a very wide range of different subject matters. But no comprehensive convention on international terrorism has yet been adopted, notwithstanding the many debates and discussions since at least 1994. (Conventions on the prevention and punishment of terrorism and for the creation of an international criminal court were adopted in 1937 by the League of Nations but they did not come into force.) In December 2021, the General Assembly again called on its legal committee to establish a working group with a view to finalising a process on the draft comprehensive convention, anticipating the convening of a high-level conference under the auspices of the United Nations, a proposal made as long ago as 1972.<sup>44</sup>

Notwithstanding that continuing lack of progress at the universal level, the appellate body of the Special Tribunal for Lebanon felt able in 2011 to declare that there was an international law of terrorism.<sup>45</sup> That ruling, made in an advisory opinion (with the accused being able to challenge it at a later stage), has been heavily criticised.<sup>46</sup> I do not add to that criticism, except to say that it does not

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41 Rome Statute of the International Criminal Court 2187 UNTS 3 (signed 17 July 1998, entered into force 1 July 2002); and Resolution RC/Res.6 (2010) of the Review Conference of the Rome Statute.

42 *The Work of the International Law Commission*, above n 35, at 88–89, 85–86 and 97–121.

43 See *T v Immigration Officer*, above n 24; and *Al-Sirri v Secretary of State for the Home Department*, above n 31.

44 See many UN General Assembly resolutions, including *Measures to eliminate international terrorism* GA Res 60/43 (2006); *Measures to eliminate international terrorism* GA Res 76/121 (2021); and *Measures to eliminate international terrorism* GA Res 54/110 (2000).

45 *Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging* STL Appeals Chamber STL-11-01/I, 16 February 2011.

46 See for example Ben Saul "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism" (2011) 24 *Leiden JIL* 677.

appear to begin to take account of the reality of the extremely lengthy and inconclusive General Assembly process. To recall one of the judgments in the 1996 case, one person's freedom fighter is another's terrorist.<sup>47</sup>

## **VII CRUEL AND UNUSUAL PUNISHMENT**

Several of the expressions discussed so far challenge the proposition that crimes, including defences, should be defined with precision. So too with the limits on the penalties which may be imposed following conviction. Consider the prohibition on the infliction of cruel and unusual or degrading punishment or treatment. That bar, or variations of it, has been part of English law since 1688 and the United States Constitution since 1791, and international treaties and declarations since 1948.<sup>48</sup> In 1688 a child as young as seven, convicted of a range of serious crimes, could be subject to the death penalty. How is the prohibition now to be seen? In 2005 the United States Supreme Court said:<sup>49</sup>

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate to be cruel and unusual.

The Court's review in that case led to the striking down of the death penalty for offenders under 18. Other cases in that Court have related to mentally retarded offenders, juvenile offenders sentenced to life imprisonment without parole for non-homicide offences and children who committed murder.<sup>50</sup>

## **VIII OVERLAPPING MARITIME ZONES**

I now move from international criminal law to a very different area of international law, the law of the sea, and in particular the law governing the delimitation of overlapping maritime zones. In this area, it will be seen, the negotiators were unable, with one exception, to settle on a text which stated a rule, a standard or even a principle. But on this occasion the International Court of Justice (ICJ) and arbitral tribunals have managed to develop methods of delimitation. The exception relates to overlapping territorial seas (of only three, four or 12 miles) where the Conventions of 1958 and 1982

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47 *T v Immigration Officer*, above n 24, at 755.

48 See Bill of Rights 1688 (Eng) 1 Will & Mar sess 2 c 2; and *Universal Declaration of Human Rights* GA Res 217A (1948), art 5.

49 *Roper v Simmons* 543 US 551 (2005) at 560. See further discussion in Georges Abi-Saab and others (eds) *Evolutionary Interpretation and International Law* (Hart Publishing, Oxford, 2019) at ch 8.

50 See for example *Graham v Florida* 560 US 48 (2010); and *Miller v Alabama* 567 US 460 (2012).

did state a rule, subject to qualifications.<sup>51</sup> A median line within a territorial sea created no real problems, except, for instance, when a river with unstable banks forms the boundary between the two states, some adjustment may be required. In terms of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and the 1982 Convention, that would be seen as a case of "special circumstances".<sup>52</sup> The Conventions also recognise that an historical title might govern.

The 1958 Convention on the Continental Shelf followed essentially the same model.<sup>53</sup> The boundary, if not settled by agreement and in the absence of special circumstances, is to be determined by the drawing of a median line from the territorial sea baselines. The ICJ in 1969 held that the delimitation provision in that 1958 Convention was not customary international law. It made that ruling in a case between Denmark and the Netherlands (both of which had ratified the Convention), on the one side, and the Federal Republic of Germany (which had not), on the other. Given the geography in the North Sea, had the equidistance rule been applied, the Federal Republic of Germany would have had only a tiny triangular segment to the great advantage of the other two states.<sup>54</sup>

The Court instead held that:<sup>55</sup>

... delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other ...

The three parties then negotiated treaties in accordance with that ruling. The judgment was given just as the process leading to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) was getting underway. It was also a time when deep water drilling technology was rapidly developing. The 1958 Convention contemplated drilling to a depth of 200 metres, while recognising that that may not be the limit. Some time ago drilling had extended to five or 10 times that depth.

The four 1958 Conventions on the law of the sea were very soon seen as inadequate. From the late 1960s major interstate negotiations began, the earlier ILC process no longer being seen as appropriate. The interstate process, proceeding through the 1970s and indeed into the mid 1990s,

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51 See Convention on the Territorial Sea and Contiguous Zone 516 UNTS 205 (opened for signature 29 April 1958, entered into force 10 September 1964); Convention on the Continental Shelf 499 UNTS 311 (opened for signature 29 April 1958, entered into force 10 June 1964); Convention on Fishing and Conservation of the Living Resources of the High Seas 559 UNTS 285 (opened for signature 29 April 1958, entered into force 20 March 1966); Convention on the High Seas, above n 16; and UNCLOS, above n 18.

52 *Territorial and Maritime Dispute between Nicaragua and Honduras (Nicaragua v Honduras)* [2007] ICJ Rep 659 at 740–748 and [267]–[298].

53 Convention on the Continental Shelf, above n 51.

54 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3.

55 At 53.

addressed a very wide range of issues, aiming at what became, in the words of Ambassador Tommy Koh of Singapore who chaired the final stages of the UNCLOS negotiations, "a Constitution for the Oceans".<sup>56</sup>

Throughout the UNCLOS negotiations, the difference between the median line group and the equitable principles group was a major focus. The outcome is a text in respect of the continental shelf, as well as of the exclusive economic zone, which refers to neither test nor to special circumstances. In respect of both areas, delimitations are to be "effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".<sup>57</sup>

In the absence of agreement, it has been for the ICJ (15 cases to date) and ad hoc arbitral tribunals, the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals set up under UNCLOS (at least 10 cases to date), to settle the boundaries, essentially without any real guidance from the international legislator. The Court in the initial *North Sea Continental Shelf* cases recognised that different methods might be used concurrently.<sup>58</sup>

The three stages of the principal test declared in the *Black Sea* case, which drew on five earlier cases dating from 1985 even before UNCLOS came into force, proceed in the following way.<sup>59</sup> The first is to establish a provisional equidistance line, using methods that are geometrically objective and appropriate for the geography of the area. There may be compelling reasons that make that unfeasible and, I would suggest, a range of methods or approaches might be employed instead. At the second stage, the court considers whether there are factors calling for the adjustment or shifting of the provisional equidistance line to achieve an equitable result. And finally, the court verifies whether the provisional equidistance line as adjusted or not would lead to an inequitable result because of any marked disproportion between the ratio of the relevant coasts and the ratio between the relevant maritime area of each state. The ICJ used the same methodology in two subsequent cases and, as it has noted, other tribunals have adopted the same methodology in resolving maritime delimitation cases brought before them.<sup>60</sup> But there are nevertheless indications that the three-stage test may be

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56 Tommy Koh, President of the Third United Nations Conference on the Law of the Sea "A Constitution for the Oceans" (Remarks at the final session of the Conference, Montego Bay, Jamaica, 6 and 11 December 1982).

57 UNCLOS, above n 18, art 74. For an insider's account of the process, see Philip Allott "Power Sharing in the Law of the Sea" (1983) 77 AJIL 1 at 19–27. For another account of the drafting process, drawing on one source not available to that author, see *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624 at 740–743.

58 *North Sea Continental Shelf*, above n 54.

59 *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 61 at 101–103 and [115]–[122].

60 *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* [2018] ICJ Rep 139; and *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2021] ICJ Rep 206 at [128]–[129].

too rigid and that achieving an equitable solution should have overriding importance. The geographical facts in some cases do not allow its operation.<sup>61</sup>

## **IX INTERNATIONAL ORGANISATIONS**

I now consider the codification of international law relating to international organisations. In this area the failure to legislate successfully may be attributed to three matters: first, the equating of states and international organisations without giving sufficient weight to the great differences between the two; second, the differences between international organisations themselves; and third, the failure to take account of the extensive body of written law which already existed and which had been elaborated through interstate negotiations.<sup>62</sup>

The ILC did not include any aspect of the subjects of international law in its 1949 provisional list of 14 selected for codification.<sup>63</sup> Under the "subjects" topic, the UN Secretariat *Survey of International Law* had referred to the need to take into account the developments amounting to the recognition of the international personality of international organisations.<sup>64</sup> The *Survey* mentions their international contractual and procedural capacity.<sup>65</sup>

In 1962 a UN Secretariat document recalled that states had proposed subjects relating to international organisations for codification.<sup>66</sup> The number of intergovernmental organisations, universal and regional, continued to grow and had reached about 150. The relations between them and with states raised complex legal problems which were not always settled satisfactorily. An established practice had come into being and there were numerous texts, including two volumes concerning the legal status, privileges and immunities of international organisations.<sup>67</sup> In response, the Commission decided to include on its agenda the topic of relations between states and international organisations. The General Assembly had earlier asked the Commission to undertake that task after it had completed

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61 See *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India) (Award of 7 July 2014)* (2014) 32 RIAA 1 at [339] and [397]; and the careful analysis of an expert practitioner in this area, Malcolm D Evans "Maritime Boundary Delimitation" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 254.

62 For a fuller discussion, see Kenneth Keith "The Processes of Law-Making: The Law Relating to International Organizations as an Example" in Maurizio Ragazzi (ed) *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill, Leiden, 2013) 15.

63 *Survey of International Law in Relation to the Work of Codification of the International Law Commission* UN Doc A/CN.4/1/Rev.1 (10 February 1949).

64 At [31].

65 At [31].

66 *Working paper prepared by the Secretariat* [1962] vol 2 YILC 84 at 89 and 97 (especially [176]).

67 See *United Nations Legislative Series: Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations* (United Nations, New York, 1959) vol 10 and 11.

its work on diplomatic and consular relations and special missions. On the basis of texts prepared by the Commission, conventions were adopted by two diplomatic conferences and the General Assembly on those three matters in 1961, 1963 and 1969.<sup>68</sup>

In 1971 the Secretariat took a more cautious view in its comprehensive *Survey of International Law*.<sup>69</sup> By that time, it could take account of related work undertaken by the Commission since 1962. The law of treaties relating to international organisations was already being studied by the Commission following recommendations to that effect by the Vienna Conference on the Law of Treaties and the General Assembly. In 1971 the Commission completed its work on the representation of states in their relations with international organisations and recommended to the General Assembly that a diplomatic conference be convened to prepare a convention. That happened and in 1975 the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character was adopted.<sup>70</sup> As the title indicates, the Convention does not extend to regional organisations, but as is recognised in its art 2, the rules it sets out might be applicable independently of it. Four states, in becoming parties to the Convention, have in fact made declarations to that effect.

In 1986 a diplomatic conference, following the work of the Commission, adopted the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.<sup>71</sup> The Commission, while essentially replicating the provisions of the 1969 Convention, recognised that the assimilation of international organisations to states, even when limited to the law of treaties, is far from exact.<sup>72</sup>

While all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization.

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68 Vienna Convention on Diplomatic Relations 500 UNTS 95 (opened for signature on 18 April 1961, entered into force 24 April 1964); Vienna Convention on Consular Relations 596 UNTS 261 (opened for signature 24 April 1963, entered into force 19 March 1967); and Convention on Special Missions 1400 UNTS 231 (opened for signature 8 December 1969, entered into force 21 June 1985).

69 *Survey of International Law: Working paper prepared by the Secretary-General* [1971] vol 2, pt 2 YILC 1 at [340]–[356] (especially the final paragraph).

70 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (opened for signature 14 March 1975, not yet in force).

71 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (opened for signature 21 March 1986, not yet in force).

72 *Report of the International Law Commission on the work of its thirty-fourth session* [1982] vol 2, pt 2 YILC 1 at [41].

The preamble to the 1986 Convention reflects those differences.

The subsequent history of both conventions has been an unhappy one. Both required 35 states parties to have accepted them before they came into force. The number of states parties to the 1975 Convention, 47 years on, has remained at 34 (eight of which as successor states to the Federal State of Yugoslavia and two to Czechoslovakia have made declarations of continuity), the last acceptance being in 2008. Only one of those states is a host state to a universal organisation and that state and the organisation have concluded a detailed headquarters agreement.

After 36 years, only 33 states have become party to the treaties Convention (two by declarations of succession), the last acceptance being in 2009. All 33 are among the 116 parties to the 1969 Convention. Perhaps it is safe to assume that the other parties to that 1969 Convention proceed on the basis that the rules stated in it are applicable as customary international law.

A third matter considered by the Commission from 1976 to 1991 was the status, privileges and immunities of international organisations. It had before it eight reports from its special rapporteurs and several Secretariat studies. In 1992 it noted that states had been slow to become parties to the 1975 Convention and doubts had accordingly been raised about continuing with the topic, a matter which was covered to a large extent by existing agreements, a point which had been made by the Secretariat as long ago as 1962. The Commission recalled that it had taken no action on the draft articles presented by the rapporteurs and there was no call within it or the Sixth Committee of the General Assembly to take the matter further unless the Assembly at the request of a state decided otherwise. There the matter rests.<sup>73</sup>

Notwithstanding that gloomy history, the Commission decided to put the topic of the responsibility of international organisations on its agenda in 2002. The topic, said the relevant background document, "is the logical and probably necessary counterpart of that of State responsibility [which was completed in 2001]".<sup>74</sup> It drew a comparison with the 1986 Convention on the treaties of international organisations which had followed on from the 1969 Convention on treaties between states. If the matter were not addressed, "the general topic of responsibility, which is, together with the law of treaties, one of the pillars of the Commission's work and probably its 'masterpiece', would be incomplete and unfinished".<sup>75</sup> It is remarkable how rarely the unhappy earlier history of the attempts to progressively develop and codify the law of international organisations was mentioned in the course of the nine years' work on the topic. It was only in the final stages of the process that states, members of the Commission (including some who had promoted the inclusion of the item on the Commission's agenda) and especially international organisations expressed concerns. They referred

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73 *Report of the International Law Commission on the work of its forty-fourth session* GA Res 47/33 (1992).

74 *Report of the International Law Commission on the work of its fifty-second session* [2000] vol 2, pt 2 YILC 1 at 135.

75 At 135.



to the great differences between international organisations, something the Commission had recognised in its work on treaties and the Secretariat in its 1971 *Survey*, the limited amount of relevant practice and problems with the expression "rules of the organization". Some of the same concerns were expressed by the secretariats of international organisations and by members of the Sixth Committee in 2011,<sup>76</sup> as the General Assembly noted the text.<sup>77</sup>

## **X SUCCESSION OF STATES**

I come to my final example of failed codification. It concerns the succession of states. Following extensive work by the Commission, the Vienna Convention on Succession of States in respect of Treaties was adopted on 23 August 1978.<sup>78</sup> As its first preambular paragraph indicates, that instrument gives particular attention to the case of newly independent states—that is, states which were formerly dependent—in the context of the rapid recent phase of decolonisation. The Convention came into force after 15 states accepted it and at present it has just 23 parties, only three of which were formerly dependent. One of them had agreed with its former colonial power to assume the treaty obligations of that state. The Commission, when proposing that the General Assembly call a diplomatic conference to adopt a convention, considered that "such a convention has important effects in achieving general agreement as to the content of the law which it codifies and thereby establishing it as the accepted customary law on the matter".<sup>79</sup> Were the majority of states, it continued, to become parties to the convention within a reasonable period of time, the establishment of a convention would have proved worthwhile.<sup>80</sup> But that has not happened. Further, the Convention has no retrospective effect and appears to have had no practical consequence.

It is also the case that the practice of both the many newly independent states relating to a range of bilateral treaties and of the other party to them concerning extradition treaties, air transport agreements and trade agreements contradicted the clean slate policy adopted by the Commission and the diplomatic conference. The practice of new states relating to many multilateral treaties is similarly to the opposite effect. So too are the many agreements between the successor states and their former dependent territories agreeing to continuity. The same is true of the unilateral declarations made by newly independent states of continuity, at least for a trial period. It may be said that the real value of

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76 See *Responsibility of International Organizations: Comments and observations received from Governments* UN Doc A/CN.4/636 and Add 1–2 (14 February, 13 April and 8 August 2011); and *Responsibility of International Organizations: Comments and observations received from international organizations* UN Doc A/CN.4/637 and Add 1 (14 and 17 February 2011).

77 *Responsibility of international organizations* GA Res 66/100 (2011).

78 Vienna Convention on Succession of States in respect of Treaties 1978 UNTS 3 (opened for signature 23 August 1978, entered into force 6 November 1996).

79 *Report of the International Law Commission on the work of its twenty-sixth session* [1974] vol 2, pt 1 YILC 157 at [63].

80 At [63].

this process was the diligent gathering in Secretariat studies of that practice. Was there not a case for leaving this area of law, through the accumulation of largely consistent practice, to the development of customary international law?<sup>81</sup>

A second convention, again based on a text prepared by the Commission, was adopted on 8 April 1983: the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.<sup>82</sup> Requiring 15 state acceptances to enter into force, it has received only seven, none of which falls within the definition of newly independent states. The Convention also has no retrospective effect and can have had no practical application.

Notwithstanding that history, the Commission in 2017 began work on state succession to state responsibility. Members of the Sixth Committee of the General Assembly, states in their comments on the project and members of the Commission have all continued to question the desirability of continuing with the project.<sup>83</sup> They also point to the fact that in significant cases particular agreements are reached between the interested states and that there is limited relevant state practice.<sup>84</sup>

I may perhaps be allowed to refer to the comment of a very experienced and senior former member of the Commission, whom I will not name. The most important thing the Commission does, he said, is to decide whether to put a matter on their agenda and they do it poorly. While that involves some degree of overstatement, it does have a central strength.

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81 For the Secretariat studies, see *Succession of States to multilateral treaties: studies prepared by the Secretariat* UN Doc A/CN.4/200 and Add 1 and 2; and see for example DP O'Connell "Recent Problems of State Succession in Relation to New States" (1970) 130 Hague Recueil 95; and KJ Keith "Succession to Treaties by Newly Independent States" in Jean G Zorn and Peter Bayne (eds) *Foreign Investment, International Law and National Development: Papers presented at the Seventh Waigani Seminar* (Butterworths, Sydney, 1975) 8.

82 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (opened for signature 8 April 1983, not yet in force).

83 See for example *Succession of States in respect of State responsibility: Information on treaties which may be of relevance to the future work of the Commission on the topic* UN Doc A/CN.4/730 (20 March 2019). The ILC, beginning in 1993, has also worked on succession to nationality of natural persons and legal persons: see *The Work of the International Law Commission*, above n 35, at 199–204; and *The Work of the International Law Commission* (8th ed, United Nations, New York, 2012) vol 2 at 393–400. The Commission in 1999 decided not to continue with the second issue, no positive comments having been received on it from states. It did in 1999 complete a text relating to natural persons and no further action appears to have been taken since a General Assembly resolution of 2011.

84 See for example *Report of the International Law Commission on the work of its sixty-ninth session* [2017] vol 2, pt 2 YILC 1 at [229]–[230].

## XI THE SCHOLAR

Finally, some remarks on texts which, on their face, are not binding but which nonetheless have major impacts in the law in practice. I must be selective and I dare not mention current or recent scholars!

The role of the scholar is recognised in art 38 of the Statute of the International Court of Justice, and of its predecessor. That provision may be seen as including the classical writers of international law. To take just one instance, Emmerich de Vattel's *Droit des Gens* was the most cited authority in argument before and in judgments of the United States Supreme Court in its first two decades.<sup>85</sup> That text also appeared in judgments of the Supreme Court and Native Land Court of New Zealand and in a remarkable letter of 26 December 1863, by Henry Sewell, the first Premier and an early Attorney-General of New Zealand to Lord Lyttleton condemning three statutes enacted in response to the war in the Waikato.<sup>86</sup>

Similar major influences may be seen in the four books of the *Commentaries on the Laws of England* prepared by William Blackstone between 1764 and 1769 and the *Commentaries on American Law* by James Kent, earlier the senior judge in New York, first published in 1826. He began his account with "The Law of Nations". As recently as 1996, in a challenging matrimonial property case, the New Zealand Court of Appeal referred to the structure, as well as the content, of Blackstone's *Commentaries*: it has had an immense and incalculable influence on the thinking and actions of lawyers throughout the common law world for more than two hundred years. His first book is entitled "Of the Rights of Persons", the second "Of the Rights of Things".<sup>87</sup>

Keeping to the New Zealand connection, John Salmond, in a notable address to the Bar of the City of New York, in effect proposed what became the American Law Institute.<sup>88</sup> Having looked at the vast holdings of the library of that Bar, he noted the unimaginable bulk of modern legal literature. While in England and the colonies the materials had swollen into a stately stream, America faced a raging torrent. He proposed a task for the bar and the law schools: they should prepare codes of the common law. And the American Law Institute, including within its membership judges as well, has been doing that for the past century in their Restatements on a very wide range of topics. Those texts

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85 Edwin D Dickinson "Changing Concepts and the Doctrine of Incorporation" (1932) 26 AJIL 239 at 259, n 132.

86 See for example Simon Mount and Max Harris (eds) *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, Wellington, 2020) at ch 8.

87 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 278.

88 John W Salmond "Literature of Law" (1922) 22 Colum L Rev 197. For an acknowledgment of the role of that paper in the formation of that Institute, see *The American Law Institute Seventy-fifth Anniversary: 1923–1988* (American Law Institute, Philadelphia, 1998) at 229–231, unfortunately naming Sir John as an Australian! For the impact of the restatements on American courts, see the chart of over 180,000 instances contained in that volume: at 46–48.

are not binding, but they continue to have a huge influence in the administration of the law in the courts.

The same is to be seen in texts adopted by the International Law Commission (1) which do not take binding form and (2) those that do take that form but which are not directly applicable as treaty law.

The principal example of the former is the 2001 text of the Responsibility of States for Internationally Wrongful Acts,<sup>89</sup> articles of which had been cited in over 430 cases in international courts and tribunals by 29 April 2022, in some cases even before the text was finalised.<sup>90</sup>

A major example of the second is the application of the interpretation articles of the Vienna Convention on the Law of Treaties. They have been applied by courts as statements of customary international law in countries which are not parties to the Convention, to treaties which predated the Convention, such as the 1948 Convention on the Prevention and Prosecution of Genocide and the 1951 Convention on the Status of Refugees, and to treaties the parties to which became bound before the Convention came into force for them.<sup>91</sup> It is in fact probably very rare for the provisions to be applicable as a binding text, given that only a little over half the states of the world are parties and the non-parties include France and the United States.

My final example draws on what has been known as "the equity of the statute".<sup>92</sup> When the New Zealand Court of Appeal was considering the developing law of public interest immunity it drew on the recently enacted Official Information Act 1982 and the report which led to it, *Towards Open Government*, although neither was directly applicable to the courts or the common law.<sup>93</sup> By contrast,

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89 See *Report of the International Law Commission on the work of its fifty-third session* [2001] vol 2, pt 2 YILC 1 at 26 and following.

90 *Compilation of decisions of international courts, tribunals and other bodies: Report of the Secretary-General* UN Doc A/77/74 (29 April 2022).

91 To take just one international and one national case as examples, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 at 109–110; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24], both citing earlier cases.

92 For a major contribution, see James M Landis "Statutes and the Sources of Law" (1965) 2 Harv J on Legis 7, reprinting a paper originally published in 1934.

93 See for example *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA) at 296 and 302; and *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 139, 146 and 156, both citing Committee on Official Information *Towards Open Government* (Government Printer, 19 December 1980).

the High Court of Australia rejected the attempt of the New South Wales Court of Appeal to do likewise.<sup>94</sup>

I should not, in speaking of international codification efforts, leave readers with a general impression of failure. There have been notable achievements. In addition to UNCLOS, the Vienna Convention on the Law of Treaties, the Geneva Conventions and their protocols, the international criminal conventions and the state responsibility articles which I have mentioned, there are, to take just six examples, the many treaties regulating and protecting the environment, international civil aviation, labour relations, human rights, outer space and Antarctica. But the comment by that long-time and experienced ILC member must be kept in mind, nationally as well as internationally.

## ***XII A CONCLUDING COMMENT***

I should attempt to draw some conclusions about the various methods for the progressive development and codification of law, nationally as well as internationally. I have attempted in the past to address that large matter in particular contexts.<sup>95</sup>

Various actors—academics, judges, legislators, treaty makers, private and public—play their parts, not necessarily on a coordinated basis. The different actors have different responsibilities. Should, for instance, the courts make major decisions about same-sex marriage, as they have in the United States, or should that matter be resolved by the legislature? Why is it that in some jurisdictions the rules of interpretation of contracts or legislation are settled by the legislatures, by the courts or the scholarly community?

The different bodies follow different procedures. Is it appropriate, for instance, for a court to introduce major changes to the law of evidence on the basis of the submissions of simply the two parties to the proceedings, or should the matter be addressed on a broader basis through a law commission consultative process?

Next, the various bodies base their rulings on different principles which they may or may not articulate. The members of legislatures or treaty-making bodies, for instance, may have greatly different reasons for adopting the particular text.

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94 See *Public Service of New South Wales v Osmond* (1986) 159 CLR 656, reversing a judgment of the New South Wales Court of Appeal which based the obligation of the Board to give reasons for a decision, in part, on the requirement to that effect in the New Zealand Official Information Act 1982.

95 See for example KJ Keith *Interpreting Treaties, Statutes and Contracts* (New Zealand Centre for Public Law, Occasional Paper No 19, May 2009); KJ Keith "Making Law—Who, How and What?" in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) 400; Kenneth Keith "Stepping Away from the State" (2014) 3 CJICL 628; and Keith, above n 62.

When is it the better course to leave the development of the law to practice, as suggested earlier concerning succession to treaties? Do judges in the common law world take sufficient account of their judicial oath that they are "to do *right* according to the laws *and customs*" of their jurisdiction?

Another difference relates to the specificity or generality of the text as developed. As with the international law relating to overlapping maritime zones, given the great variations in the geography and geology of the oceans, it may not be possible to state any principle at all. The same is to be found with many areas of national commercial law where general terms abound—"the fair and equitable ground", "unfair terms", "in the ordinary course of business" and so on.

There is, however, no means by which one method of progressive development or codification is to be preferred to another. Rather, I recommend that those undertaking those tasks, nationally, regionally or internationally, through public or private processes, make their own assessment of the best means available. I trust that this article may assist them in that task.<sup>96</sup>

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96 For a much broader examination of the huge influence that the printed word may have, see Melvyn Bragg *12 Books that Changed the World* (Hodder & Stoughton, London, 2006). In addition to the works of Isaac Newton, Marie Stopes, Charles Darwin, William Tyndale and his colleagues who prepared the King James Bible, Adam Smith, Mary Wollstonecraft, William Shakespeare and Michael Faraday, he includes four which may be seen as having legal significance: Magna Carta (1215); *The Rules of Association Football* (1863); Richard Arkwright's patent for his spinning machine; and William Wilberforce's four-hour parliamentary speech on the abolition of the slave trade (1789). The Abolition of the Slave Trade Act was passed in 1807.