WATCHDOG OR PAPER TIGER: 
THE ENFORCEMENT OF HUMAN RIGHTS IN INTERNATIONAL FORUMS

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Abstract

The admission of international human rights is illusory unless they can be enforced. The enforcement of international human rights law has always been seen as the weak link in the international legal system. This article considers the enforceability of international law in such international forums. It will be seen that, inter alia, jurisdictional limitations reflect the traditional view that international law is concerned with Nation-States, not individuals. Ultimately the ineffectiveness of international forums to act as a watchdog for the enforcement of international human rights heightens the importance of domestic forums for the protection of human rights.

I INTRODUCTION

Post World War II international law became more concerned with the rights of individuals.¹ The United Nations (‘UN’) was created on a foundation of greater recognition of the human rights under both customary²

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2 Such as customary international law’s protection against torture, now embodied in Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); Universal Declaration of Human Rights and the prohibition against genocide, now embodied in Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951).
and conventional international law.\textsuperscript{3} The admission of international human rights is, however, illusory unless they can be enforced. As Janis notes, the ‘central problem has become not so much finding a universal law of human rights (most agree that one now exists), but enforcing that law’.\textsuperscript{5} The enforcement of such international standards has been ‘woefully inadequate’\textsuperscript{6}. It has been observed that enforcement of international law ‘has always been seen as the weak link in the international legal system, and it is surely the weak link of international human rights law’.\textsuperscript{7}

As discussed below, the main reason international law has suffered this perception as a ‘paper tiger’ has been the traditional view that international law is only concerned with Nation-States. As the author has discussed in detail elsewhere,\textsuperscript{8} while modern international law recognises a great number of individual rights, the traditional view that only States can be the beneficiaries of international rights and obligations still permeates international law and practice. Traditionally, international law is concerned with the rights and duties of States, seemingly to the exclusion of individuals.


\textsuperscript{4} \textit{Filartiga v Pena-Irala}, 630 F 2d 876 (2\textsuperscript{nd} Cir, 1980) (Kaufman J); Henkin, above n 1; Cassidy, above n 1.

\textsuperscript{5} Mark Janis, \textit{An Introduction to International Law} (2\textsuperscript{nd} ed, NewYork: Aspen Publishers, 1993), 249.


\textsuperscript{7} Henkin, above n 1, 41.

\textsuperscript{8} Cassidy, above n 1.
of the individual. As discussed below, the traditional theory also denies individuals the procedural capacity required to enforce international law. It is the latter that is the key focus of this article, particularly in terms of the ability of individuals to bring actions in international forums.

If the recognition of international human rights is not illusory there must be a legal forum that can act as a watchdog. That legal forum may be an international or a domestic forum. What are the options open to an individual seeking to enforce international law? In recent years there has been a growing number of cases where litigants have turned to their domestic courts to enforce their international rights. As Kirby J notes, in Australia international law has become an important source of rights particularly in the absence of a ‘comprehensive charter of rights in the Australian Constitution’. Even in the United States, which unlike Australia does have a constitutional bill of rights, international human rights litigation in the municipal arena has grown in importance. In this regard it is also important to note that the ‘traditional way of enforcing international criminal law was, and still is, through national criminal justice systems’. Thus the municipal courts continue to provide a possible forum for the enforcement of both ‘civil’ and ‘criminal’ breaches of international law.

As the author has detailed elsewhere, there are, however, barriers to the use of international law, particularly conventional international

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9 Cassidy, above n 1, 539; See especially the works of Oppenheim, the chief exponent of the traditional theory. He asserts an ‘individual human being ... is never directly a subject of International Law ... . But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations’: Lassa Oppenheim, *International Law* (1st ed, London: Longman, 1905) 334.

10 In the absence of international rights, individuals cannot possess a requisite interest in a dispute and thus will lack *locus standi*: Cassidy, above n 1, 534.


12 Australia is the only Western democracy without a federal bill of rights: Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law* (1st ed, Sydney: University of New South Wales Press, 2006) 64; The importance of international law is not, however, confined to human rights. As H Kindred and P Saunders (ed) note, lawyers are realizing that the world is becoming characterized by transnational transactions: Hugh Kindred and Phillip Saunders, *International Law Chiefly as Interpreted and Applied in Canada* (7th ed, Toronto: Emond Montgomery, 2006) 185.


14 Kindred and Saunders, above n 12, 808.

law, in the municipal courts. To this end Bradley notes that municipal international law litigation has primarily been concerned with customary international law, rather than treaties. This is because governments have not ratified many human rights treaties or governments have expressly declared them not to be self-executing. For example, despite the Australian federal government signing the *International Covenant on Civil and Political Rights* (1966) over 30 years ago, no federal legislation has incorporated the Covenant into domestic law. Even customary international law is a vulnerable source of rights in the domestic arena, as it can be overridden by domestic legislation. If Parliament’s intention to legislate inconsistently with international law is evident from the face of municipal legislation, municipal courts are bound to apply the infringing law. More generally, domestic judges often feel uncomfortable when asked to apply international law in the domestic courts and struggle to somehow justify its use. As Erades notes, ‘[n]ational judges seldom are experts in international law. Whenever … confronted with international law, they are facing ...

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17 Bradley, above n 16, 422.
18 According to this view international law prevails ‘[b]ut only so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals …’: *Chung Chi Cheung v R* [1939] AC 160, 167-168 (Lord Atkin).
19 Note, in the Anglo-American legal systems the judiciary often invokes a strong presumption against parliament intending to breach international law. ‘It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains’: *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64, 118 (1804). ‘In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction accordingly’: *The Annapolis* (1861) Lush 295, 506; In the Australian context see *Polites v Commonwealth* (1945) 70 CLR 60, 72 (Latham CJ), 74 (Rich J), 77 (Dixon J), 79 (McTiernan J), 81 (Williams J); *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Ab Hin Teob* (1995) 183 CLR 273, 287-288 (Mason CJ and Deane J), 315 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 71 (Dawson J), 87-88 (Toohey J). See also the discussion of the ‘Bangalore Principles’ in Michael Kirby, ‘The Australian use of International Human Rights Norms: From Bangalore to Balliol’ (1993) 16 *University of New South Wales Law Journal* 363; Michael Kirby, ‘The Bangalore Principles’ (1997) 78 *The Parliamentarian* 326; Michael Kirby, above n 11.
20 *The Marianna Flora* 24 US (11 Wheat) 1 (1826); *The Johannes* (1860) Lush 182; *Edye v Robertson* 18 F 135 (NY, 1883); *R v Keyn* (1876) 2 Ex D 63; *Theopbile v Solicitor-General* [1950] AC 186, 195-196; *Polites v Commonwealth* (1945) 70 CLR 6, 72; *Swat v Board of Trustees of Maritime Transportation Unions* (1967) 61 DLR (2d) 317, 322; *Bouzari v Islamic Republic of Iran* (2004) 243 DLR (4th) 406. As is apparent from the cases cited, this principle applies in both dualist and monist legal systems.
21 Cassidy, above n 15.
a branch of law with which they are unfamiliar’. This has led to an inconsistency in judicial practice in the application of international law in jurisdictions such as Australia.

In light of the difficulties in utilising the domestic courts to enforce international law, the question then turns to whether individuals can use the international courts to obtain justice. This raises many questions. Can these international forums be used where domestic remedies have been exhausted and failed? Do they provide a viable alternative to aggrieved individuals? Given that the individual’s own government is often the offender, do victims have to rely on the ‘good nature’ of their government and their willingness to act to see that their human rights are enforced in an international forum? The particular focus of this article is the extent individuals can enforce international human rights laws in international courts. Specifically, the article considers the locus standi of individuals in international courts. It also considers the ability of an individual to indirectly obtain relief through such forums through, for example, any complaints mechanism.

It will be seen that, inter alia, jurisdictional limitations in these courts reflect the above noted traditional view that international law is concerned with Nation-States, not individuals. This includes not only those forums of long standing, such as the International Court of Justice (‘ICJ’), but also the relatively recently established International Criminal Court (‘ICC’). Not only do individuals have no locus standi before these courts, they cannot even indirectly access justice through these forums through an individual complaints/petition mechanism. Consequently, these forums do not provide effective enforcement mechanisms for aggrieved individuals. Even where a complaints mechanism based on individual petitions has been created under certain discussed treaties, the relevant United Nations bodies have also proven to be ineffective watchdogs. It will be seen that some of the limitations to the enforcement of international law in these forums have been legislatively imposed, while others stem from the absence of effective enforcement mechanisms.

Ultimately, the article suggests that these procedural limitations that prevent individuals accessing justice in international courts do not reflect modern international law’s concern for human rights. It is time that the jurisdictions of the major international courts accord with international law’s recognition that individuals are not mere.

23 See Cassidy, above n 15.
objects of international law, but enjoy substantive international rights. Importantly, once individuals are accorded standing in international courts, they will no longer have to rely on the ‘good nature’ of their national governments for the enforcement of their rights. Moreover, if international rights are enforceable in the international courts, the difficulties involved in utilising domestic forums can be avoided.

However, it is concluded that given the current ineffectiveness of international forums to act as watchdogs for the enforcement of international human rights, the importance of domestic forums for the protection of human rights has heightened. Despite the difficulties involved in enforcing international law in the municipal courts, until reform measures are embraced in terms of international enforcement mechanisms, it is in fact within the domestic jurisdiction, that justice will most likely be found for human rights abuses.

II INDIVIDUAL RIGHTS IN INTERNATIONAL LAW

Before specifically considering the jurisdictional limits of the international forums under consideration, the role of individuals as enforcers of human rights laws needs to be briefly outlined. As noted above, traditionally, international law is seen as primarily concerned with the rights and duties of States, seemingly to the exclusion of the individual. Under the traditional theory, individual international rights are not possible as the individual is only an ‘object,’ not a ‘subject’ of international law. International responsibility is owed to the State of which the individual is a national, not the individual.

As noted above, a flow on from such is the denial of individuals having the procedural capacity required to enforce international law. Kelsen suggested that this lack of procedural capacity was the reason individuals could not be the direct beneficiaries of international rights. Consequently, according to the traditional theory, as it is the State’s and not the individual’s right which has been infringed, only the State may enforce that right in the international courts. Further, only the State of

24 See Cassidy, above n 1.
25 See Cassidy, above n 1, 15; See especially the works of Oppenheim, the chief exponent of the traditional theory. He asserts an ‘individual human being ... is never directly a subject of International Law ... . But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations’: Oppenheim, above n 9, 334.
26 As noted above, in the absence of international rights, individuals cannot possess a requisite interest in a dispute and thus will lack locus standi: Cassidy, above n 1, 534.
which the aggrieved individual is a national can bring such an action. As Story J stressed in the *La Jeune Eugenie case*, as no other State has an interest in the breach, no other State has the right to object to the violation. A breach of the Law of Nations is not an injury against all States. Only the injured State has an interest in the breach. A parallel may be drawn with private wrongs in municipal law:

[We] are all familiar with the distinction in the municipal law of all civilized countries, between private and public rights and the remedies for the protection or enforcement of them. Ordinary injuries and breaches of contracts are redressed only at the instance of the injured person, and other persons are not deemed entitled to interfere. It is no concern of theirs.

Thus, under the traditional theory, except in rare cases, such as humanitarian intervention, other Nation-States are said to have no interest in any breach of such rights and consequently cannot enforce these rights on behalf of aggrieved individuals or minorities.

There are a number of flaws in the reasoning underlying the traditional theory. As Jessup points out, if international responsibility was based on the idea that it is the State which is injured when its national is injured, any consequent compensation would reflect the importance of the individual to the State. Yet compensatory orders reflect the personal loss to the individual, not the indirect loss to the State. Further, contrary to the traditional theory, in many jurisdictions, including Australia, Canada, Britain and the United States, customary

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28 *United States v La Jeune Eugenie* 26 F. Cas. 832 (Mass, 1822), 846; See Cassidy, above n 1, 540.
29 Elihu Root, ‘The Outlook for International Law’ (1915) 10 *American Society of International Law* 1, 29, quoted in Cassidy, above n 1, 540.
30 See Cassidy, above n 1, 541.
32 Cassidy, above n 1, 541. See, eg, the calculation of damages in cases such as *Forti v Suarez-Mason* 672 F Supp 1531 (N.D. Cal, 1987) and in *Filartiga v Pena-Irala* 630 F 2d 876 (2nd Cir, 1980).
33 While the position in Australia remains unresolved, there is an emerging trend in judicial practice that reflects monist and adoption theories. See the extra-curial comments of Kirby J whereby he notes that dualism may be the dominant theory, but argues that monism is the merging theory supported by the judiciary: Kirby, above n 19, ‘From Bangalore to Balliol’, 363; Kirby, above n 19, ‘Domestic implementation’, 109.
international law is part of the ‘law of the land’ even in the absence of formal transformation into municipal law.\textsuperscript{37} In turn, individuals can enforce their international legal rights in the municipal arena even without the formal incorporation of these international rights into domestic law. Clearly in such cases international law is being invoked directly by the individual.

Thus the author\textsuperscript{38} has suggested that the traditional view is slowly being undermined and discarded as state practice increasingly recognises the individual as capable of being the direct beneficiary of international rights enforceable by the individual.\textsuperscript{39} Nevertheless, as this article concludes, the traditional view that only States can be beneficiaries of international rights and obligations still permeates international law and practice, thereby providing a formidable barrier to an individual seeking to enforce such rights in the international arena. As detailed below, despite the developments made for the recognition of human rights, this constraint still prevents individuals and minority groups enforcing their rights in the international arena.\textsuperscript{40}

\section*{III Jurisdictional Limits of ICJ}

As noted above, while state practice increasingly recognises the individual as a direct beneficiary of international rights\textsuperscript{41} enforceable by either the individual or other States,\textsuperscript{42} these developments are not incorporated into the statutes establishing the ICJ, nor the ICC.

Before referring specifically to the procedural limitations contained in the \textit{Statute of the International Court of Justice} (1945), it is relevant to note that the above detailed traditional view of the role the State, not the individual, as the enforcer of international law has time and again been reiterated by the ICJ. For example, in the \textit{Nottebohm Case}, the ICJ stated:

\begin{quote}
\textit{Michigan Law Review} 1555, 1560-1562.  \\
\textsuperscript{37} See Cassidy, above n 15.  \\
\textsuperscript{38} Cassidy, above n 1; Henkin, above n 1, 31, 44.  \\
\textsuperscript{39} Jessup, above n 31.  \\
\textsuperscript{40} It will also be seen that while the International Law Commission’s \textit{Articles on State Responsibility} recognises that States may have an interest in disputes that relate to norms of importance to the international community as a whole, the traditional view that States have no interest in a breach that does not affect one of their nationals continues to be reflected in the jurisdictional limits of the ICJ, discussed below.  \\
\textsuperscript{41} Cassidy, above n 1.  \\
\end{quote}
As the Permanent Court of International Justice has said and has repeated, by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law.\textsuperscript{43}

These sentiments were relatively recently echoed in \textit{Bosnia and Herzegovina v Yugoslavia}.\textsuperscript{44}

Turning to the specific terms of the \textit{Statute of the International Court of Justice} (1945), according to Article 2(7) ‘matters which are essentially within the domestic jurisdiction of any State’ are reserved from interference. This is known as the ‘reserved domain’ of the State.\textsuperscript{45} Thus \textit{prima facie} domestic disputes, such as that between a State and citizen, are outside the ICJ’s jurisdiction. The exclusion of domestic matters from the ICJ’s jurisdiction is considered highly important by member States. It is often reiterated in Nations’ reservations to the ICJ’s compulsory jurisdiction. This is where a State elects by a special declaration to consent to the ICJ’s jurisdiction in every case brought against them. While approximately one-third of States, who are parties to the ICJ statute\textsuperscript{46} have lodged such ‘declarations of acceptance of the compulsory jurisdiction of the Court’ with the Secretary-General of the United Nations, most include reservations.\textsuperscript{47} Commonly\textsuperscript{48} the reservation reiterates Article 2(7) by reserving ‘matters falling within the domestic jurisdiction of the declaratory State, as determined by international law or by the State making the declaration itself’.\textsuperscript{49} As the latter part of the reservation indicates, States include this reservation, despite the existence of Article 2(7), so that the State itself, rather than the ICJ, can determine if the matter is within the realm of the domestic jurisdiction.\textsuperscript{50} Such a reservation automatically, and effectively, excludes such disputes from the ICJ’s jurisdiction.\textsuperscript{51}
Article 62 of the *Statute of the International Court of Justice* (1945) allows a State to request permission to intervene in ICJ proceedings, but only if it has an interest of a legal nature that may be affected by the decision in the case. In accordance with the traditional theory discussed above, this serves to prevent third party Nation-States from intervening in disputes before the Court unless they can establish they have legal rights that will be affected by the decision. Establishing the requisite legal interest will of course be rare.\(^{52}\) Cases where applications to intervene have been rejected include *Continental Shelf* (1) case,\(^{53}\) *Continental Shelf* (2) case\(^ {54}\) and *Land, Island and Maritime Frontier Dispute*\(^ {55}\). Effectively, Article 62 is designed to allow Nations to intervene in cases where that Nation’s title to an area, for example, may be impacted by the ICJ’s determination of a boundary dispute between two other Nations.\(^ {56}\) Thus the impact of Article 62 in most cases will be to echo the traditional view, discussed above, that no State has an interest in a breach, other than the State of the affected national.

Specifically in regard to *locus standi* rules, Article 34(1) of the *Statute of the International Court of Justice* (1945) provides that only ‘States may be parties before the Court’. The constraint contained in Article 34 prevents individuals bringing an action before the ICJ. Even collectives lack standing unless they can establish they have retained their character as a sovereign State. This is important in the context of minority groups that may retain sovereign status within the confines of another occupying Nation-State.

Thus for collectives, their standing before the ICJ will be partially dependent upon them establishing their status as a sovereign Nation. Sovereignty has been defined as ‘the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive,

\(^{52}\) See, for example, *The Land and Maritime Boundary Case (Cameroon v Nigeria) (The Intervention by Equatorial Guinea)* (1999) ICJ Rep 1029, where an application to intervene was successfully made by Equatorial Guinea. Parties to a treaty might establish the requisite interest in a case involving the interpretation of that treaty.

\(^{53}\) *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya)* (1982) ICJ Rep 18. The application to intervene by Malta was rejected as there was no legal interest that could be affected by the dispute.

\(^{54}\) *Continental Shelf (Libyan Arab Jamahiriya / Malta) (Libyan Arab Jamahiriya v Malta)* (1985) ICJ Rep 13. The application to intervene by Italy was rejected as there was no legal interest that could be affected by the dispute.

\(^{55}\) *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v Honduras)* (1992) ICJ Rep 351. The application to intervene by Nicaragua was rejected as its legal interests could not be affected by any determination by the ICJ in regard to the particular matter before the Court.

\(^{56}\) See, for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (1999) ICJ Rep 1029 where an application to intervene was successfully made by Equatorial Guinea.
legislative or judicial jurisdiction of a foreign State or to foreign law other than public international law'. While often used interchangeably with the notion of self-government, sovereignty is technically different. Self-determination does not necessarily ensure access to particular rights, such as independence. As Nettheim notes, self-determination ‘is a process’ which allows peoples to make a choice between a vast variety of relationships with the ‘occupying’ State ranging from total integration through to full independence. It is difficult for even aboriginal peoples, for example, who are clearly the previous owners of former colonial settlements to establish their sovereignty under international law notions. There are a number of international law doctrines, such as the intertemporal rule and acquisitive prescription, which limit the ability of such minority groups to claim sovereign status. Similarly, Eurocentric doctrines tied to western notions of sovereignty, such as terra


62 Such as the cultivation test. See Cooper v Stuart (1889) 14 AC 286; Milirrpum v Nabalco Pty Ltd and the Commonwealth (1971) 17 FLR 141; Coe v Commonwealth (1979) 24 ALR 118.
nullius, are at times invoked to validate the acquisition of sovereignty by colonial powers through occupation and in turn deny, for example, aboriginal sovereignty.

In the context of international law there is a further prerequisite to such collectives establishing standing before the ICJ, namely State recognition. Even if sovereignty is established under international law, the requirement of State recognition may nevertheless pose a considerable hurdle to the exercise of those sovereign rights. As Bryant notes, ‘political recognition will no doubt turn on whether the State, exercising sovereignty over a particular indigenous group, first recognizes their self-determination status’. Given the current climate in countries such as Australia, Canada, New Zealand and United States, it is unlikely that claims of aboriginal sovereignty, much less Statehood, would be supported by the ‘occupying’ State. In this regard Bryant notes that, as a matter of political reality, as opposed to legal theory, an ‘occupying’ State’s territorial integrity will almost always trump the wishes of a minority of citizens.

Thus in the absence of the recognition of Statehood even sovereign collectives will have no standing in the ICJ and must turn to the municipal courts for relief. While this is not to deny that, alternatively,  

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64 While it has been suggested that in the eighteenth century mere discovery was sufficient to establish title to terra nullius, the inchoate title stemming from discovery had to be perfected by effective occupation: *Island of Palmas Case (United States of America v Netherlands)* [1928] 2 United Nations Reports of International Arbitral Awards 829. See *Island of Palmas Case* [1928] Rep Int Arb Awards 829.

65 Cassidy, above n 61.

66 Cassidy, above n 61.


68 Particularly bearing in mind that these Nations were the four countries that voted against the *United Nations Declaration on the Rights of Indigenous Peoples*.

69 Bryant, above n 67, 267-268; See the discussion of the alternative ways that sovereignty may be exercised/accommodated in, *inter alia*, Loretta Kelly, ‘Reconciliation and the Implications for a Sovereign Aboriginal Nation’ (1993) 61(3) *Aboriginal Law Bulletin*, 10,11.
the domestic government itself could nevertheless bring a matter in the ICJ on behalf of these peoples, as the occupying State is often the offending Nation, this is unrealistic.\textsuperscript{70}

Moreover, even if an action were somehow brought in the ICJ, the Court does not automatically have jurisdiction to rule on the dispute. The jurisdiction of the ICJ is often dependent upon the consent of the alleged offending State.\textsuperscript{71} While, as noted above, a State may elect by a special declaration to consent to every case brought against them, only one-third of UN Nation-States have so elected. Moreover, as also noted above, even those Nations that have elected to consent to proceedings through such a declaration have done so conditionally.\textsuperscript{72}

Finally, formal sanctions for non-compliance with ICJ decisions are ‘often weak or non-existent’.\textsuperscript{73} Decisions of the ICJ are reliant upon enforcement by the United Nations Security Council.\textsuperscript{74} Where enforcing a decision clashes with the interests of permanent members, such as the United States, States may use their veto power to prevent the Security Council from requiring compliance.\textsuperscript{75} Thus in a world where governments are more often the violators, than the protectors, of the human rights of even their own nationals, it is unrealistic to believe international law accords individuals any real rights unless they can be enforced by the individuals themselves.

Before concluding on the ICJ’s jurisdiction to hear \textit{inter partes} disputes, one final alternative needs to be addressed. Where an individual or minority group lacks standing to appear before the ICJ, another alternative lies in the United Nations initiating proceedings for an advisory opinion under Article 33, specifically Articles 65-68 \textit{Statute of International Court of Justice} (1945).\textsuperscript{76} If such a course of action is adopted, the consent of the domestic government is not required. As will be apparent, individuals themselves lack the

\textsuperscript{70} Thus the Australian Senate’s Standing Committee on Constitutional and Legal Affairs simply assumed that the Australian Government would not be cooperative when it considered the matter: Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, \textit{Two Hundred Years Later … Report on the Feasibility of a Compact of ‘Makarrata’ between the Commonwealth and Aboriginal People} (Parliamentary paper 107/1983).

\textsuperscript{71} Bradley, above n 13.

\textsuperscript{72} For a discussion of common reservations, see ICJ, above n 45, 44-45.

\textsuperscript{73} Bradley, above n 13, 1.

\textsuperscript{74} Charlesworth et al, above n 12, 36.

\textsuperscript{75} See the discussion of the \textit{Nicaragua Case} in Charlesworth et al, above n 12, 36.

\textsuperscript{76} See, e.g. \textit{Western Sahara (Advisory Opinion)} (1975) ICJ Rep 3; \textit{Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)} (1950) ICJ Rep 65. ICJ, above n 45, Ch 8 contains a summary of ICJ advisory opinions.
ability to request an advisory opinion. Only specific organs of the United Nations\textsuperscript{77} and certain other international agencies\textsuperscript{78} have this power. In fact, States themselves cannot request advisory opinions.\textsuperscript{79} In turn, advisory opinions are uncommon when compared to contentious merits judgments.\textsuperscript{80} Most of the entities that have the ability to request an advisory opinion have not utilised this power.\textsuperscript{81} In turn, between 1948 and 2004 the ICJ delivered only 25 advisory opinions.\textsuperscript{82}

Moreover, as advisory opinions do not stem from contentious proceedings to which the relevant States are parties, they do not have legally binding force.\textsuperscript{83} They are purely advisory in nature. There is, in turn, no relevant enforcement mechanism for advisory opinions. The requesting body can simply choose how, or even whether, to give effect to the advice.\textsuperscript{84} Thus advisory opinions essentially only have tactical, political effect. To this end, it is relevant to note while these United Nations’ bodies may request an advisory opinion, they lack standing to bring contentious proceedings in the ICJ.\textsuperscript{85} As noted above, under Article 34, paragraph 1 of the \textit{Statute of the International Court of Justice} (1945) this power continues to be confined to States.

For these reasons, advisory opinions do not pose a reasonable alternative to counter individual’s lack of \textit{locus standi} in the ICJ. The reality is that, apart from such rare interventions by UN bodies, individuals and minority groups will generally have to rely on the ‘good nature’ of their own government to enforce their international rights in the international arena. Whether they enjoy the benefits of an international law will, therefore, depend upon the interests of the government.

\textsuperscript{77} Specifically, the General Assembly, Security Council, Economic and Social Council, Trusteeship Council and Interim Committee of the General Assembly: ICJ, above n 45, 80.

\textsuperscript{78} These include the International Labour Organization, United Nations Educational, Scientific and Cultural Organization and International Maritime Organization: ICJ, \textit{International Court of Justice} (5\textsuperscript{th} ed, The Hague: ICJ, 2004) 80. The precise circumstances when such agencies can request an advisory opinion are specified in the relevant constitutive Act, constitution or statute: ICJ, above n 45, 81.

\textsuperscript{79} ICJ, above n 45, 81-82; In turn, the States must request one of these relevant United Nations bodies to seek the advisory opinion: ICJ, above n 45, 82.

\textsuperscript{80} ICJ, above n 45, 82.

\textsuperscript{81} ICJ, above n 45, 80.

\textsuperscript{82} ICJ, above n 45, 82; Moreover, a large percentage (11) of these advisory opinions were delivered by 1956, as they related to the consequences of the Second World War: ICJ, above n 45, 82.

\textsuperscript{83} ICJ, above n 45, 89; The exception is in select cases where it is stipulated beforehand that an opinion shall have binding force: ICJ, above n 45, 89-90.

\textsuperscript{84} ICJ, above n 45, 89.

\textsuperscript{85} ICJ, above n 45, 78.
Bearing in mind the above developments in the role of the individual in international law, Articles 2, 34 and 62 of the *Statute of the International Court of Justice* (1945), precluding individuals from bringing actions before it, appear to be excessively rigid and outdated. Leaving aside the very practical issue of effective enforcement of ICJ decisions, reform measures are necessary to ensure that individuals are accorded *locus standi* to enforce international human rights matters in the ICJ. In the interim, it appears that it is within the domestic jurisdiction that the primary forum for individuals seeking to enforce international law is found.

**IV JURISDICTIONAL LIMITS OF THE ICC**

The relatively newly created ICC also has jurisdictional limitations that again mean that it is prevented from acting as a forum for individuals enforcing international law. The ICC was created pursuant to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in July 1998, where the *Rome Statute of the International Criminal Court* was adopted. The Rome Treaty, as it is known, came into force on 1 July 2002 upon the ratification by 60 States. As of 1 June 2008, 106 States, including Australia and Canada, are members of the court. Under Article 1 the Statute establishes the ICC as a permanent court and vests it with jurisdiction over ‘persons for the most serious crimes of international concern’. Under Article 5 these offences are stated as genocide, crimes against humanity, war crimes and the crime of aggression. Significantly in the context of this article, the ICC can investigate and prosecute individuals under Article 5 and order

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87 Note, the crime of aggression is only included in the court’s jurisdiction once the conditions specified in Arts 121 and 123 are met. Note also, ICC only has jurisdiction over offences that have been committed after the Rome Statute came into force: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3, Art 11 (entered into force 1 July 2002). Moreover, there is no liability for offences committed by nationals, or on the territory of, a State prior to the Rome Treaty coming into force in that particular State unless the State chooses to accept the ICC’s jurisdiction under Article 12(3), discussed below.

reparations for victims under Article 75. Thus at first glance it appears to be an international forum concerned with enforcing individual international rights. However, it will be seen that the Rome Statute of the International Criminal Court does not include an explicit complaints mechanism based on individual petitions.

While the ICC appears to be able to act, seemingly without the further consent of States, there are jurisdictional limitations stated in Articles 12-14 that ensure the Court’s jurisdiction is largely based upon States’ consent. For example, Article 12 sets out the preconditions to the ICC’s jurisdiction. Under Article 12(1) a party to the Treaty accepts the Court’s jurisdiction in regard to the crimes listed in Article 5. However, under Article 12(4) a State may simply declare that it does not accept the ICC’s jurisdiction for war crimes committed by its nationals or on its territory for a period of seven years from the Statute coming into force. This transitional ‘opt-out’ provision potentially undermines the notion that a State accepts the ICC’s jurisdiction by simply being a party to the Rome Treaty.

For the ICC to be able to exercise jurisdiction, Article 12(2) also requires one or more of the States to be a party to the Statute or in the case of a non-party State, it requires that State to have accepted the ICC’s jurisdiction on an ad hoc basis under Article 12(3). Further, under Article 12(2) the crime must be committed on the territory of that State or the person accused of the crime must be a national of that State. Thus the ICC does not exercise universal jurisdiction over international crimes. Rather the ICC’s jurisdiction is ‘effectively one of franchised territorial or nationality jurisdiction, the ICC acting as the consented representative of the State with jurisdiction under one of those heads’.

In turn Article 13 sets out the parameters of the ICC’s jurisdiction, stating that it extends to crimes referred to the Prosecutor by a State party to the Treaty under Article 15 or by the UN Security Council, acting under Chap VII Charter of the United Nations. In the latter case there is no need for the relevant State to consent to the ICC’s

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89 Bradley, above n 13.
91 If the crime has been committed on the territory of a non-party State by a national of that State or another non-party State, the ICC has no jurisdiction unless, in accordance with Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, Art 13(b) (entered into force 1 July 2002), there a reference by the UN Security Council acting under Charter of the United Nations Ch 8.
jurisdiction. In this regard the ICC exercises a form of universal jurisdiction, albeit through the filter of the UN Security Council. However, the UN Security Council may also limit the ICC’s jurisdiction. A resolution adopted by the UN Security Council under Chap VII of the *Charter of the United Nations* may contain a binding request that the ICC defer an investigation or prosecution for 12 months. Under Article 16 such a request is renewable and theoretically such a renewal need not be for just a further 12 months, but could be for an unlimited period. This obviously has the potential for the UN Security Council, at the instigation of the offending Nation, to stifle the ICC’s jurisdiction for political reasons.

As noted above, there is no reference in the Rome Statute to the ability of individuals to refer cases for ICC investigation. This can only occur indirectly through the ICC Prosecutor. The ICC has jurisdiction under Article 13(c) to hear cases where the Prosecutor initiates the investigation *proprio motu* under Article 15. Under Articles 13(c) and 15(3)-(5), this must be approved by the pre-trial chamber of the ICC, that body determining if there are reasonable grounds for further investigation. This process, therefore, allows the Prosecutor to act on information from sources other than that provided by Nation-States. It could, therefore, act on complaints made by individuals. However, it is clear that in practice prosecutions in the ICC are going to be dependent upon a State referral. In turn it is relevant to note that some ratifying Nations have expressly limited when they will refer a matter to the ICC. For example, on ratification of the Treaty, Australia made the following declaration ‘the terms of which have full effect in Australian law, and which is not a reservation’:

The procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender. Australian law also provides that no person can be arrested pursuant to an arrest warrant issued by the [ICC] without a certificate from the Attorney-General.

This procedure has been given legislative effect in *International Criminal Court Act 2002* (Cth). Thus a prosecution in the ICC is

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92 Cryer, above n 90, 279.
dependent upon the agreement and certification of the Australian Attorney-General.95

When assessing the role of the ICC as a forum for enforcing international law, it is important to appreciate that its creation has not detracted from the continuing primacy of the municipal courts in enforcing international criminal law.96 The jurisdiction of the municipal courts to prosecute international criminal law has not been lost with the creation of the ICC, as the ICC only has complementary jurisdiction.97 Effectively, the ICC only has jurisdiction when the municipal courts are unwilling or unable to operate.98 Again, on ratification, Australia made the following declaration ‘the terms of which have full effect in Australian law, and which is not a reservation’.99

Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes.

To this end s 268.1(2) Criminal Code 1995 (Cth) (as amended by International Criminal Court (Consequential Amendments) Act 2002 (Cth)) provides that it is Parliament’s intention that the ICC’s jurisdiction is complementary to the jurisdiction of Australian courts. Section 268.1(3) continues by providing that accordingly, International

95 Note, the ability to challenge the ICC’s jurisdiction is limited under Article 19 to the accused, a State that has jurisdiction over a case or a State which has accepted the ICC’s jurisdiction: Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, Art 19 (entered into force 1 July 2002). See also the decisions of the International Criminal Court Re Situation in Darfur, Sudan ICC 02/05 (10 November 2006); Re Situation in Darfur, Sudan ICC 02/05 (1 December 2006).

96 Similarly, while the Convention on the Prevention of Genocide, opened for signature 9 December 1948, 1021 UNTS 78, Art 6 (entered into force 12 January 1951) for example, provides for the trial of persons charged with genocide by an international penal tribunal, the municipal courts continue to have primary jurisdiction over genocide.


99 Flynn, above n 94, 118.
Criminal Court Act 2002 (Cth) does not affect the primacy of Australia’s right to exercise jurisdiction with respect to crimes within the jurisdiction of ICC.

Ultimately, despite the absence of a locus standi provision equivalent with Article 34(1) of the Statute of the International Court of Justice (1945), the ICC is not a forum that may be used by individuals for the enforcement of international law. Individuals do not hold the role of complainant as under domestic criminal investigations, much less can avail a role of private prosecutor. While the status of a victim is recognised under the ICC and compensation may follow, all power to bring the matter before the ICC lies in the hands of the State. States continue to be the primary instigators of investigations and the complementary status of the ICC means that domestic matters will continue to be out of the parameters of the Court’s jurisdiction. This should be changed. Victims of international crimes should be able to instigate prosecutions in the ICC. This would not necessarily require the victim taking on the role of private prosecutor, but at least being able to refer a crime to the ICC Prosecutor.

Until such reform measures are embraced, the paucity of ICC jurisdiction will mean that it is within the domestic jurisdiction in Australia that the primary forum for enforcing international criminal law is found. Given that the offender under international criminal law is so often the national government a mechanism by which victims may initiate proceedings in an unbiased international forum is crucial.

V THE UNITED NATIONS COMMITTEES

Whilst this article is primarily concerned with international courts, before leaving the issue of the enforcement of human rights in these international forums, the individual petition mechanism sometimes created under conventional international law requires brief consideration. For example, the International Covenant on Civil and Political Rights (1966) (creating the UN Human Rights Committee) and International Convention on the Elimination of All Forms of Racial Discrimination (1966) (creating the UN Committee on the Elimination of Racial Discrimination) are examples of treaties that establish international forums that include individual petition mechanisms. As the discussion below evidences, such treaty mechanisms have not provided effective enforcement mechanisms for individual complaints.

First, the ratification of the relevant Convention may be conditional.
In turn its force may be undermined by, in particular, reservations. For example, the United States attached to its ratification of the *International Covenant on Civil and Political Rights* (1966) ‘five reservations, five understandings, and four declarations’ qualifying its acceptance of its underlying obligations. These exclude specific substantive protections under the Convention and expressly provide that the Convention is not self-executing. Obviously, the former, in particular, undermines the protection that the petition mechanism may provide. Similar reservations have been made in regard to the United States’ ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966).

Second, more specifically, the acceptance of the petition mechanism is at times optional. For example, a State may ratify the *International Covenant on Civil and Political Rights* (1966), but refuse to accept the UN Human Rights Committee’s jurisdiction in regard to its compliance with human rights protected under the Treaty. Some States have refused to ratify the Optional Protocol because they believe individuals should have no standing under international law.

Third, the enforcement of the decisions of bodies, such as the UN Human Rights Committee and UN Committee on the Elimination of Racial Discrimination, is left in the hands of the particular State, which is often the offending entity. The former Howard Liberal Federal Australian Government consistently refused to address international

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100 Henkin, above n 1, 37.
101 Bradley, above n 13.
104 Kindred and Saunders, above n 13, 907. See in regard to compliance with, and enforcement of, treaty obligations: Kindred and Saunders, above n 13, 905-914.
105 The mechanism did prove effective under the previous Keating Federal Australian Government. Thus in response to the decision *Toonen v Australia* (1994) 1-3 Int Human Rts Rep 97 the Federal Parliament passed legislation which rendered inoperative provisions of the *Criminal Code 1924* (Tas) that criminalised consensual homosexual acts in private. In time the *Criminal Code 1924* (Tas) was amended to reflect this federal legislative change.
findings of breaches of human rights.  

Ultimately the government’s norm was simply not to publicise either the treaty bodies’ findings or the government’s response, contrary to conventional international law obligations. When government responses were forthcoming, whether from the Prime Minister, Minister of Foreign Affairs or Attorney-General, they merely rebuked the relevant committee for its findings against Australia and asserted that the United Nations was interfering in domestic affairs. In fact the Howard government had determined to limit the ability of such UN human rights treaty committees to investigate human rights breaches in Australia and resolved not to sign or ratify the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (1979) which establishes an individual petition mechanism. Thus individual petition mechanisms have not proved to provide an effective international forum for the protection of human rights.


108 See, for example, the then Prime Minister John Howard’s response to the UN Committee on the Elimination of Racial Discrimination Report on the failure to apologise or offer redress to the stolen generation where he asserted that: ‘We are not told what to do by anybody’: Sally Sara, Interview with John Howard, Prime Minister of Australia (Radio Interview, 18 February 2000).

109 See, for example, the then Foreign Minister Alexander Downer’s response to a decision of the UN Committee on the Elimination of Racial Discrimination that: ‘If a UN Committee wants to play domestic politics here in Australia, then it will end up with a bloody nose’: ABC, ‘Australia headed for bottom of the human rights barrel’, 7.30 Report, 51 March 2000. See also Alexander Downer, ‘Government to Review UN Treaty Committees’ (Press Release, 30 March 2000).

110 See, for example, then Attorney-General Daryl Williams response to the UN Committee on the Elimination of Racial Discrimination Report on the failure to apologise for the stolen generation where he asserted that: ‘It is unacceptable that Australia, which is a model member of the UN, is being criticised in this way for its human rights records’: ‘CERD Report Unbalanced’ (Press Release, 26 March 2000).

VI CONCLUSION: THE CASE FOR REFORM

The jurisdictional limits of international courts mean that they do not provide effective forums for the enforcement of international law by individuals. Bearing in mind the developments in the role of the individual in international law, these jurisdictional limitations, effectively precluding individuals from bringing actions before them, appear to be excessively rigid and outdated. Given international law’s modern focus on human rights, it seems anomalous that individuals do not have access to international courts to enforce such rights.

There are many advantages in accepting individuals as having independent procedural capacity in these international courts. Most importantly, private individuals would be provided with a remedy, even when their own State refuses to bring a claim on their behalf. Given that the individual’s own government is often the offending body, international human rights are illusory unless they can be enforced by the individual. Stateless persons, otherwise without recourse to justice, would have a right of action. Individual petition mechanisms and the other methods of ensuring the maintenance of international protections that have proven to be ineffective would no longer be needed.

This would also remove much friction from the international arena. Individuals could bring claims directly against offending States, removing the dispute from the international political arena. As Lauterpacht notes, ‘[a]t present the espousal of a claim by the State tends to impart to the complaint the complexion of political controversy and unfriendly action’.112 This would be avoided if the individual could act independently of the State. Over the decades these advantages have been appreciated and international bodies have come to accept the individual’s right to bring actions against, not only foreign States, but their own State. Such practice is now well established, yet still fails to be supported by the procedural requirements of the most important international courts, the ICJ and the ICC. Reform is required. In terms of the ICJ individuals should have standing to bring a claim for a ‘civil’ breach of international law. In terms of the ICC, if the notion of private prosecutions is not accepted, at the very least an individual should be able to act as a complainant, in the same manner as domestic crimes.

Ultimately, however, once it is accepted that these international forums currently do not act as watchdogs for aggrieved individuals, the domestic courts’ ability to enforce international human rights becomes

all the more important. Thus in the absence of reform, despite the difficulties involved in enforcing international law in the municipal courts, it is in fact within the domestic jurisdiction, that justice will most likely be found.