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## International Law and Treaties: BIALL Pre-Conference Seminar 2005

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# International Law and Treaties: BIALL Pre-Conference Seminar 2005

International law and treaties was this year's theme at the seminar in Harrogate. Maria Bell reports on two of the papers. Professor Anthony Aust gave the opening paper on the basics of international law and the treaty framework. Paul Barnett and Nevil Hagon of the Foreign and Commonwealth Office Treaty Section presented an overview of their work in maintaining treaty records and in advising on treaty procedures and processes.

## Introduction

This year's BIALL Pre-Conference seminar organised by the Professional Standards and Development Committee was devoted to international law and, judging by the large attendance, it is a subject of importance to legal information professionals.

Speakers were Professor Anthony Aust, formerly Deputy Legal Adviser to the Foreign and Commonwealth Office and currently teaching international law at LSE, UCL and SOAS. He is the author of the highly regarded *Modern Treaty Law and Practice*, published by Cambridge University Press. Turning to the practicalities of researching treaties, Paul Barnett, Head of Treaty Section and Nevil Hagon, Head of Treaty Information at the Foreign and Commonwealth Office, discussed methods and sources and provided guidance on issues such as the difference between signatories, parties, ratification and reservations. The seminar was completed by Amy Osborne, Foreign and International Law Specialist at the Kentucky College of Law Library, who talked about the EISIL Database. This article will attempt to highlight the key points of Professor Aust's, Paul Barnett's and Nevil Hagon's papers. Amy Osborne's paper is included later in this issue.

## Framework within which treaties operate

Professor Aust set the context explaining the basics of international law and the framework within which treaties operate, outlining issues such as the co-existence of customary law and treaties.

First some terminology was explained, as misunderstandings exist. Private international law is a very confusing term as it is not international law! Private international law is more accurately described as "conflict of laws" and is the body of domestic law of a state which applies when a legal issue contains a foreign element and it has to be decided whether the domestic court should apply foreign law. The term "transnational law" is used to describe the study of aspects of law that are concerned with more than one state – conflict of laws, comparative law, supranational law, public international law. "Public international law" is used to differentiate it from private international law and it is distinguished by the fact that it is a product of all the states of the world, not one national legal system. It has been developing over centuries though the Peace of Westphalia in 1648 is often cited as the beginning of international law as it is known today. Public international law is all around us with airline flights being just one example of international law in action, as they cannot operate without treaties. Other examples are in issues of human rights, war crimes, land issues such as Antarctica, and copyright.

In some areas, such as jurisdiction, issues both of public international law and conflict of laws may be involved.

Professor Aust asked "Is international law really law?" This question does not arise with a body of binding domestic law, but with international law it could be viewed as a set of principles that can be ignored when it suits a state. There is no international police force or army that immediately steps in when a breach occurs so the perception arises that international law is not really law. Professor Aust said that the "raison d'être of international law is that relations between states should be governed by common principles and rules". Early developments in international law in the seventeenth

century revolved around matters which assisted in increasing international trade, such as freedom of the high seas and immunity of diplomats. Thus Aust argued that the binding force of international law is based on the “consent (express or implied) of states, and national self interest”. States have an interest in maintaining a sense of order therefore they develop bonds in the form of international law and treaties to achieve this.

### Sources of international law

How do we know what international law is on a particular matter? This is often difficult as unlike domestic law it is not invariably to be found in legislation and judgments. There is no hierarchy of courts in international law. There are a series of different international courts and no one court takes precedence over another. International law is derived from various sources, which are listed authoritatively in Article 38(1) of the Statute of the International Court of Justice and which include international conventions, international custom; general principles of law recognised by civilised nations, and judicial decisions.

“International conventions” refer to bilateral and multilateral treaties, which now play a key role in international law. Treaties have to be signed and ratified before entering into force and, when a treaty does come into force, it is only binding on those parties who ratified it.

Professor Aust went on to explain about “custom” or customary international law which plays an important role in international legal matters. A rule of custom evolves from the practice of states over a period of time. There must be evidence before a practice can be accepted as law between a number of states. “There must be a general recognition by states that the practice is settled enough to amount to an obligation binding on states in international law”. This is known as *opinio juris* and establishing it can be difficult, though this is sometimes done via court judgments.

A questioner from the floor asked how we can know if an issue has been established as “custom”? Are there any sources that we can use or is it so commonly recognised that there is no written evidence? Professor Aust suggested that textbooks will give an initial indication of the international law of a topic. Key texts to begin research in include: Oppenheim, *International Law*, Brownlie, *Principles of Public International Law* and Shaw, *International law*, which will direct researchers to any treaties of relevance or explain whether the topic is recognised as customary alone. Customary international law is complex and by its nature is not documented. In recent years much of customary international law has been codified in treaties, charters or conventions, with essential work being carried out under the auspices of the International Law Commission.

Professor Aust referred in closing to “international lawyers” and stated that this term is used widely, particularly in the media, but in his view incorrectly. Students study international law in large number but do not

necessarily find opportunities to practice it. Large law firms may have international law departments but much of the work is commercial arbitration. Opportunities for international lawyers exist in the British Diplomatic Service or in the United Nations and other intergovernmental organisations. Recognised and distinguished practitioners of international law appearing before international courts or tribunals are often professors of international law.

Of the questions following the presentation one of interest was about the importance of the difficult to locate, “travaux préparatoires” - the preparatory work/materials preceding a treaty or other agreement. It is common for researchers to want to see how the final document was negotiated as an aid to interpreting it. The problem is that many treaties etc are negotiated behind closed doors with no documentary record. It varies from country to country as to how important travaux préparatoires are.

### Practical issues in researching treaties

Our attention was then turned to the practicalities of working with treaties. Paul Barnett, Head of Treaty Section and Nevil Hagon, Head of Treaty Information at the Foreign and Commonwealth Office (FCO) gave an insight into the Treaties Section, how it works and what essential tools exist for treaty research.

The term “treaty” is used as a generic term for convention, agreement, protocol and charter. The definition of a treaty is given in Article (I) of the Vienna Convention on the Law of Treaties as:-

“a generic term for an agreement concluded between States (or other entities such as international organisations having international personality) in written form and intended by them to be binding in international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

### Foreign and Commonwealth Office Treaty Record Section

The FCO Treaty Section has two parts, *Treaty Procedures* and *Treaty Information*.

Treaty Procedures manage the production of a treaty for signing in the UK, and advise on procedures to be followed when a treaty is signed overseas. They organise publication and laying before Parliament and also advise on the form of draft treaties and the production of Full Powers (required for signing) and Instruments of Ratification. All treaties entered into force in the UK must be registered with the United Nations and Procedures do this.

Treaty Information maintains and updates the UK treaty database (an in-house system). This contains details of all treaties to which the UK is a party. It provides a Treaty Enquiry Service (see website and email address at

the end) and also co-ordinates the UK's responsibilities as depository for multilateral treaties and arranges for the transfer of treaties to the National Archive at Kew.

## Sources of treaty information

All treaties signed by the UK and subject to ratification or accession are laid before both Houses of Parliament and treaties are published as Command Papers. The treaty must lie before Parliament for at least 21 days before any actions can be effected. This practice is known as the "Ponsonby Rule" and any treaties laid in this way are accompanied by an Explanatory Memorandum (EM). Command Papers are published in one of the following series: the *Country Series* for bilateral treaties; the *Miscellaneous Series* for multilateral treaties and the *EC Series* for treaties between EU member states or between one of the Communities and the Member States and non member states.

When a treaty enters into force it is published again in the *Treaty Series*. Treaties deposited in the National Archive are bound and held in a series of Classes – the current classes for treaty material being FCO 85. The FCO website provides a link to the National Archives giving access to the catalogue and shelf lists to aid research.

An Annual Treaty Index is published in the *Treaty Series* and there is a quarterly publication produced by Treaty Information called the *Supplementary List of Ratifications, Accessions, Withdrawals, etc.*, which includes references to actions by the state and any declarations or objections that have been made. The Supplementary List can be purchased at the Stationery Office.

For research on older treaties, the FCO uses the following resources:

- *An Index to British Treaties 1100 – 1968* compiled by Clive Parry and Charity Hopkins
- *Multilateral Treaties Index and Current Status*, by MJ Bowman and DJ Harris
- *Multilateral Treaty Calendar 1648 – 1995*, compiled by Christian L Wiktor
- *British State Papers* - a series of early 19th century treaties.

Some rarer series include *Hertslet's Commercial Treaties and A collection of Treaties Engagements and Sanads by CU Aitchison covering the Middle and Near East, and A General Collection of Treatys, Etc.* London 1710 – 32.

## Researching current information at the FCO

The key is the FCO Treaty Database, an in-house system begun in the 1980s to record all treaty records which up until then had been maintained in manual registers. The FCO has a responsibility to record and maintain accurate current data for the FCO and other government departments as well as external enquirers. Since 2003,

the data has been transferred to a specially designed database scheduled to be fully implemented in Summer 2005. This currently remains an in-house system but the FCO Treaty Section aim to develop applications in the future including internet access.

Statistics give an idea of the size of the database with 2,900 multilateral treaty records and 10,000 bilateral records from 1835 onwards. It includes all treaties that the UK is directly involved in plus those that the UK is likely to be party to. Coverage includes details of terminated treaties (the FCO does not delete records) and any Exchanges of Notes and additional protocols. The database is an index and not full text.

The Treaty Section maintains Treaty webpages via the FCO website – [www.fco.gov.uk/treaty](http://www.fco.gov.uk/treaty). They contain much useful material for legal information professionals. Sections include lists of treaties for which the UK is Depository; texts of Explanatory Memoranda (EM); all new Treaty Command Papers since 2002; a glossary of relevant terms; information on the Ponsonby Rule; guidance on treaty and MOU (Memorandum of Understanding) practice and procedure.

## Treaty making process

Key elements and processes for treaties involve preparation, negotiation, drafting and eventually signing and we were given a taste of some of the details that the Treaty Section are responsible for in these processes. To sign a treaty, a person must have what is known as "Full Powers" authority. Only three people in the UK can sign a treaty in their own right: the Head of State, the Head of Government and the Foreign Secretary and only these three can assign Full Powers to a person to sign a treaty on behalf of the State. Treaty Procedures advise on the assignment of Full Powers and are responsible for signatory ceremonies for the UK. It seems that signatory ceremonies do not go smoothly every time. Problems arise from parties having different versions of the treaty, or queries about translations. Signing is preceded by a section by section comparison with both parties present to ensure accuracy and agreement. These can be carried out against tight timescales. Once a treaty is signed and sealed in wax, officials must ensure each party leaves with the correct version. It was noted that the British State Papers include a description of an eventful signatory ceremony which involved British gunboats in action! Present day ceremonies do not usually require a gunboat's presence.

As mentioned before, treaties are subject to ratification before entering into force. Some treaties provide that they will come into force on signature, others make specific provision, so it is necessary to check the treaty itself.

A complex area of treaty procedures relates to the application of UK treaties to Overseas Territories and the Treaty Section website provides guidelines. Treaty provisions can be extended to include Overseas Territories or an explanatory note can be issued laying out its application to them.

Finally, there was an explanation of the origin of the strangely termed “Ponsonby Rule” which has been in place since 1924. The Foreign Secretary and not Parliament signs treaties and before the First World War suspicion had arisen about secret treaties being signed. To stem this suspicion, in 1924 Mr Arthur Ponsonby, then Under Secretary for Foreign Affairs, made a statement in the House of Commons that the government would lay all treaties before Parliament for viewing for 21 days. Parliament can ask for a debate on a treaty or an extension of viewing time. This practice has continued ever since and although it is not law, it is parliamentary practice that the Ponsonby Rule is applied. Further information on the Ponsonby Rule is available from the Treaty Section website.

### Conclusion

The seminar closed with a presentation on the EISIL (Electronic Information System for International Law)

database ([www.eisil.org](http://www.eisil.org)) by Amy Osborne from the University of Kentucky College of Law Library, giving us an overview of a useful research tool for international law. Amy’s paper is published separately in this issue. The seminar was informative and entertaining, providing delegates with a wealth of information about the nature of international law and how treaty procedures and processes work in practice.

### Acknowledgement

Pre-conference seminar handout containing:

Extract of Chapter I of *Handbook of international law* by Professor Anthony Aust, to be published in October 2005 by Cambridge University Press.

Paul Barnett and Nevil Hagon, *Practical issues in researching treaties* prepared for the seminar on 9 June 2005.

### References

Aust, A. *Modern Treaty Law and Practice*, 2000. Cambridge University Press.  
Foreign and Commonwealth Office Treaty website – [www.fco.gov.uk/treaty](http://www.fco.gov.uk/treaty)  
Treaty Enquiry Service: E-Mail: [treaty.fco@gtnet.gov.uk](mailto:treaty.fco@gtnet.gov.uk)

### Biography

Maria Bell is the librarian responsible for the law and EU collections at the British Library of Political and Economic Science at the London School of Economics.

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# Access to Legal Literature: the Italian DOGI Database

Ginevra Peruginelli of the Institute of Legal Information Theory & Techniques of the Italian National Research Council. Ginevra was a colleague of Gillians whilst she studied at IALS and Gillian originally asked Ginevra to submit this article.

### Introduction – legal literature

Legal information has specific features due to its nature, its different purposes and the intrinsic need for integration of

its components, represented by legislation, cases and doctrine. Access to legal literature in particular is a primary requirement; it responds to the demand for understanding and interpretation of statutes and cases, an objective that law scholars and professionals greatly contribute to.