

Chapter 5

The Tasmanian Dam Case – An International Lawyer's Perspective

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In July 2013, Professor James Crawford of Cambridge University gave the annual lectures to The Hague Academy of International Law.¹ One of his 15 lectures was entitled *International Law and National Law; Serving Two Masters*. He began with a quote from Matthew 6, Verse 24: 'No man can serve two masters: for either he will hate the one and love the other or else he will hold to one and despise the other'.² The 'one' and the 'other' I took to be international law and national law. One cannot say that the approach of the various judges of the High Court in the *Tasmanian Dam Case*³ was proof positive of that verse, though some other more recent cases both here and in the United States might have come closer to that mark.

Under international law, there are two fundamental principles concerning the relationship between treaties and domestic law. Both of these are reflected in the Vienna Convention on the Law of Treaties.⁴ The first of these, the principle of *pacta sunt servanda*, was referred to by Brennan J in the *Tasmanian Dam Case*⁵ and is set out in Art 26 of the Vienna Convention which provides: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.⁶ The second principle immediately follows in Art 27 and that is that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁷ A similar sentiment is reflected in Art 3 of the International Law Commission's *Articles on Responsibility of States for Internationally*

1 James Crawford, *Chance, Order, Change: The Course of International Law* (Pocket-books of The Hague Academy of International Law, 2013).

2 Ibid 160.

3 *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*).

4 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (Vienna Convention).

5 (1983) 158 CLR 1, 219.

6 Vienna Convention Art 26.

7 Ibid Art 27.

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