



**Australian and New Zealand Society  
of International Law**



**American Society  
of International Law**

# **International Legal Challenges for the Twenty-first Century**

## **PROCEEDINGS**

**of a Joint Meeting of the  
Australian & New Zealand Society of International Law and  
the American Society of International Law**

**26–29 June 2000**



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# International Legal Challenges for the Twenty-first Century

Joint Conference of the  
Australian & New Zealand Society of  
International Law  
and the  
American Society of International Law



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**Centre for International and Public Law**  
**Faculty of Law**



**Australian National University**



The Centre for International and Public Law (CIPL) is a specialist centre based in the Law Faculty at the Australian National University. It is concerned with aspects of law and policy which affect relations between citizens and governments, and between government.

The Centre undertakes research, organises conferences and publishes books and journals. CIPL members also teach in the ANU Law Faculty and play active roles on government committees, in community organisations, and in the media.

The Centre's regular activities include convening the Annual Conference on International Law and the Annual Public Law Weekend, and publishing the *Australian Year Book of International Law*, the *Law and Policy Papers* series, and the electronic *Legal Research Network*.

## **Introduction**

The Australian and New Zealand Society of International Law and the American Society of International Law held a joint conference in Sydney and Canberra in June 2000. The conference was enjoyable and successful. These Proceedings include the papers submitted after the conference. They are not a complete record of the event as some participants were unable to write up their conference presentations in time to be published. The Proceedings do, however, give a taste of the diversity of topics and approaches presented at the conference and they record some of the lively and provocative debates.

We are very grateful to Jennifer Braid for her great efforts in gently badgering authors for their papers and in producing this volume.

Hilary Charlesworth & Susan Karamanian  
Conference Convenors



# International Legal Challenges for the Twenty-first Century

## Program

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### Sydney: 26 June

Opening and Keynote Address: Sydney

**The Hon. Justice Michael Kirby** (High Court of Australia) 'International Law: Down in the Engine Room'

#### PANEL 1: Contemporary Challenges for the WTO

**Mr Ross Ramsay** (Deacon Graham & James) Chair

**Professor Frederick Abbott** (Chicago Kent College of Law) 'Challenges Facing the WTO from the US Perspective'

**Associate Professor Jan McDonald** (School of Law Bond University) 'The Significance of Evolving Environmental Exceptions for the WTO'

**Ms Sundya Pahuja** (Faculty of Law University of Melbourne) 'Embedded Normativity and the Dispute Settlement Body of the WTO'

#### PANEL 2: Formulating and Enforcing Competition Law in a Global Economy

**Mr Mark R. Joelson** (Washington DC Bar) Chair

**Mr Allan Asher** (Australian Competition & Consumer Commission) 'A View from the ACCC'

**Associate Professor Jill McKeough** (Faculty of Law University of New South Wales) 'The Interaction of Anti-Trust and Intellectual Property Law: Australia's Efforts to Integrate Them'

**Professor Warren Pengilly** (Deacon Graham & James) 'United States Self-Interest: The Chief Barrier to Effective Agreement on World Competition Laws'

**The Hon. Diane Wood** (US Appeals Court) 'International Anti-Trust Enforcement: The Virtues of Cooperation'

Address

**Professor Thomas M. Franck** (School of Law, New York University) 'Global Rights and Cultural Exceptionalism'

#### PANEL 3: International Environment Law: Covering the Gaps in the 21st Century

**Professor Edith Brown Weiss** (Georgetown University Law Center) Chair

**Ms Elana Geddis** (Ministry of Foreign Affairs & Trade NZ) 'Resources and the Environment: IEL and the Governance of High Seas Resources'

**Professor Gunther Handl** (Tulane University Law School) 'Extending IEL Rules to Corporations and the Private Sector'

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**Judge Charles Brower** (White & Case) Chair

**Mr Garry Downes QC** (Sydney Bar) 'Relationship of International Arbitral Tribunals and National Courts as Regards Interim Measures'

**Mr Derek S Firth** (Auckland Bar) 'Special Australian and New Zealand Perspectives or Issues as Regards International Arbitration'

**Dr Gavan Griffith QC** (Melbourne Bar) 'Proposed Revisions to the UNCITRAL Model Law'

**Ms Kathleen Paisley** (Morrison & Foerster Brussels) 'Arbitration and E-Commerce'

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**Mr Don MacKay** (Ministry of Foreign Affairs & Trade NZ) Chair

**Professor Sam Blay** (Law Faculty Univ. of Technology Sydney) 'The Antarctic Treaty's First 40 years: An Assessment'

**Professor Christopher C Joyner** (Georgetown University Law Center) 'Shipping and Navigational Issues including the IMO's Draft Code on Navigation through Ice-covered Areas'

**Dr Stuart Kaye** (Faculty of Law University of Tasmania) 'Article IV: Territorial Sea EEZ and Continental Shelf Issues'

**Mr Jonathon Thwaites** (Department of Foreign Affairs & Trade) 'The Interplay of the Antarctic Treaty System and the Law of the Sea: An Australian Perspective'

**Ms Felicity Wong** (Ministry of Foreign Affairs & Trade NZ) 'A Liability Regime for Environmental Damage: Unfinished Business'

#### PANEL 6: Litigating International Law in National Courts

**Professor Hilary Charlesworth** (Centre for International & Public Law Australian National University) Chair

**Ms Alison Duxbury** (Law School Monash University) 'The Immunity of International Organisations'

**Dr Susan Karamanian** (Locke Liddell & Sapp Texas) 'Universal Jurisdiction and United States Courts'

**Dr Peter Nygh** (Refugee Review Tribunal) 'The Refugees Convention in National Courts'

### Canberra: 28 June

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**The Hon. Genta Hawkins Holmes** (United States Ambassador to Australia)

**The Hon. Alexander Downer** (Australian Minister for Foreign Affairs)

#### PANEL 1: Is there an Asia-Pacific Regional Law?

**Mr Ben Keith** (International Law Association New Zealand) Chair

**Mr David Goddard** (Wellington Bar) 'Cross-Border Dispute Resolution in Civil and Commercial Cases: Current Developments and New Proposals'

**Professor Donald R. Rothwell** (Faculty of Law University of Sydney) 'Is there an Asia Pacific Environmental Law?'

**Commander Robin Warner** (Australian Defence Force) 'Marine Protected Areas Beyond National Jurisdiction: An Asia-Pacific Innovation'



## PANEL 2: Recent Developments in International Criminal Law

**Professor Tim McCormack** (Faculty of Law University of Melbourne) Chair

**Mr Payam Akhavan** (International Criminal Tribunals for the former Yugoslavia) 'Recent Developments at the Tribunals'

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## PANEL 3: Maritime Boundary Settlements through Joint Development Zones

**Professor Jonathan Charney** (School of Law Vanderbilt University) Chair

**Professor Ted McDorman** (Faculty of Law University of Victoria Canada) 'Is the Timor Gap Arrangement a Useful Model for Other Ocean Boundary Disputes?'

**Mr David Ong** (Department of Law University of Essex) 'The Legal Status of the Timor Gap Treaty Post-Referendum: Is Joint Development Mandated by International Law?'

**Professor Victor Prescott** (University of Melbourne) 'Explanation of the Limits of the Zone of Cooperation and East Timor's other Potential Maritime Boundaries'

**Professor Gillian Triggs** (Faculty of Law University of Melbourne) 'Creative Obfuscation: The Role of Joint Development Agreements in Side-Stepping Sovereignty Disputes'

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**Professor Ruth Wedgwood** (Yale Law School) Chair

**Professor John Gamble** (Penn State University) 'International Law Teaching: Just Do It'

**Ms Catherine Iorns** (Faculty of Law Victoria University Wellington) 'There's Method in Her Madness or Games Teachers Play'

**Ms Dianne Otto** (Faculty of Law University of Melbourne) 'Some Thoughts on Resisting Hierarchies in the Teaching of International Law'

**Dr Shirley Scott** (School of Political Science University of New South Wales) 'Teaching International Law to Non-Lawyers'

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**Ms Shelley Wright** (Faculty of Law University of Sydney) Chair

**Dr Larissa Behrendt** (Law Program Research School of Social Sciences ANU) 'Brackets and Footnotes: Indigenous Women and the International Human Rights Regime'

**Ms Makere Harawira** (School of Education University of Auckland) 'Creating the Architecture of a Global World Order: The Need for a New Ontology'

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**Professor David Kinley** (Faculty of Law Monash University) Chair

**Mr Bill Campbell** (Attorney-General's Department Australia) 'Australian Treaty Reform: Unfinished Business?'

**Ms Mai Chen** (Palmer & Chen New Zealand) 'Unfinished Business: The Evolving Role of Parliament in Executive Treaty-making in New Zealand'

**Professor Linda Malone** (William & Mary Law School) 'Improving Soil and Water Quality: How Clean is Clean?'

**Professor David Wirth** (Law School Boston College) 'Mixed Agreements in the EU and the Treaty Power in the United States'

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**Dr Susan Karamanian** (Locke Liddell & Sapp Texas) Chair

**The Hon. Daryl Williams** Attorney-General Australia

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**Professor David Kennedy** (Harvard Law School / European Law Research Center) Chair

**Professor Karen Engle** (College of Law University of Utah)

**Professor Thomas M. Franck** (School of Law New York University)

**Professor Karen Knop** (Faculty of Law University of Toronto)

**Dr Anne Orford** (Faculty of Law University of Melbourne)

PANEL 8: Human Rights and Cultural Diversity

**Associate Professor Robert McCorquodale** (Faculty of Law Australian National University) Chair

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**Ms Kristen Walker** (Faculty of Law University of Melbourne) Chair

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**Ms Pene Mathew** (Faculty of Law Australian National University) 'A Clean Slate? Timor Lorosa'e During and After UNTAET'

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**Mr Gerry Simpson** (Faculty of Law Australian National University) 'Out of Law'

**Mr Ralph Wilde** (Trinity College Cambridge University) 'Some Conceptual Issues Raised by the Activities of International Organisations in Bosnia/Herzegovina Kosovo & East Timor'

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**Ms Rebecca Irwin** (Attorney-General's Department Australia) Chair

**Mr Henry Burmester QC** (Attorney-General's Department Australia) 'Managing International Obligations within a Federal System'

**Professor Brian Galligan** (University of Melbourne) 'International Law and Australian Federalism'

**Ms Sarah Joseph** (Faculty of Law Monash University) 'Human Rights and Federalism'

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PLENARY PANEL: Reviewing the Year of International Law

**Professor Ivan Shearer** (Faculty of Law University of Sydney) Chair

**Professor Philip Alston** (European University Institute) 'Recent Developments: A European Perspective'

**Professor Christine Chinkin** (London School of Economics / Humanities Research Centre ANU) 'The UN Decade of Poverty Reduction'

**Ms Treasa Dunworth** (Faculty of Law University of Auckland) 'The Importance of International Dispute Resolution Mechanisms for Smaller Countries'

**Professor Ruth Wedgwood** (Yale Law School) 'Recent developments: A US Perspective'

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## **Keynote Address**





# International Law — Down in the Engineroom

The Hon Justice Michael Kirby AC CMG\*

## The Lucky Ones

We are the lucky ones. To this generation much is given. The lawyers and judges of today are living through a remarkable *rapprochement* between international and municipal law.<sup>1</sup> Some have suggested that the process involves a dangerous liaison.<sup>2</sup> Some fear the corrupting influence and seduction of the plain folks of municipal law by the fascinating interloper from outside.<sup>3</sup> But my thesis is that the development is one natural to the social, intellectual and technological features of the age we live in. It is necessary to the resolution of the problems of the planet we inhabit. It is beneficial to the rule of law, the maintenance of peace and security and the defence of human rights in every land. This is why we are the lucky ones, for we have the chance to see the future and to contribute to it in a way that no previous generation of lawyers could do.

Australia's wealthiest man (if we now omit our erstwhile citizen but frequent visitor Rupert Murdoch) is another media owner, Mr Kerry Packer. When he almost died of a heart attack a few years ago, he went through a near death experience. Upon his recovery he declared that he had been to the other side and that there was 'nothing there'. This was uncharacteristically ungenerous of him, given the heroic efforts of the surgeons and the confident prayers of the Sisters at St Vincent's Hospital at Sydney where he was nursed back to health. I too have been to the other side of international law. I am here today to tell you that there is a lot there. It is all happening at once. If it does not quite measure up to one's aspiration of heaven: nor is it properly described as hell (except for the occasional bureaucratic experiences).

I have no competence to speak about the great disputes of politics that capture the headlines and preoccupy the political organs of the international and regional institutions of an interdependent world. Nor do I intend to speak about the growing significance of the International Court of Justice<sup>4</sup> or even of the International Criminal Tribunals and the proposed Court that have responded to special problems in recent years. Instead, I want to take you down into the engineroom of international law. Down to the international agencies and municipal courts in which, today, lawyers and judges have special opportunities to contribute to the growth and influence of international law in practice. This is where I have seen the other side. It is where one finds not a few angels and secular saints who have a deep commitment to building a new world order that upholds international peace and security in an environment of economic equity and with respect for universal human rights.

Because a great change has happened in my lifetime, it has happened in yours. It is happening today, and it will gather pace, in the lifetimes of the young lawyers now graduating from law schools in Australia, New Zealand, the United States and far beyond. To give you some idea of the range and variety of activities that are occurring in the engineroom of international law, let me illustrate my thesis with some examples from my own life. I am sure that many who read and hear these remarks could offer similar stories. I will deal first with some experiences in international agencies that have convinced me that international law and practice is now a highly practical and useful subject. Then I will take you into my courtroom in Australia where international legal questions arise all the time and with increasing importance and urgency.

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\* Justice of the High Court of Australia. Member, Advisory Board, Centre for International and Public Law, Australian National University.

<sup>1</sup> D Z Cass, 'Traversing the Divide: International Law and Australian Constitutional Law' (1998) 20 *Adelaide Law Review* 73, 79.

<sup>2</sup> cf H Charlesworth, 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20 *Adelaide Law Review* 57.

<sup>3</sup> Ibid 57.

<sup>4</sup> S M Schwebel, 'The Impact of the International Court of Justice' in *Boutros Boutros-Ghali, Amicorum Discipulorumque Liber* (1998) 663.

## The Agencies

For me, it all began when I was appointed chairman of the Australian Law Reform Commission 25 years ago. Soon afterwards, the Commission was required by the Federal Attorney-General to prepare a report for the Australian Parliament on privacy protection. This task coincided with the establishment by the Organisation for Economic Cooperation and Development (OECD) of an Expert Group to develop guidelines on privacy protection in the context of transborder data flows. That was an unusual task for the OECD. Looking back, we can see it as an early portent of the increasing moves in recent years of that hard-nosed combination, the OECD, the World Bank, the International Money Fund (IMF) and the World Trade Organisation into areas of governance without which economic advancement will be a hollow achievement, if it is attainable at all.<sup>5</sup>

I was elected chairman of the OECD group. We prepared our guidelines.<sup>6</sup> They were adopted by the Council of the OECD. They were as much designed to prevent the economic inefficiency of disparate municipal regulation of the new information technology as to defend fundamental human rights. Eventually most OECD countries, including Australia and New Zealand, accepted the guidelines. In this country (as in New Zealand) they provided the basis for privacy principles incorporated in privacy protection legislation.<sup>7</sup> Through the Law Reform Commission, I was able to see the highly practical way in which a legal project at an international level could assist and influence municipal law-making. After that, I could never accept that international law — even soft law — was a matter for scholars and theorists alone. In countries as far apart as Japan, the Netherlands and Australia, the deliberations of our group in Paris had a real, practical and beneficial effect on local law and international cooperation.

In the manner of these things, one engagement leads to another. Soon after the OECD work was completed I took part in the general conference of UNESCO, also in Paris. That organisation was in the bitter throes of what became the withdrawal of the United States and the United Kingdom, the former alas not yet repaired. Strangely enough, one of the given reasons for the United States withdrawal was the insistence of Director-General M'bow that UNESCO should continue the exploration of the meaning in the common first articles to the *International Covenant on Civil and Political Rights* the *International Covenant on Economic, Social and Cultural Rights* which promise the self-determination of peoples. Who were a 'people' for this purpose?

It always seemed to me particularly odd that the United States should have opposed the exploration of this idea, given the famous opening words of the *Declaration of Independence*. But the United States quit UNESCO and, to its great credit, that organisation went on with the exploration of the issue of self-determination. I was appointed to the group and ultimately elected as rapporteur and chairman. Our task was to examine who were a 'people' entitled to this promised right. It was, and is, a highly controversial topic. It is uncongenial to many nation states. It is even unwelcome to some people in Australia. But who can doubt, looking at the real causes of conflict in the world today, that this is one of the great issues of international law — from East Timor to Aceh; from Burma to Tibet; from Palestine to Kosovo; from Corsica to Ulster; from the Falklands to Nunavut; and most recently from Fiji, Bougainville, West Irian and Solomon Islands to Aboriginal Australia. This is an issue that circles the earth and goes to the heart of most contemporary dangers to international peace and security. It concerns the rights of peoples but also the human rights of the individuals who make up those peoples.

The UNESCO expert group completed its task. It identified four elements necessary to constitute a 'people' for international law purposes.<sup>8</sup> It is a misfortune that many who are unaware of the body of international law on this subject mistake self-determination for total national independence. That is a possible but not a necessary

<sup>5</sup> J Kelsey, 'Global Economic Policy-making: A New Constitutionalism?' (1999) *Otago Law Review* 535, 539.

<sup>6</sup> OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, Paris, 1980. cf 'Privacy in Cyberspace' in M D Kirby, *Through the World's Eye* (2000) ch 5, 52.

<sup>7</sup> *Privacy Act 1988* (Cth), s 14. By the operation of s 5 each Principle is treated as if it were a section of the Act.

<sup>8</sup> UNESCO, International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples (1985-91) (Final Report SHS-85/Conf 613/10). See also UNESCO, Report of the International Conference of Experts, Barcelona 21-27 November 1998, 'The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention' (1999).

attribute of self-determination. This is a message from international law that needs to be learned in many countries.

By the time the work of the UNESCO groups was completed the HIV/AIDS pandemic was upon the world. I then met one of the truly noble participants in the building of international law — a United States doctor who called me to serve on the World Health Organisation Global Commission on AIDS. This was Dr Jonathan Mann who tragically lost his life in 1998 *en route* to Geneva for a meeting on HIV vaccines. The Global Commission established principles for the management of the HIV epidemic, now being pursued by that unique inter-agency body, UNAIDS. Implementing the guidelines has been by no means easy, given the cultural impediments that exist in various countries. It has fallen on some of the participating agencies, such as the United Nations Development Programme (UNDP) to attempt to persuade governments and bureaucracies in affected countries to adopt the bold strategies that will help reduce the spread of the virus. Significantly, those countries that have done so (including Australia) have seen the graph of sero-conversions to HIV plateau and even fall. Those countries which have not (particularly in sub-Saharan Africa and parts of Asia) have witnessed rapid escalation in the spread of the virus.

Even that secular saint, Nelson Mandela of South Africa, could not bring himself to support effectively the UNAIDS strategy. His successor, President M'beke, seems to be embracing denial and unorthodox medical theories, for example that HIV is not the cause of AIDS. An international meeting in Durban in a month's time may give a new beginning to international strategies in southern Africa designed to tackle this affliction of the human family. UNAIDS guidelines<sup>9</sup> worked out in 1997 at meetings held in concert with the United Nations Centre for Human Rights which I have chaired, provide reflections of consensus amongst the most informed public health and epidemiological experts in the world. The guidelines afford a stimulus to the recalcitrant or the ignorant leaders and officials of nation states. This is not international law in the traditional sense. But the influence of such guidelines, carried into municipal bureaucracies by WHO and UNAIDS experts, fired with a zeal to prevent the ravages of AIDS, can sometimes have a direct local impact far greater than high-sounding treaties. This is international cooperation and principle turned to the vital effort to save human lives. Without international law and international agencies it would just be a dream.

In two other specialised agencies of the United Nations I have witnessed the practical helping hand that can sometimes be offered to domestic law-making. In 1991-92 I participated with two other judges in the International Labour Organisation (ILO) Fact-Finding and Conciliation Commission on Freedom of Association. Our particular task, just before the achievement of constitutional change, was to examine the labour laws of South Africa and to advise on the standards they had to attain in order to conform to ILO Conventions. Having walked out of the ILO rather than be expelled during the apartheid years, South Africa's labour laws had fallen into serious disrepair. South Africa was keen to repair its relationship with international legal norms.<sup>10</sup> The ILO mission examined closely the letter and practice of the South African law. Its report, delivered to the de Klerk government was subsequently acted upon by the Mandela government. A new *Labour Relations Act* was adopted, complying with ILO standards.<sup>11</sup>

In 1994, UNDP arranged my participation in a number of meetings leading up to the constitutional conference in Malawi. It was that conference that agreed on the text of constitutional changes designed to usher in a multi-party democracy in the place of the one-party rule of President Hastings Banda. After a referendum and elections, a peaceful change of government was accomplished in Malawi. I pay tribute to the fine officers of UNDP and other agencies who facilitated this remarkable change in Malawi and in other lands. This was truly a translation of the universal principles of human rights into action in a particular country. I do not believe that it could have happened without the skills of United Nations agencies that I saw in operation at first hand.

In more recent years I have been privileged to take part in the International Bioethics Committee of UNESCO. That body has been grappling with some of the most difficult legal and ethical questions confronting humanity. I

<sup>9</sup> UNAIDS/Centre for Human Rights *Guidelines on Implementation of HIV/AIDS Strategies* (Geneva, 1997).

<sup>10</sup> cf A Stemmett, 'The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law' (1999) *The International Lawyer* 47.

<sup>11</sup> International Labour Organisation, Report on the Mission to South Africa (1992).

refer to the quandaries presented by genomic science and the development of the Human Genome Project. The UNESCO Committee in 1998 adopted the *Universal Declaration of Human Rights and the Human Genome*. This contains a number of basic norms aimed to provide a framework for a global response to legal and ethical questions relevant to the entire human species.<sup>12</sup> It is possible that in due course this Universal Declaration will lead on to a treaty, as others in the past have done. The point to be made is that an international agency, calling on diverse expertise and viewpoints from different religions and cultures, is seeking to design an effective universal response. The difficulties of securing such a response in a world of so many different starting points and where large investments and differing national intellectual property regimes apply, is not to be underestimated.

Within the last few weeks I was called to Vienna by the United Nations Office for Drug Control and Crime Prevention. Under the aegis of that agency, a Global Programme Against Corruption has been established. Several international agencies, including the OECD, the World Bank, the IMF and the World Trade Organisation, have been concerning themselves with the problem of corruption and its insidious effect on municipal governmental institutions. A judicial group on strengthening judicial integrity has now been established in Vienna working directly to the United Nations office there.

This group comprises four Chief Justices from Asia and four from Africa. At present, all of them are from countries of the common law tradition. The intention, in due course, is to establish similar groups in Latin America, Central and Eastern Europe, the former Soviet Union and perhaps elsewhere. The task is to draw up strategies, including a universal minimum code of judicial conduct. Wisely, the Vienna agency is leaving the task to the judges themselves, supported by research and other staff, as well as by informed non-governmental organisations, such as Transparency International in London and the Centre for the Independence of Judges and Lawyers within the International Commission of Jurists in Geneva.

In due course it may be expected that the Vienna Group will draw up judicial guidelines. These will afford a framework for action by United Nations agencies and member countries. Whether these guidelines may lead to treaty obligations or be given effect as conditional requirements imposed by the OECD, the World Bank, the IMF or the World Trade Organisation, remains to be seen. Effective international law cannot be dismissed. Pursuant to an OECD Convention, long arm legislation has been enacted both in the United States and Australia, to render it a crime for nationals of those countries to engage overseas in corruption of foreign officials. The point to be made is that, once again, an issue of common concern has attracted a universal response under and outside the aegis of the United Nations. The sharing of research and knowledge and the pooling of ideas will contribute to global standards and hopefully effective action, not just papers and talk.

I tell these stories not to enlarge my own role in any of these multifarious activities. My role has been relatively minor. Instead, it is told to illustrate, by reference to some activities with which I am familiar, the rapid advance of international initiatives, many of them relevant to law. What, only forty years ago, was basically the concern and responsibility of the nation states has increasingly become an issue for international cooperation, the development of universal guidelines, the involvement of people and their organisations and, sometimes, international law. These developments continue to gather pace. We are only witnessing the opening phase of them. But we were privileged, in effect, to be there at the creation.

### **Policing Universal Human Rights**

One of the most remarkable developments of international law in recent decades has been the growing impact of international human rights treaties on municipal law and practice. I have observed this at three levels. I want to mention each.

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<sup>12</sup> *Universal Declaration on Human Rights and the Human Genome* (1998) cf 'The Human Genome' in M D Kirby, *Through the World's Eye* (2000) ch 4, 41.

### The Special Rapporteurs and Special Representatives

Between 1993 and 1996 I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. That function arose in the aftermath of the successful completion of the UNTAC phase, as a requirement agreed between Cambodia and members of the international community and given effect in the Paris Peace Accords.<sup>13</sup> Twice a year, in Geneva in April and in New York in November, it was my duty to report on the state of human rights in Cambodia to the Commission on Human Rights and to the General Assembly. I was one of about thirty United Nations Special Representatives and Special Rapporteurs. I saw at first-hand the operations of the Centre for Human Rights. I worked closely with the High Commissioner for Human Rights. The criteria for my visits and reports were not intuitive beliefs of my own about civilised standards. They were the principles laid down in the international treaties that together establish the basic framework of international human rights law.

Despite various difficulties, I have no doubt that my work and that of the United Nations Office of Human Rights in Cambodia, stimulated, cajoled and encouraged domestic law and practice in that country to conform with the international treaty obligations which Cambodia increasingly accepted. In a land that had been racked by revolution, war, genocide and invasion, there was a deep thirst for guidance and support. I wish that time permitted me to tell you of the noble servants of the United Nations with whom I worked during those years. Of 'Shorty' Coleman, an Australian soldier supervising landmine clearance. Of Christoph Peschoux, human rights officer, who investigated dangerous cases of abuse of power. Of Basil Fernando, who instituted programmes for training prison officers and police. Of Ms Kek Galebru who helped establish non-governmental organisations to assert and uphold the rights of women.

Let no one say that the United Nations is made up of time-servers. I have seen with my own eyes the dedicated and idealistic servants of international human rights law, often working in most trying and even dangerous situations. That work goes on. Many of the Special Rapporteurs of the United Nations have suffered retaliation for their actions, including the Special Rapporteur on the Independence of the Judiciary (Dato' Param Kumaraswamy) whose case was recently taken to the International Court of Justice.<sup>14</sup> The bureaucracy of the United Nations is often trying. The frustrations and rejections are sometimes dispiriting. But let no one say that it is all talk. At least in the case of Cambodia, there was action. Even for more oppressive nation states, it is a salutary requirement of international institutions and practice today that the autocrats and their representatives must come before the bar of the United Nations and answer to charges of infractions of international human rights law. There is progress in that fact alone.

### The ICCPR First Optional Protocol

My second illustration brings little credit on me. Soon after it was announced that Australia would sign the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR) (thereby rendering itself accountable to the United Nations Human Rights Committee on the communication of an individual), I was asked whether the gay and lesbian reform group in Tasmania should mount a complaint to the United Nations concerning the Tasmanian criminal laws against adult homosexual conduct between males.<sup>15</sup> I am ashamed to say that I advised against such a communication. The intended complainant, Nicholas Toonen, had not been charged with an offence under the Tasmanian laws. He had not exhausted domestic remedies because no domestic process had been taken against him. I told him that his complaint was doomed to fail. In fact, the Human Rights Committee upheld Mr Toonen's complaint against Australia.<sup>16</sup> In the ultimate result, the

<sup>13</sup> The 1991 Paris Peace Agreements are referred to and the work of the author as Special Representative explained in 'Cambodia: The Struggle for Human Rights' in M D Kirby, *Through the World's Eye* (2000) ch 3, 24.

<sup>14</sup> International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (United Nations v Malaysia), Advisory Opinion (1999) ICJ Rep 62.

<sup>15</sup> Criminal Code (Tas) ss 122 and 123.

<sup>16</sup> *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No 3) reproduced in H J Steiner and P Alston, *International Human Rights in Context* (1996) 545. See also 'Same-Sex Relationships' ch 6 in M D Kirby, *Through the World's Eye* (2000) ch 6, 64, 67.

Australian Federal Parliament enacted a statute over-riding the Tasmanian laws.<sup>17</sup> Those laws were repealed and replaced by the non-discriminatory provisions now in force. Now, nowhere in Australia is there any law imposing criminal sanctions on people for adult private sexual conduct, although there are still serious inconsistencies in the treatment of who is an adult for this purpose.

The lessons of the *Toonen Case* are many.<sup>18</sup> For my immediate purposes, they show once again the practical operation of international human rights law, at least in a country such as Australia that has signed the First Optional Protocol to the ICCPR and is a good international citizen. As we do not have a general constitutional Bill of Rights in Australia and as there is no regional human rights court or commission for Asia or the Pacific, the importance of the ICCPR could not be over-stated. Indeed, the significance of the *Toonen* decision runs far from Tasmania and Australia that, ultimately, would have corrected their legal aberration on homosexual offences. It brings hope to people in countries where individuals are still oppressed by reason of their sexuality.<sup>19</sup> Because I am homosexual myself, I understand that oppression; indeed it helps me to understand all oppressions based on irrational and irrelevant grounds. I applaud the fact that two Australians, Nicholas Toonen and Rodney Croome, politely ignored my advice and pressed on with their communication, invoking international law. They teach once again, as Martin Luther King Jr and other leaders of the American freedom movement did, the importance of courage and obstinate adherence to principle in the face of apparent difficulties.<sup>20</sup>

I do not pretend that the *Toonen* decision, and its reasoning, has passed without criticism in Australia or elsewhere. For example, some have seen it as an unwarranted and premature intrusion into Australia's domestic concerns and federal arrangements. Some of the other view has considered that it did not go far enough. Thus, it has been suggested that it is fundamentally erroneous to rest the human rights response to oppression on the ground of sexuality on notions of privacy rather than on notions of full equality. This has been seen, by some observers, as little more than the 'freedom' of a closeted human identity and one which tolerates the very public violence and discrimination suffered by many homosexual citizens when they move out of the privacy of the kind that ICCPR protects.<sup>21</sup>

If one were to look to the growth areas for the application of fresh thinking about international human rights norms in the decades immediately ahead, they would, I suggest, include two. One would be sexuality. Already essays are appearing on whether the right to same-sex marriages, for example, can be derived from international law.<sup>22</sup> One judge of Australia's highest court has suggested that the 'marriage power' appearing in the Australian Constitution,<sup>23</sup> although originally denoting only marriage between a man and a woman for life may,

<sup>17</sup> *Human Rights (Sexual Conduct) Act 1994* (Cth). See also *Croome v Tasmania* (1997) 191 CLR 119.

<sup>18</sup> E Evatt, 'National Implementation — The Cutting Edge of International Human Rights Law', (1999) 12 *Law and Policy Paper* 24 (Centre for International and Public Law, ANU).

<sup>19</sup> See eg *Report of the Special Representative on Iran*, UN Doc E/CN.4/1991/35 [59] [60] recording how homosexual people are executed in the Islamic Republic of Iran, based on the Islamic Shariat. See extract in H J Steiner and P Alston, *International Human Rights in Context* (1996) 411, 415.

<sup>20</sup> See initiatives of Amnesty International, P Baehr, 'Amnesty International and the Self-Imposed Limited Mandate' (1994) 12 *Netherlands Quarterly of Human Rights* 5.

<sup>21</sup> W Morgan, 'Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights' (1993) 14 *Australian Year Book of International Law* 277; W Morgan, 'Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740; P Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17 *Sydney Law Review* 177, 185.

<sup>22</sup> E H Sadtler, 'A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?' (1999) 40 *Virginia Journal of International Law* 405.

<sup>23</sup> Australian Constitution, s 51(xxxi).

in today's society, be read more broadly to include a federal legislative power to enact laws with respect to same-sex unions.<sup>24</sup> Having the constitutional power is one thing. Having the political will is, of course, another.

The second growth area is surely in the field of drug use and drug dependence. I suspect that in 20 years we will look back on the current municipal and international response to the problems presented by drugs of addiction with something like the shame that now attends, or ought to attend, the way municipal law dealt (and in some places, including in the United States, still deals) with human sexuality.

### Bangalore Principles on Domestic Application of International Law

A most important development has occurred in Australia in the use that is being made of international human rights norms. It is a development new in a country that has hitherto adhered strictly to the 'dualist' notion: that the norms of international law do not become part of the domestic law unless made so by the municipal lawmaker.<sup>25</sup> The development to which I refer is sometimes described by reference to the Bangalore Principles.<sup>26</sup> These were adopted at a conference mainly attended by Commonwealth judges in Bangalore, India in 1988. The only 'outsider' was Ruth Bader Ginsburg, then on the eve of her appointment to the United States Supreme Court. The Bangalore Principles acknowledge the dualist rule. International law is not in most countries, as such, part of domestic law. But in respect of international human rights norms, the Bangalore Principles accept that judges of the common law tradition may properly utilise such international rules in construing an ambiguous statute or in filling the gaps in the precedents of the common law.

In a former judicial post, I frequently invoked the Bangalore Principles, sometimes with, and sometimes without, the support of judicial colleagues.<sup>27</sup> An important breakthrough occurred in Australian thinking on this subject in the *Mabo* decision that, for the first time, upheld the rights of indigenous peoples in Australia to title in land with which they could prove long association.<sup>28</sup> One strand in the reasoning which led the majority of the High Court of Australia to reversing past judicial holdings and upholding that claim, was the serious breach that would otherwise arise in respect of Australia's international human rights obligations. Justice F G Brennan, who wrote the leading opinion in the *Mabo Case*,<sup>29</sup> said:

'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded in unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule'.

The Court in *Mabo* acknowledged the impact that 'the powerful influence of the Covenant' would increasingly come to play upon Australia's common law. This appreciation obliges a shift in the understanding of the dualist principle. In the past, it has ordinarily been voiced in terms that municipal law must await incorporation of international law by the municipal legislature. Now, in a common law country, it should, I think, be accepted

<sup>24</sup> *Re Wakim; Ex parte McNally* (1999) 73 ALJR 639, 850 [45] per McHugh J.

<sup>25</sup> R Higgins, 'The Role of National Courts in the International Legal Process' in *Problems and Process: International Law and How We Use It* (1994) ch 12, 205; T Buergenthal, 'Modern Constitutions and Human Rights Treaties' (1997) 36 *Columbia Journal of Transnational Law* 211, 213.

<sup>26</sup> cf Bangalore Principles (1988) 62 *Australian Law Journal* 531; (1988) 14 *Commonwealth Law Bulletin* 1196; Judicial Colloquium April 1989, Harare, Zimbabwe, on Domestic Application of International Human Rights Norms (1989) 63 *Australian Law Journal* 497.

<sup>27</sup> *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414; *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262. cf M D Kirby 'The Australian Use of International Human Rights Norms: from Bangalore to Balliol, a View from the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.

<sup>28</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>29</sup> (1992) 175 CLR 1 at 42.

that the judiciary also has a role, albeit in the minor key, to shape, express and develop the law. In the exercise of that role, the judiciary of the common law tradition may, in appropriate cases, play a part in moulding the common law to universal principles expressed in international human rights law. In doing so, they should not simply incorporate a treaty *holus bolus* 'by the back door'.<sup>30</sup> However, the legitimate role of judicial elaboration using international law as an influence upon municipal common law is now increasingly understood and decreasingly controversial. This process would, I have no doubt, continue to gather pace.

In my reasons in a couple of decisions in the High Court of Australia, I have suggested that the Bangalore Principles might be appropriate for incorporation into reasoning about the meaning of the Australian Constitution itself.<sup>31</sup> I have suggested that the Court 'should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that it would involve a departure from such rights'.<sup>32</sup> In elaborating this view I have suggested:<sup>33</sup>

'Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity ... The Australian Constitution ... speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community'.

I believe that in due course this opinion will be vindicated. The *rapprochement* between municipal laws (including constitutional laws) and international law will gather pace as the 21<sup>st</sup>-century progresses.

It has to be acknowledged that views of the kind which I have mentioned have attracted criticisms, especially from those who adhere to the 'originalist' school of constitutional interpretation,<sup>34</sup> which I regard this as a form of legal ancestor worship.<sup>35</sup> Two other Australian developments should also be stated. One is the introduction of a Bill designed to overcome a decision of the High Court and to render, as part of Australian federal law, the rule that 'entering into an international treaty is not reason for raising any expectation that government decision-making will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic law'.<sup>36</sup>

The second development is the institution by the Australian government of a review of Australia's participation in six United Nations committees that oversee human rights treaties.<sup>37</sup> This review has followed, in point of time, criticism of Australia in the Committee on the Elimination of All Forms of Racial Discrimination in respect *inter alia* of mandatory sentencing laws that were partly copied from the United States. The work of the

<sup>30</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 per Mason CJ and Deane J. cf J Bouwhuis, 'International Law by the Back Door?' (1998) 72 *Australian Law Journal* 794.

<sup>31</sup> cf E-U Petersmann, 'How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society' (1998) 20 *Michigan Journal of International Law* 1; J C Yoo, 'Globalism and the Constitution: Treaties, Non Self-Execution and the Original Understanding' 99 *Columbia Law Review* 1955.

<sup>32</sup> *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 417. cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, 655-657.

<sup>33</sup> *Kartinyeri* (1998) 195 CLR 337, 418 [166]-[167] citing *South West Africa Cases* (2<sup>nd</sup> phase) [1966] ICJR 3, 293; cf E-U Petersmann, above n 31, 1.

<sup>34</sup> G Craven, 'The High Court of Australia: A Study in the Abuse of Power' (Alfred Deakin Lecture Trust, Melbourne, 1997) 33 noted H Charlesworth, above n 2, 65.

<sup>35</sup> M D Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1. cf *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648, 669-673 [110]-[129].

<sup>36</sup> Administrative Decisions (Effect of International Instruments) Bill (1999) (Cth).

<sup>37</sup> 'UN urges Howard to review state jail laws', *Sunday Telegraph*, 26 March 2000, 19.



United Nations human rights committees has been defended by the President of the Australian Human Rights and Equal Opportunity Commission.<sup>38</sup> The outcome of the review is not yet known.

So far as domestic application of international law by the judges is concerned, Hilary Charlesworth has said, accurately I believe, that the suggested 'threat of international law to the Australian legal system is much exaggerated'.<sup>39</sup> She has described the highest court as being 'very cautious in its embrace of international law; it has kept its gloves and hat on at all times'.<sup>40</sup> If, occasionally, I have lifted my hat to pay passing respect to international law it is (I hope you will understand) because my experience over twenty years has brought me into close familiarity with the operations of international law and international institutions - especially in the field of human rights. That operation is by no means alien to lawyers of the Anglo-American tradition. The influence of such lawyers upon the texts and jurisprudence, from the beginnings of Mrs Roosevelt's *Universal Declaration of Human Rights* up to the present time, has been profound. In a sense, as Judge Buerghenthal said in 1997:<sup>41</sup>

'It is ironic that western countries which have a cultural and geopolitical interest in global respect for human rights, have lately come to apply brakes to the domestic application of international norms. By way of contrast, some States which have suffered from past dictatorial regimes have played an important role in encouraging the adoption of domestic constitutional mechanisms that strengthen the power of the independent judiciary to enforce international human rights guarantees in conflict with national law and to implement the rulings of international tribunals'.

## Conclusions

In these remarks I have concentrated mainly on the international law of human rights. But no sitting of the High Court of Australia now passes without some relevant international legal principle being invoked as an aspect of a domestic legal problem. Many cases come before the Court concerning the *Refugees Convention* which, in Australia, has been incorporated into municipal law in respect of the definition of 'refugees'.<sup>42</sup> Beyond this, important questions are regularly presented to the courts concerning extradition law,<sup>43</sup> the *Convention on the Civil Aspects of International Child Abduction*,<sup>44</sup> the international intellectual property protection regimes,<sup>45</sup> various conventions of the International Labor Organisation to which Australia is a party,<sup>46</sup> the *Hague Rules* and the *Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*,<sup>47</sup> and the *Closer Economic Relations Treaty* between Australia and New Zealand.<sup>48</sup> Most of these cases are collected each

<sup>38</sup> A Tay, 'Walk Tall in a Wicked World', *Sydney Morning Herald*, 26 March 2000, 17.

<sup>39</sup> Charlesworth, above n 2, 66.

<sup>40</sup> Ibid, 66.

<sup>41</sup> Buerghenthal, above n 25, 212-213.

<sup>42</sup> See, eg, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Ethnic Affairs v G* (1998) 191 CLR 559; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. cf C Ward, 'A' v Minister for Immigration and Ethnic Affairs: Principles of Interpretation Applicable to Legislation Adopting Treaties' (1998) 26 *Federal Law Review* 207; P Mathew, above n 21, 177.

<sup>43</sup> *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528; *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 193 CLR 128.

<sup>44</sup> *De'L v Director General (Department of Community Services)* (1996) 187 CLR 640.

<sup>45</sup> *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1998) 191 CLR 140; *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158; *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648.

<sup>46</sup> *Victoria v The Commonwealth* (1996) 187 CLR 416; *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

<sup>47</sup> *Great China Metal v Malaysia Shipping* (1998) 196 CLR 161.

<sup>48</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

year by Professor Donald Rothwell in the splendid *Australian Year Book of International Law* produced by the Australian and New Zealand Society. Each year this chapter grows larger.

Even if municipal judges today in countries such as Australia, New Zealand and the United States were personally disinclined to lift their eyes to the burgeoning growth of international law, their ordinary judicial duties will increasingly confront them with the realities that come with global transport, interactive technology and international problems. International law is no longer a realm of princes, diplomats and nations. The global economy and the global village have brought international law into the courtrooms at every level.

These developments will continue and indeed will gather pace. They will require greater imagination and open-mindedness on the part of judges and lawyers. The element of parochial self-satisfaction and the sense of superiority has never been far from the legal traditions of the common law. Now lawyers of that tradition must live in the reality of a world in which international law has a very large and growing part to play.

That is why this conference is both symbolic and timely. It is symbolic because it brings some of the most distinguished lawyers from the northern hemisphere to Australasia to share insights and understanding. Australia and New Zealand are good international citizens. They have a fine tradition of intellectual participation in the field of international law. This conference is timely because, as I have demonstrated, many things are happening in this part of the world to render international law of great relevance. We are the lucky ones. We have the chance to witness, and to contribute to, changes of the most profound legal significance. Let future generations say of international law at this moment that it was blessed with creative intellects who saw the tectonic shift occurring and recognised what they saw.

# **Formulating and Enforcing Competition Law in a Global Economy**



# **New Developments in Competition Policy: An Australian Perspective**

**Allan Asher\***

I will provide an Australian perspective on the international dimension to competition policy.

## **Globalisation**

As we all know, the international factor in the economic activities of countries has been increasing greatly in recent decades. Trade has grown even faster than economic growth in the last 50 years — so also have foreign investment and international capital flows. The causes of this include:

- Economic growth itself, which both creates ever-increasing demand for imports and also increases the capacity of economies to produce exports; it also generates greater amounts of savings which may be invested domestically and internationally to meet the greater investment demands associated with economic growth.
- Technological innovation. This pervades most fields of economic activity but is especially great in the areas of information and communication technology. A sector particularly affected by technological growth in these areas is the financial services sector, which, in turn, facilitates higher degrees of financial and economic interaction between economies in different countries.
- Falling transport costs.
- International, as well as domestic, liberalisation of trade, investment and economic activity generally.

Generally speaking, globalisation has positive effects on promoting competition and in widening consumer choice. However, it can be associated, in some cases, with anti-competitive behaviour on an international scale. This can pose problems for national governments which have difficulty dealing with behaviour taking place in other countries that can affect their own economies.

Today I will particularly focus on international cartels and global mergers, although I shall also mention some other areas where the global dimension to anti-competitive behaviour is relevant. I would also like to refer, in passing, to the related debate about the interaction of trade policy and competition policy and to some of the policy choices being discussed. Given the growing importance of cooperation from offenders in the detection of global cartels, I would also like to discuss leniency policy. Finally, I will look at some of the policy implications of globalisation and how the lack of an international anti-trust regime can be addressed.

## **Global cartels**

Global cartels, that is, cartels organised on an international scale, have long existed ever since the beginnings of international trade. There is a long history of cartels, in particular, during the nineteenth century and early parts of the twentieth century. Indeed, in 1907 an important United States Antitrust case sought to end a tobacco cartel, which had divided the world tobacco markets between British and United States producers. The United Kingdom producers controlled the United Kingdom, the United States producers controlled the United States and the rest of the world was divided up and allocated between the two.

However, there appears to have been a sharp increase in the extent of global cartel activity, or at least in its detection, in the past few years. If there has been an increase in the amount of international cartel activity, rather than just greater detection, this is probably due to the impact of trade liberalisation. Liberalisation is generally good for competition, but it tends to put pressure on firms that have dominated particular local markets without

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\* Deputy Chairperson, Australian Competition and Consumer Commission.

much international competition. Facing competition for the first time, some of them tend to get together with producers in other countries to divide up world markets and to agree on prices and output.

The vitamins case is the most spectacular example. Vitamins are an important product supplied to the food processing and the animal feed industries. There is also a small amount supplied to consumers directly. Food companies blend raw vitamins into products like bread, rice and juice. The animal feed industry buys huge amounts of bulk vitamins to produce healthier and faster growing livestock. An example would be huge chicken farms. The vitamins cartel affected \$5–6 billion of United States commerce. The world-wide effect would be much greater — over \$20 billion. There is evidence that the cartel increased prices by around 70 per cent during the 1990s.

The conspiracy appears to have begun in 1989 when executives at Roche AG, and BASF began holding talks about price fixing. They decided to carve up the vitamin market and to recruit other major vitamin producers into the arrangement, like Rhone-Poulenc of France and Takeda Chemical Industries from Japan. Later, yet further vitamin producers joined the cartel. Nearly all world vitamin producers now face massive fines. Already Roche has paid fines of \$US500 million and the total fines already collected exceed \$US1 billion in the United States alone. Fines in other countries and damages cases lie ahead.

The cartel appears to have operated in a fairly stable manner for over ten years. There were frequent high-level executive meetings. There were very detailed arrangements involved in the administration of the cartel, including careful budgeting, market allocation, price fixing and so on.

I think it is worth noting that vitamins are not produced very much in the United States. They are mainly produced in Europe and Asia. The United States business culture is far more wary about entering into price-fixing arrangements, although as I shall show in a moment, the Archer Daniels Midland's conspiracy shows that one must be wary about this kind of generalisation.

Another important cartel concerned Archer Daniels Midland, which paid \$100 million to settle United States charges about price-fixing conspiracies in 1996. Some top executives are now in gaol. The Archer case was revealed by Mr Mark E Whitacre an Archer executive who secretly tape recorded company executives discussing price fixing with rivals. In fact, he very conveniently was able to arrange for the videoing, as well as recording, of these meetings for a couple of years. The Archer Daniels Midland's case involved international cooperation between American, Japanese and European firms to fix prices in the world-wide food and feed additives industries. Another important case concerned UCAR International Inc, which pleaded guilty to participating in an international cartel that agreed to fix prices and allocate market shares in the graphite electrodes industry which is valued at \$US500 million per annum.

The United States is currently investigating a number of other international cartels. There are over 25 grand jury investigations. We are told that there are some major cartels still to be disclosed. The above conspiracies involved secret meetings of high-level executives in a number of countries around the world. Typically the meetings were held outside the United States where fear of imprisonment, high penalties and detection is greatest. A significant number of meetings were held in the Asian region.

I believe that the existence of international cartels on a rather large scale is an important reason why steps need to be taken to enhance the extent of international cooperation in competition law and perhaps why every country needs to consider having a competition law and policy of its own.

### Global mergers

In recent times there has been a spectacular increase in international merger activity, in one sector after another: finance, communications, oil, airlines, pharmaceuticals, automotive professional services and so on. For the most part, these mergers are not anti competitive and pose no major challenge to the global economy's major competitiveness. Indeed, in many cases, they enhance competitiveness and improve economic efficiency by creating more efficient arrangements for international business transactions. However, it is very important that we be vigilant about these matters. I am often asked whether in Australia or indeed in other smaller countries global mergers pose an economic threat and are we powerless to deal with them. My answer is, that for the most part, the global mergers that we read about every day are not anti competitive. Most of them are logical

commercial developments occurring in response to the forces of globalisation, technological change and liberalisation. For example, many of the financial sector mergers in Europe are a response to the advent of the Euro which is leading to the emergence of a single European financial market. In the United States many of the financial mergers are a response to deregulation of financial markets which had previously prohibited operations on a truly national scale within the United States. Likewise, telecommunications mergers have a great deal to do with the emergence of a liberalised approach to telecommunications and the breaking down of barriers to international transactions. This is similarly the case with airlines.

Another reason why these mergers do not deeply concern me is that these days in particular, major anti-competitive mergers are likely to be stopped by overseas authorities. In this respect, it is worth noting that the United States after a rather quiet period in the 1980s has become far more active in the public enforcement of anti-trust law. The European Union is also becoming far more active than in the past. Japan and Korea are also stepping up some of their anti-trust activities and I have no doubt that there are other examples. Indeed, in some respects the real issue is that some global mergers have to be approved by so many regulators in so many countries that greater cooperation between regulators is required, as I will discuss further. However, it still remains the case that some international mergers can damage competition and force consumers to pay more in certain countries with particular market structures. Are these countries powerless to act? My view is that they are not. I shall take Australia as an example. When Gillette tried to take over Wilkinson Sword in the wet shaving market, the Australian Competition and Consumer Commission (ACCC) opposed the merger successfully in the Federal Court of Australia, even though the transaction occurred offshore. As a result of the Federal Court action divestiture was imposed upon the companies with the selling off of the Wilkinson Sword brands to an independent buyer for ten years. This case established the jurisdiction of the *Trade Practices Act* with respect to off-shore mergers and showed that strong remedies are possible.

Moreover, when a merger occurs that is anti competitive, it is often possible to achieve a resolution that does not damage competition. A recent example was the attempt by the British American tobacco company (trading in Australia as WD & HO Wills) to take over Rothmans. In some countries this would not have lessened competition. However, in Australia it was clear that it would. There are only three companies — WD & HO Wills, Rothmans and Philip Morris — and imports are fewer than 1 per cent. The Commission considered that a merger of two of three big players would reduce competition. It opposed the merger. Following this, British American Tobacco and Rothmans decided to release 17 per cent of the total brands of cigarettes on the market and they were acquired by Imperial Tobacco, a major international tobacco organisation which has now entered, aided by an initial 17 per cent market share and the introduction of its own well-established brands into Australia. Some coincidental changes in tax law will also boost imports. As a result, there remains three strong credible players in the Australian market and the original merger between British American Tobacco and Rothmans has been able to go ahead in Australia as well as in other parts of the world. The point is that very often practical solutions can be found to seemingly difficult problems.

Another case we have dealt with has been the Coca-Cola acquisition of Schweppes. This was an interesting merger because it was never proposed to occur in the United States where there are clear anti-trust problems. At this stage, the merger has not proceeded in France where there have been competition issues, which were made clear in the Orangina case. Moreover, there have been problems with the merger in the European Union. Australia opposed the merger. It noted strong opposition by many outlets that sell Coca-Cola. Following that, Coca-Cola put two proposals to try and meet our concerns but, in each case, the Commission decided that they could not overcome our concerns. The essential concern of the Commission was with the merger of the two sets of brands, that is, Coca-Cola brands and the powerful international brands of Schweppes. The undertakings to which I have referred and which the Commission rejected all failed to address this fundamental concern. They involve concessions about other minor brands and some other arrangements.

A further interesting solution has occurred in a couple of cases where the Commission had initial concerns. When Broken Hill Proprietary Company Limited, Australia's major steel company, wanted to take over New Zealand Steel, the Commission believed that there could be some anti-competitive effects in certain parts of the steel market, even though international trade would take care of many problems. However, when the Commission objected a practical solution was found. The Government agreed to reduce tariffs on an accelerated basis in relation to those parts of the market where there could have been an anti-competitive effect. Accordingly, it is my provisional view that many of the problems for competition created by global mergers can be met by appropriate action in domestic markets.

### Market power

It is not my intention to discuss issues of market power occurring on a global basis other than to make one point about the Microsoft case in the United States. In November 1999 the United States District Court found that Microsoft possessed monopoly power in the markets for intel-compatible PC operating systems and browsers, and that it has used this power to thwart competition in contravention of United States anti-trust law, which resulted in substantial consumer detriment. On 6 June 2000 the Court ruled that Microsoft should be split into two distinct entities.

The point I want to make about this case is that it is essentially about anti-competitive arrangements in the United States that have a global effect. Moreover, the Microsoft case illustrates the importance of applying anti-trust law to areas of the economy, which are characterised by high rates of technological innovation.

### Trade and competition

I would now like to deal with one sub set of the problems concerning the international dimension of competition policy. This concerns the interaction between trade policy and competition policy. I emphasise in passing that this is only one aspect of the global competition scenario but this fact is not always recognised. The essence of the debate about the interaction between trade and competition policy can be summarised as follows. First, trade-policy liberalisation can be frustrated by failures in the enforcement of competition policy. For example, supposing a country liberalises trade, allowing a potential flow of imports following the reduction or elimination of trade barriers. The benefits to consumers of this liberalisation can be defeated by restrictive practices in the liberalising market. For example, retailers in the liberalising market may reach agreement with manufacturers in the home market not to accept imports. Entry into that distribution sector may be difficult. Trade-policy liberalisation in such cases can clearly be frustrated by failures to enforce competition policy properly, for example, if the regulator does not exist or fails to take action to stop anti-competitive practices. Second, it is important to note the reverse relationship. Trade policy can be highly anti competitive. For example, nearly all forms of import protection, whether they be quotas, tariffs, anti-dumping laws and so on, can reduce competition and damage consumer interests. It is important that the debate about the damaging effect on trade of failures in competition law enforcement be balanced by recognition of the damaging effects on competition and consumers of trade restrictions. Third, it is important to note that there is another extremely important variable which may be at work — regulation. Very often it is government regulation rather than failures in the enforcement of competition law that are the true obstacle to imports, to trade liberalisation and to competition. What is needed is a three-way debate about the relationship between trade, competition policy and regulation, rather than a debate that is focused too narrowly on trade protection and failures in competition law and enforcement.

Intellectual property laws are an interesting example. An interesting aspect of the Microsoft case that I discussed earlier is that the outcome reinforces the defeasibility of intellectual property rights in the event that they are used as a façade for blatant anti-competitive behaviour. Intellectual property law has been captured by the interests of producers in countries which are net exporters of intellectual property. In particular, the statutory restrictions on parallel imports under copyright law have enabled massive unjustified price discrimination between countries, have hindered and distorted competition and imposed draconian restrictions on international trade. In this part of the world we are losers from these laws. I am heartened that some change is occurring in some parts of the world — New Zealand has abolished parallel import restrictions, Australia has removed restrictions in some areas and Japan's Supreme Court has relaxed them in patents.

### Leniency policy

Internationally, most competition authorities are recognising the growing importance of cooperation from offenders in mounting a successful prosecution in respect of violations of anti-trust laws. This is based on the realisation of the increasing difficulty of detecting and proving the existence of anti-competitive conduct, which is further compounded by the fact that such conduct is very commonly global in its scope and effect.

Certain enterprises participating in anti-competitive agreements might wish to terminate their involvement and inform the Commission of the existence of the agreements, but are deterred from doing so by the risk of incurring large fines. Perhaps the best 'carrot' to encourage persons to blow the whistle on themselves and their



co-conspirators is to offer them favourable treatment. Favourable treatment means any penalty or obligation that is less severe than one which would be sought in the absence of disclosure and cooperation by the party who may have contravened the provisions of the *Act*.

It is generally felt that the interests of customers and consumers in ensuring that such practices are detected and prohibited outweigh the policy objectives of imposing financial penalties on those entities which engage in anti-competitive practices and which cooperate with the law-enforcement agency.

The vitamins case I discussed earlier first came to the attention of the anti-trust authorities when one of the participants to the cartel came forward in exchange for immunity. Most competition authorities have developed guidelines regarding when they will grant leniency in exchange for cooperation. The European Union and the United States have developed prescriptive factors to determine when leniency will be granted. In comparison, the ACCC has adopted an overtly flexible cooperation policy. The Commission developed guidelines which are intended only as an indication of the factors the Commission will consider relevant when considering a request for leniency. The Commission distinguishes between corporate and individual leniency. The ACCC further enunciates two levels of amnesty, being:

- Immunity from prosecution; and
- Leniency in the imposition of a civil penalty.

Leniency, including immunity, may be considered appropriate for directors, managers, officers or employees of a corporation who come to the ACCC as individuals where they:

- a) Have important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings;
- b) Provide the ACCC with full and frank disclosure of the activity and relevant documentary and other evidence available to them;
- c) Undertake to cooperate throughout the ACCC's investigation, and comply with that undertaking;
- d) Agree not to use the same legal representation as the firm by which they are employed; and
- e) Have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity.

Leniency is most likely to be considered for a corporation which:

- f) Comes forward with valuable and important evidence of a contravention of which the ACCC is otherwise unaware or has insufficient evidence to initiate proceedings;
  - g) Upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity;
  - h) Provides the ACCC with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the ACCC's investigation and any ensuing prosecution;
  - i) Has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader of the activity;
  - j) Is prepared to make restitution where appropriate;
  - k) Is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking; and
- Does not have a prior record of contraventions.

It must be noted that not all of the above criteria need to be met in order for leniency to be granted. Rather, the ACCC assesses each case on its merits.

In all jurisdictions, irrespective of the guidelines developed, it is of paramount importance that enforcement agencies be seen to be encouraging parties to come forward as soon as they believe they are implicated in an offence. What is also clear is that requests for immunity must be subject to the closest scrutiny, and must be considered on the basis of established criteria, consistent with the fair and impartial administration of the law. Further, all jurisdictions must be satisfied that the public interest will be served by making such a recommendation.

## Policy

Let me now turn to some policy issues relating to globalisation.

First, it seems obvious that in an economy characterised by ever-increasing degrees of economic interaction between countries with ever-increasing activity on the part of multi-national firms involved in global cartels and/or with global market power, that some kind of international effort is needed to deal with some of the problems. National governments alone cannot deal with all global problems. The issue is, with no international anti-trust regime, nor any likelihood of one being introduced in the future, what should and can be done to address the issues raised? There seems to be six options:

- Extraterritorial application of laws;
- Enhanced voluntary convergence in competition laws and enforcement practices;
- Enhanced bilateral voluntary cooperation between competition agencies;
- Regional agreements containing competition provisions;
- Plurilateral agreements; or
- Multilateral competition policy agreements.

Of these I will discuss bilateral and multilateral approaches.

## Bilateral approaches

There are number of forms of bilateral cooperation agreements. They are:

- Non-binding, voluntary exchange of non-confidential information and of technical expertise;
- Traditional comity;
- Positive comity;
- Bilateral agreements of treaties permitting exchange of confidential information on case-by-case basis, for example, the Australia/United States Treaty; or
- Mutual Legal Assistance Treaties.

On 28 April 1999 the Australian and United States governments signed an agreement that will allow the two countries' anti-trust organisations to assist each other. Further, on 20 July 2000 the ACCC signed agreements with the Federal Trade Commission (FTC) to facilitate law enforcement cooperation in the consumer protection area between the United States and Australia. The agreements relate to notification of enforcement activities,

cooperation and coordination and exchange of information and will enable the ACCC and the FTC to better combat fraudulent, misleading and unfair commercial conduct in each other's jurisdiction.

Australian and United States agencies can now exchange evidence on a reciprocal basis for use of anti-trust enforcement and assist each other in obtaining evidence located in the other's country. Agreements like this will greatly assist in the break up of global cartels and the investigation of global mergers.

### **Multilateral competition rules**

Before discussing this approach I refer to terminology being developed at the Organisation for Economic Co-operation and Development (OECD).

- Core principles: fundamental principles of general application, which are probably binding.
- Common standards: more detailed and specific commitments by countries, which are probably binding.
- Common approaches: list criteria or objectives without detailed weighting. They may be binding or non-binding.

### **Elements of multilateral framework**

The key elements of a framework are:

- Core principles;
- Scope and coverage of competition law;
- Common standards and approaches;
- Advisory forum on institutions and enforcement;
- Principles of enforcement (including rights of remedy);
- Bilateral cooperation forum;
- Dispute settlement arrangements; and
- Sectoral approaches.

### **Core principles**

Core principles include:

- National treatment;
- Non-discrimination;
- Transparency;
- Due process (rights to remedy under competition laws);
- Scope and coverage of competition laws; and
- International cooperation.

### **Common standards and common approaches**

Common standards and approaches cover:

- Hard-core cartels;
- Vertical restraints;
- Abuse of dominance; and
- Mergers.

### **Dispute settlement**

There are two key points:

- Individual cases would not be dealt with internationally; and
- Dispute settlement would relate to observance of core principles and possibly to common standards and even common approaches.

### **Conclusion**

Whether we go down a bilateral or multilateral, or a mixed bilateral or multilateral path is the issue which is being faced on international discussions at present. It is difficult to forecast the outcome. The most likely is perhaps that the World Trade Organisation will want to give further study to the options, leaving open the possibility of some negotiations on these topics in coming years.

In the meantime, it is important that widespread and serious competition policies are adopted at the domestic level everywhere. The lack of an international anti-trust regime can be overcome if countries throughout the world have comparable domestic laws with a high level of international cooperation. Most OECD countries have recently become very active in competition policy. Many Asian countries are starting to recognise the benefits of competition policy, although most still have a long way to go.

# **United States Self Interest: A Major Impediment to Agreement on the Principles of International Competition and its Enforcement\***

**Warren Pengilley\***

This paper is a discussion from an Australian viewpoint of United States trade and antitrust laws and an evaluation of how such laws prevent basic agreement on international competition laws and their enforcement.

## **Introductory observations**

### **The approach of this paper**

This is a research paper prepared for a conference, the basic theme of which is to discuss international issues including those of international trade and litigation. My brief at the conference is to discuss whether agreed international competition rules are likely to eventuate in the foreseeable future and, if so, whether Australia would be wise to become a party to an international competition enforcement regime, should such a regime become a realistic option. In this context, I intend to define international competition enforcement as being something more than reciprocal recognition of judgments. Mechanisms for this already exist. My theme is directed at the possibility of international enforcement by means of a supra national authority.

I intend to discuss the relevant issues from basically an Australian perspective. This is done for three reasons. First, it is the perspective from which I can best view the problems involved. It is also territory which may perhaps not be familiar to a number of Australasian delegates to this conference. Second, it is a perspective with which I believe the United States, and its citizens, are singularly unfamiliar.<sup>1</sup> Hence my discussion may have the benefit of bringing home a different approach at an international conference at which there is wide United States representation. Third, the Australian situation has some unique characteristics but, on the broad front, it is far from unique. It is, indeed, only illustrative of issues faced by most middle-order developed economies around the world. I suggest that without the support of these economies any international competition rules will be of very limited application and also that any sort of international competition enforcement is likely to be unsuccessful or, at best, extremely limited as to what it can achieve.

Having said the above and rationalised my approach, I must, nonetheless beg the indulgence of those at this conference to whom the points made in this paper may well have a familiar ring.

### **The 'in principle' case for international competition law enforcement and the United States as the major impediment to this**

In principle, there is a good case for agreed goals and enforcement in at least some areas. There is, for example, agreement in the internal competition regimes of both Australia and the United States on the detriments of price

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\* The paper is written as at 31 May 2000.

\* Sparke Helmore Professor of Commercial Law at the University of Newcastle, Australia; Special Counsel to Deacons Graham & James, Sydney; Former Commissioner of the Australian Trade Practices Commission.

<sup>1</sup> This is a purely subjective evaluation but is thought to be an entirely appropriate and correct one. The writer is Australian. His views as expressed above are based on his having first become familiar with antitrust law as part of his Doctor of Jurisprudence degree at Vanderbilt University in the United States and as a former Visiting Overseas Fellow at the Wharton Business School at the University of Pennsylvania. It is also based on a considerable number of United States friendships and contacts over many years. As will be apparent as this paper develops, internal competition in the United States is rigorously enforced. Most United States citizens simply assume that the United States carries the same philosophical approach to international competition enforcement. Yet this is simply untrue. Internationally, the chief function of United States policy has been to load the dice in its own favour not to look at competition law as a level playing field.

fixing and collective boycotts.<sup>2</sup> There is, in fact, general agreement around the free-enterprise world that those practices should be banned *per se*, or virtually so. One would think, therefore, that there should be no difficulty in organising international adjudication of these practices. However, it is not as simple as this for reasons which will subsequently become apparent. Foremost in these reasons is that the United States, though vigorously enforcing its competition laws internally, enforces its competition laws selectively in the international arena. It also has a plethora of statutes aimed at advancing its cause to the detriment of its competitors. The United States also claims a reach of its jurisdictional writ which most other nations regard as imperialistic. Further, such a jurisdictional reach, or a jurisdictional reach akin to it, is not even recognised by, let alone reciprocated by, the United States itself in the case of other countries.

The United States can effect these ends because of its immense importance to the world economy, because of the need of most countries for access to United States technology, because most significant international trading entities have assets in the United States which can be seized to satisfy United States judgments and because payments from the United States to non-United States entities are vulnerable to United States garnishee proceedings in satisfaction of United States judgments. The United States is a behemoth in international trade. The world must deal with it. Yet its laws deny internationally to the world, and to itself, those benefits of competition which are so clearly articulated and enforced internally within the borders of the United States itself. Given that the playing field is nowhere near level, this paper argues that Australia, and similarly placed world economies, would be most unwise to agree to any international competition law principles or to a supra-national enforcement authority unless and until the United States abandons, or at least substantially modifies, those trade advantages which it has and which it enforces through a variety of legislative and judicial stratagems. The paper aims to identify some of the major problems facing Australia in this regard. It also concludes that the United States is not only not ameliorating the problems involved in obtaining any agreement on international competition laws or their enforcement but has, in recent years, considerably aggravated them.

The best way to internationalise competition law is to internationalise what we agree on domestically

It is all very well to contemplate the wider issues of international competition policy such as control over mergers, exclusive dealing, misuse of market power and the like. The writer's view is that we should try to obtain agreement internationally where there is most agreement domestically, that is, in control of price fixing and boycott arrangements. If we cannot internationalise widespread domestic agreement, we should give the game away.

### Australian trade

Competition law is a function of trade. It is thus important, in evaluating Australia's approach to international competition law, to ascertain those countries which invest in Australia and those countries in which Australia itself invests. These statistics are set out, in relation to the top ten nations in each case, in the appendix to this paper. A brief analysis of these statistics<sup>3</sup> shows:

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<sup>2</sup> In Australia and New Zealand, these practices are banned *per se*. However, it is possible to obtain an Authorisation from the appropriate regulatory authorities for such practices if the public benefit delivered by them outweighs any anticompetitive detriments. Authorisation must be obtained prior to the arrangements being implemented. Not a great number of Authorisations have been granted. As a generalisation, the writer believes that most Authorisations which have been granted in Australia or New Zealand would receive a blessing in the United States under rule of reason analysis or on the basis of efficiencies delivered. The delivery of efficiency has been the prime basis for grants of Authorisation in Australia and New Zealand.

<sup>3</sup> See appendix. This summary is taken from *Australian Trade Outcomes and Objectives Statement 2000*: Australian Department of Foreign Affairs and Trade (Tabled 5 April 2000). In this document is reproduced the relevant figures for:

- Australia's Principal Export Destinations 1999;
- Australia's Principal Merchandise Sources 1999;
- Australia's Services Trade 1999 (Imports and Exports);
- Level of Foreign Investment in Australia as at 30 June 1998;

- *The United States* is Australia's largest export market after Japan. It is the destination of 10.3 per cent of the total exports to Australia's top 40 export destinations. The United States is Australia's largest source of imports. It is the source of 21.8 per cent of the total imports from Australia's top 40 import sources. The United States is Australia's largest services export destination and its largest services import source. The United States holds the second greatest foreign investment in Australia being 25.5 per cent of total foreign investment in the country as at 30 June 1998. (The largest foreign investment in Australia is held by the United Kingdom which is in front of the United States by a mere 0.1 per cent with a 25.6 per cent foreign investment holding.) The United States is the largest destination of Australian foreign investment abroad, being the country in which 33.8 per cent of Australian foreign investment was held as at 30 June 1998. However, the comparative size of Australian foreign investment abroad and United States foreign investment in Australia is important. United States investment in Australia as at 30 June 1998 was \$A146,086 million whereas Australian foreign investment in the United States at that date was \$A84,257 million, that is, Australia's investment in the United States is slightly over one half of United States investment in Australia. The comparative sizes of the two economies, of course, make United States investment in Australia far more significant in terms of the economy as a whole than is the vice versa situation.
- *Japan* is Australia's largest export market. It is the destination of 20.4 per cent of total exports to Australia's top 40 export destinations. Japan is Australia's second largest source of imports (after the United States). It is the source of 14 per cent of the total imports from Australia's top 40 import sources. Japan is Australia's largest services export destination (after the United States and the United Kingdom) and is its third largest services import source. Japan is the third largest holder of foreign investment in Australia having 9.9 per cent of total foreign investment in the country as at 30 June 1998. Japan is the fourth largest destination of Australian investment abroad (after the United States, the United Kingdom and New Zealand) being the country in which 4.4 per cent of Australian foreign investment was held as at 30 June 1998.
- *Other countries* are much less important than the United States and Japan in terms of their overall trade and investment in relation to Australia. Only the United Kingdom, New Zealand and The People's Republic of China are, statistically, of major significance. The situation is as follows:
  - The United Kingdom is marginally the largest foreign investor in Australia (exceeding that of the United States by 0.1 per cent of total foreign investment), and is the second most important country (after the United States) in respect of which Australia has services trade transactions. The United Kingdom is also Australia's second largest investment destination but Australian investment in the United Kingdom is only about half of Australia's investment in the United States. (In the present context, however, the law of the United Kingdom poses no problems akin to those posed by the United States. Australian law reflects the United Kingdom law as to the extent to which the writ of one country can reach to activities in another.)

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- Level of Australian Investment Abroad as at 30 June 1998.

These figures seem to be the latest available at the time of writing this paper. In the Department's Tables a comparison of the previous and latest figures is given. Whilst there are, of course, variations between periods, none of these are significant enough to affect the theme discussion of this paper. The United States has consistently had a favourable trade balance with Australia. United States figures for U.S.-Australian bilateral trade over recent years are set out below:

**US Australian bilateral trade (\$US Million)**

	US Exports to Australia (\$US million)	US Imports from Australia (\$US million)	Balance (\$US million)
1995	10,789.10	3,322.90	7,466.20
1996	12,008.40	3,868.90	8,139.50
1997	12,062.90	4,602.30	7,460.60
1998	11,917.50	5,386.80	6,530.70
1999	11,810.70	5,290.40	6,520.30

Source: US Census Bureau: Foreign Trade Division

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- New Zealand, with which Australia has a trade treaty (The Closer Economic Relations (CER) Treaty) is Australia's third largest merchandise export destination behind Japan and the United States (being about one-third of exports to the United States) and Australia's third largest destination of foreign investment (but only one-sixth of Australian foreign investment in the United States). (New Zealand law poses no difficulties to Australia internationally both because it, too reflects United Kingdom law and because of the Australian-New Zealand CER Treaty, which includes provisions for 'harmonisation' of competition laws and for their reciprocal enforcement.)
- The balance of Australian trade, as a broad generality, is largely with Taiwan, The People's Republic of China, Singapore, Malaysia, Hong Kong and Indonesia. The role of each of these countries is, however, dwarfed by that of the United States and Japan. The greatest overall trade in Asia, other than with Japan, is with The People's Republic of China. That country, however, receives only about half of the value of Australian exports to the United States and about one-quarter of the value of those to Japan. It is the source of the value of only about one-half of the imports from Japan and the source of the value of about one-third of imports from the United States. Australian services exports to The People's Republic of China are only about 14 per cent of the value of the services it exports to the United States and its services imports are only about 11 per cent of the value of United States services imports. The People's Republic of China holds only 0.4 per cent of the foreign investment in Australia and only 0.5 per cent of Australian foreign investment is in The People's Republic of China.

These figures need to be put in detail even in a discussion of legal issues. For it is against trade figures that competition issues and Australia's attitude to them need to be evaluated. The figures clearly show the dominant influence of two countries on the Australian economy: the United States and Japan.

### **What follows from the trade realities in relation to competition law?**

Students in high school at the end of the second world war learnt that there were three factors of production: land, labour and capital. Of these factors only capital was then reasonably transferable. However, immediately post war, capital was subject to considerable currency restrictions. Slower communications also meant that capital, even when it moved, moved somewhat sluggishly and was subject to considerable regulatory scrutiny.

All of the standard factors of production are now global. The speed of communications has been responsible for much of this. Capital is so global now that there are real questions raised as to the extent to which governments can any longer effectively control their own economies. Floating exchange rates mean that there is an enormous supply of 'world money'. The old saying that 'When Wall Street sneezes, the world catches flu' is never truer than at present. Land is physical but the real question now is not where land and factories are situated but who owns such assets and how they are exploited. Labour is perhaps the least internationalised factor of production. However, even here, physical barriers are breaking down. A government's capacity to control physical immigration is no longer determinative of whether work is actually performed in a particular country. Investors seek out countries which have favourable labour regimes and 'export' jobs to them. In many cases, it is no longer necessary for a person to be physically present in a country to perform tasks in that country. Telephone enquiries initiated in Asian countries in relation to some Asian airline timetables are now answered by an Asian language-speaking consultant physically situated in Tasmania. Akin Australian enquiries may be answered in India. Technology has, to a significant extent, internationalised even labour in industries where previously services had necessarily to be delivered in the country in which the service deliverer was physically present.

Immediately post second world war, technology did not rate a mention as a factor of production though some economists were tentatively suggesting that something called 'innovation' could possibly be considered as a fourth factor of production. No-one needs to be told that technology is probably the engine which is currently driving the world, or at least the developed world.

Given all of this, competition law also conceptually needs internationalising, both as to its content and as to its enforcement. Factors of production now simply transcend national borders. So should their control. But internationalising competition law, from Australia's point of view, means applying the same rules to all; and this is where the problem begins.



Australia is a low tariff country and, no doubt, has benefited from this. However, it is a country which is very aware that there is frequently little or no reciprocity in tariff reductions. It is quite unlikely that Australia would be prepared to sign up to any international competition regime when this enforcement cannot possibly assist Australian trade because it operates unilaterally against Australia's interests.

The Australian statistics previously cited cast the world's economies into four basic groupings from Australia's viewpoint. These basic groupings are:

#### Lesser developed economies and economies which have no competition law experience or reject the philosophy of competition

Numerous countries have philosophical objections to competition law principles or are not prepared to implement these for societal or political reasons. Nations may have to regulate matters such as the supply of basic commodities, which supply would not be available to all on an equitable basis if competition law were to run. Competition is a ruthlessly efficient economic engine but it does not ration societal benefits. From an economic efficiency viewpoint, there is nothing wrong with the rich person's dog having milk whilst the poor man dies of rickets. Yet, this is hardly a desirable societal outcome. Further, many societies cannot implement competition law because of political instability or the inability to ensure that court writs are, in fact, the law of the land. The views of such countries have to be respected. It may also be the fact that such countries are, in fact, highly competitive because of international trade pressures or trade pressures of organisations such as the World Trade Organisation (WTO). It is just that many countries believe that their resources are better spent on matters other than court competition battles: a seemingly inevitable result of legislating competition principles.

Respecting the views of lesser developed countries which do not espouse the enforcement of competition by law does not, however, necessarily also mean that Australia would benefit from entering into international competition law enforcement arrangements with them. Any such arrangements would assuredly be non-reciprocal. I see no benefit in Australia agreeing to what would effectively be only a unilateral exposure.

#### Developed economies (other than Japan and the United States)

Australia has no incentive to agree international competition law principles or to join in a supra national competition law enforcement program in relation to developed countries (other than Japan and the United States) unless reciprocity is guaranteed. Most developed economies are in a similar position. Most have strongly developed and enforced competition regimes. They may well wish to internationalise their competition laws. However, these countries may well have the same reservations, discussed later, as Australia in relation to their trading relationships with the United States. Undoubtedly they will see themselves as trading with a behemoth and will want to see trade and competition regulatory arrangements evenly weighted and reciprocally applied.

#### Japan

Japan, of course, has a competition law. This was as a result of post second world war United States policy to de-cartelise Japan. Under General MacArthur strong anti-trust laws were brought into force during the United States occupation of Japan. Indeed, the Japanese *Antimonopoly Act*, on its wording, might be considered to be a United States *Sherman Act* clone. One would think that Australia would not object to agreement with Japan on international competition law principles and to supra national enforcement of antitrust arrangements between the two countries, given the strong Australian antitrust legislation.

Legal institutions, however, take on the character of host nations and often develop in ways which the country of origin would barely recognise. In an article by Joel Davidow, current as at 1996,<sup>4</sup> the realities of Japanese antitrust law are pointed out. These are:

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<sup>4</sup> J Davidow, 'The New Japanese Guidelines on Unfair Practices and Know How Licenses: An American View', Chapter 1312.15 *Laws of International Trade: Business Laws Inc.*

- There has been only one significant criminal antitrust case in Japanese history. This was the petroleum price fixing case of the 1980s.
- There have only been two or three damages actions ever filed in Japan and none has been fully successful.
- Virtually all cases brought by the Japanese Fair Trade Commission have been settled by consent. Indeed, says Davidow, speaking in the context of the Japanese antitrust position in relation to technology transfer:

In truth, there is little hope of any other result for a person such as a foreign licensor. Such parties have been denied standing to challenge a Japanese Fair Trade recommendation to a licensee not to accept a restriction.

Further, Japan has traditionally maintained fairly high tariffs on many products and flatly refused to allow the importation of others. Japanese technical specifications have also been long regarded as a 'non tariff barrier' to imports.

The result of this is that a very significant change of Japanese competition philosophy would be a pre-requisite to Australia entering into any competition pact with Japan. Not only is Japanese antitrust law not enforced internally but Japanese purchasers of coal, Australia's largest export commodity into the Japanese market, have consistently acted collusively to drive down the price of that product. This has partly been by manipulating supplies and partly by taking stakes in new Australian coalmines to force a glut of coal on the world market and push down prices.<sup>5</sup>

### The United States

The position of the United States is crucial to any international agreement on, and/or enforcement of, competition laws. Particularly is this so in the case of Australia. As the conference for which this paper is prepared is one conducted by the American Society of International Law, I will concentrate in the balance of this paper on the position in relation to the United States. I will discuss this issue from an Australian perspective but the comments made are far more widely applicable.

### **The growth of United States multinationals and the extraterritorial expansion of the United States writ**

Colonialism may be based on trade or conquest. As far as Australia is concerned, in times gone by, Britannia ruled the waves and Britain's power was colonial. British trade policy was based on the axiom that 'Trade follows the Flag'. Whatever one's views on colonialism, the legal doctrine on which it was based was simple to comprehend. Britain had direct legislative power over its colonies and until the mid-twentieth century, many such colonies were administered by the Colonial office. It was only after the second world war that the majority of Britain's colonies achieved independence though Australia, New Zealand, South Africa, Ireland and Canada were granted effective independence well before this.

The genesis of the spread of American power lies not in conquest but in trade. Given the differences of approach, the United States sought to impose its undoubted economic power not through colonisation but through trade alone. Because it had no widespread territorial base upon which to enact protective trade legislation, the United States sought in its laws to enact legislation through principles never previously a part of international law. There

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<sup>5</sup> See T Maher, President of the Australian Construction, Forestry, Mining and Engineering Union in a paper to 'Coal Trade 2000 Forum' in Sydney on April 26, 2000 (reported in *The Newcastle Herald* April 27, 2000). Maher was citing a translation of the 1989 Japanese government document outlining the tactics mentioned. The document stated that the main interest in Japanese coal investment in Australia was in commission on sales and in cheap power to Japanese steel mills and power plants. Coal industry consultants, Barlow Jonker, prepared a list of projects and presented this to the conference. It showed that new projects and expansions would create an extra 42 million tonnes of extra capacity in New South Wales and more than 100 million tonnes of excess capacity in Queensland.

have been three major such principles: the 'effects' doctrine; the 'extended personality' doctrine and the 'contractual submission' doctrine.

### The 'effects' doctrine

In international jurisprudence, it is accepted that each sovereign state controls conduct within its own territory but not otherwise. It is also accepted theory that one sovereign state accepts the laws of another so long as those laws relate to the territory of the other. This principle of international law is expressed by Brierley in the following terms:

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth within which it normally exercises, subject to limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises authority of this kind over certain territory, it is popularly said to have "sovereign" over that territory.<sup>6</sup>

The United States has never, however, accepted this limitation insofar as economic and commercial laws are involved. So if conduct occurs which has an 'effect' on the economy of the United States, this conduct can be controlled under United States law. This is so even in the case of non-United States trading corporations of non-United States countries. Thus corporations, which have no affiliation with, or loyalty to, the United States are subjected to United States law under the 'effects' doctrine. The conduct of any such corporation does not have to have any territorial nexus at all with the United States in order for the 'effects' doctrine to make United States laws applicable to it.

The 'effects' doctrine is said not to be applied mechanically. In *Mannington Mills v Congoleum Corp.*,<sup>7</sup> the Third Circuit Court of Appeals said that: 'the individual interests and policies of each of the foreign nations differ and must be balanced against our nation's legitimate interest in regulating economic activity'.

A balancing approach was devised consisting of an analysis of a wide range of factors.<sup>8</sup>

The 'effect' must be a 'substantial effect'. The most recent pronouncement of the United States Supreme Court is in *Hartford Fire Insurance Co v California*<sup>9</sup> in which the court said: 'The *Sherman Act* applies to foreign conduct that was meant to produce, and did in fact produce, some substantial effect in the United States.'

The above provisions might appear to be reasonable tests. The *Foreign Trade Antitrust Improvements Act* 1982 attempts to limit the 'effects' doctrine in relation to antitrust actions. However, United States courts have always

<sup>6</sup> J L Brierley, *The Law of Nations: an introduction to the international law of peace* (1955) 162.

<sup>7</sup> 595 F 2d. 1287 (3<sup>rd</sup> Cir. 1979).

<sup>8</sup> These factors are:

- (i) the degree of conflict with foreign law or policy;
- (ii) the nationality of the parties;
- (iii) the relative importance of the alleged violation of conduct committed to that abroad;
- (iv) availability of a remedy abroad and pendency of litigation there;
- (v) the existence of intent to harm or affect United States commerce and the foreseeability of that harm or effect;
- (vi) possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
- (vii) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements of both countries;
- (viii) whether an order for relief would be acceptable in the United States if made by the foreign nation in similar circumstances; and
- (ix) whether a treaty with an affected nation has addressed the issue.

<sup>9</sup> 113 S. Ct 2891 (1993); 1993-1 Trade Cases ¶ 70,280.

taken an expansive view of their jurisdictional reach and, as we shall see later, in relation to the *Helms Burton Act* and in relation to United States laws dealing with Japanese import restrictions, the claimed reach of United States legislation is very wide indeed. Further, no country can help but feel incredulous when United States Federal Trade Commission officials claim to have power to levy a fine of \$US10,000 per day on any non-United States company which fails to report (under United States 1976 pre-merger notification law) its proposed acquisition of another non-United States firm if certain statutory thresholds are passed and one of the two firms realises merely \$US10 million worth of annual exports to the United States.<sup>10</sup> Presumably this somewhat imperious claim is made on the basis that such a quantum of export activity has an 'effect' on United States commerce and thus entitles the United States to exercise merger jurisdiction in respect of the companies involved.

### The 'extended personality' doctrine

The United States, of course, claims jurisdiction in relation to all matters territorial to it. However, it also under the 'extended personality' doctrine claims jurisdiction in respect of United States-based corporations in the world wherever such corporations trade. The extended personality doctrine ensures that both the parent of a United States-based subsidiary and the subsidiary of a United States-based parent can, under a variety of laws and judicial interpretations, be subject to the United States legislative and judicial writ. Such companies are subject to United States law wherever they are incorporated and wherever they trade.

The extent to which the United States has claimed that the 'extended personality' doctrine reaches is perhaps most dramatically illustrated in the introduction into Congress in 1979 of the Energy Antimonopoly Bill. The alleged purpose of this Bill was to ensure that world energy did not become monopolised. One consequence of the Bill, if it had been enacted, would have been its impact on the North Sea gas project, which project was seen, no doubt, as contrary to United States commercial interests. It is disturbing to think that such a Bill could even seriously be debated because its jurisdictional claim was such that it could have prevented either Shell or British Petroleum, Dutch and British companies respectively, from acquiring controlling interests in joint ventures organised to exploit North Sea and Dutch offshore fields. The claimed basis of United States jurisdiction, had the Bill been enacted, would have been that Shell and BP had subsidiary companies trading in the United States. Therefore, the argument ran, they were each subject to United States jurisdiction throughout the world and could not act anywhere other than in accordance with United States legislation enacted to protect United States commercial interests.

In a more practical, and real world context, one effect of the extended personality theory was to prevent, under the United States *Trading with the Enemy Act*, Utah Developments, a United States subsidiary incorporated in, and trading in, Australia, from fulfilling a coal contract with Vietnam. This contract had been encouraged by the Australian government but was cancelled when the United States State Department 'approached' Utah's United States parent and advised that the Australian contract was illegal under United States law. Effectively, Australia could not have its own foreign policy with Vietnam in relation to this coal contract because of the United States *Trading with the Enemy Act* and the United States 'extended personality' theory incorporated into that Act.

### The 'contractual submission' doctrine

The United States *Export Administration Act* of 1979 uses both the extended personality doctrine and a theory of 'contractual submission' to subject foreign corporations to United States policy. That Act controls not only exported United States technology but, by way of expansive language, controls also the re-export of goods and technology from one country to another. A 'submission clause' has to be executed by foreign companies which requires United States technology not to be used for purposes contrary to United States laws. This, on its face, may seem reasonable but United States laws can be expressed retrospectively in order to achieve United States foreign policy objectives. So, for example, in December 1981 and June 1982, the United States government banned the re-export by foreign countries of any United States-based oil and gas technology used by them. The purpose of this was to further United States political objectives relating to the construction of the West Siberian

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<sup>10</sup> D E Rosenthal and W M Knighton, *National Laws and International Commerce : The Problem of Extraterritoriality* (1982) 73. The authors reported at the time of their study that the power, though claimed, had not been exercised.

pipeline. Countries tendering for the Soviet pipeline had no idea at the time of tendering, that the United States would retrospectively impose a ban on the use of decidedly non-military technology in an effort to pressure the Soviet Union into relaxing military law in Poland and in an attempt to prevent Western Europe becoming a major purchaser of Soviet energy. The action of the United States was, in effect, an effort, through retrospective legislation, to achieve certain United States policy objectives which were quite unforeseeable at the time of the purchase of decidedly non-strategic United States technology. One incidental, but unforeseeable, effect of the United States 1981–82 action in relation to the West Siberian pipeline was that Santos, a French firm which had contracted to construct an Australian gas line, was significantly frustrated in this task. As may well be imagined, Australia was not impressed by United States action which prevented the re-export from France to Australia of technology essential to the construction of an important Australian asset.

How has the United States been able to implement its ‘effects’; ‘extended personality’ and ‘contractual submission’ doctrines?

The United States has been able to implement legislation along the lines set out above notwithstanding the fact that the basis of such legislation is not generally internationally accepted. The facts are that, after the second world war, the world could do little about the economic power of the United States. The United States was then, and remains, the giant of the economic world. Hence there was, and still is, no realistic alternative in many cases but to acquiesce in the American concept of the reach of its laws. After the second world war, the United States was quick to leap into power vacuums created by the collapse of pre-war cartels and by, in many cases, the collapse of colonial links as well. The United States was the one country which was able to produce and deliver a wide variety of goods and United States companies were particularly active in developing branches and subsidiaries all over the world. One writer estimated that in the 1970s, some 90 per cent of the world’s multinational companies were chartered and headquartered in the United States.<sup>11</sup>

The heritage remains. In Australia’s case, the United States is virtually the equal of Britain as the largest investor in the country. This is quite an amazing statistic given that Australia was founded by Britain and Britain has undoubtedly played a dominant trade role in Australia for most of Australia’s history. Comparatively, the United States is a latecomer to the Australian trade scene.

Whilst Britain accepts that the effect of its judicial and legislative writ is territorial, various judicial and legislative stratagems invoked by the United States mean that United States Australian investment, 25.5 per cent of the total overseas investment in Australia, is subject to United States laws and 33.8 per cent of Australia’s total overseas investment is subject to United States laws.<sup>12</sup> When the ‘effects’ doctrine and the ‘contractual submission’ doctrine (neither of which doctrines are claimed as part of British heritage law or generally recognised in international law) are added to this United States control (and note that neither of these doctrines necessarily involves United States investment at all) the United States policy influence in Australia is formidable.

The purist will argue that United States policy legislation has nothing to do with competition law as such and thus should be ignored in any discussion relating to competition principles. I do not believe that the law can be so neatly compartmentalised. Each of the examples given is an example involving trading. What must be of concern to countries such as Australia is that the United States seems to be expanding, rather than contracting, the extent of its claimed jurisdiction.

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<sup>11</sup> See J J Servan-Schreiber, *The American Challenge* (1969). See also Varga, ‘The Multinational Enterprise: A New Challenge for Transnational Law’ (1970) 83 *Harvard Law Review* 739 for an analysis of multinational corporations and their ownership in the 1960s.

<sup>12</sup> This is based on the fact that United States investment in Australia is, under the ‘extended personality’ theory, subject to United States policy control and all Australian investment in the United States is, on territorial principles, subject to United States policy control. Britain holds an investment in Australia which is 0.1 per cent greater than that of the United States. Britain, however, does not claim extraterritorial jurisdiction under ‘effects’, ‘extended personality’ or ‘contractual submission’ doctrines.

### Expansion of United States trade sanctions

As we have seen, the United States utilises a wide variety of legislative and judicial stratagems in order to implement foreign policy objectives. There has to be added to these the United States tactic of direct trade sanctions. Such sanctions seem to be becoming more, rather than less, popular in recent years and the globalisation of world trade does not appear to have diminished their usage as a method of implementing United States foreign policy.

The United States National Association of Manufacturers reports that in the period 1993 to 1996 (the last compiled figures of which I am aware):<sup>13</sup>

- 61 laws and executive actions were enacted authorising unilateral economic sanctions for foreign policy purposes;
- 35 countries in the above four-year period were targeted for sanctions. These represent some 2.3 billion people or some 42 per cent of the world's population; and
- United States sanctioned markets were valued at \$US 790 billion constituting 19 per cent of world markets.

The problem faced by the world is that, not infrequently, the United States requires other countries to comply with its trade sanctions. In any event, United States subsidiaries (representing, in Australia's case, 25 per cent of overseas investment in the country) will be required to comply. Given the above figures, this is the denial of a huge amount of the world's market to 'Australian' trade. United States trade sanction laws can, of course, be classified as 'foreign policy' laws and the United States may argue that they are not, for this reason, relevant to the competition law debate. But their effect on the trading of non-United States countries, and their world competitive position, is obvious enough.

### Expansion of the 'effects' doctrine

Despite the fact that the *Foreign Trade Antitrust Improvements Act* of 1982 attempts to limit the antitrust 'effects' test to activities which involve 'a direct, substantial and reasonably foreseeable effect on domestic or import commerce', the legislative record in other areas is somewhat depressing from the viewpoint of the non-United States entity. The ultimate United States legislative arrogance is undoubtedly the enactment of the *Helms Burton Act* in 1996. This Act is discussed in greater detail in this paper. We note here only that one of the claimed justifications for the 1996 *Helms Burton Act* is that Castro's confiscation of property as an adjunct to the Cuban revolution in the late 1950s and early 1960s has an 'effect' on United States commerce in the 1990s.

The *Helms Burton Act* sanctions companies and countries trading with Cuba even if such companies or countries have no affiliation at all with the United States. The sanctions are that a company or country may have any United States assets appropriated on a claim by a former Cuban resident in the United States relating to 'confiscated property' (Embassies are exempted from seizure but this is all). The fact that the claimant was a citizen of Cuba at all relevant times and only went to the United States some decades after the relevant 'confiscation' occurred is an irrelevant factor. The fact that a foreign country may specifically mandate trade with Cuba as its foreign policy is similarly to be disregarded. The Act further requires the Secretary of State to deny a United States visa to, and the Attorney-General to exclude as an alien, any person who has been involved in a corporation which has been involved in 'trafficking in confiscated property'. Virtually any entity trading with Cuba will be involved in 'trafficking in confiscated property'. This is because all United States property in Cuba was nationalised in 1959–1960 as a response to United States sanctions against sugar imports (virtually Cuba's only cash crop export) and a refusal of the United States to allow United States subsidiaries in Cuba to supply or refine oil for that country.<sup>14</sup> The definition of 'trafficking in confiscated property' under the *Helms-Burton Act* includes 'engaging in commercial activity, using or otherwise benefiting from confiscated property'.

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<sup>13</sup> National Association of Manufacturers (March 1997): *A Catalog of New U.S. Unilateral Economic Sanctions for Foreign Policy Purposes* 1993–1996.

<sup>14</sup> For an excellent analysis of the Cuban situation and how it developed see, A Story 'Property in International Law : Need

The United States sanctions of Cuba do not seem likely to topple Castro. The United States foreign policy to which America subjects the world is perhaps a reflection of frustration in that United States-endorsed plans to assassinate Castro were unsuccessful and the Bay of Pigs invasion of April 1961 was similarly a disaster. United States policy can be justified in principle only on a view that a revolution is *per se* illegal: surely a strange proposition for the United States, a country whose very foundations lie in revolution, to embrace. The *Helms-Burton Act* appears a very blunt instrument by which to achieve United States objectives. Many of its provisions have not been proclaimed, largely because of threatened trade and other retaliations, primarily from Canada and the European Union. It is, of course, for the United States to decide what trade sanctions it will adopt. When, however, the extensions of United States legislation are taken into account, this effectively means that Australia is required, in relation to a significant amount of its trade, to adopt similar sanctions.

The implications for world competition rules from the expansion of the United States extraterritorial writ It is, in my view, not possible neatly to segment laws into boxes headed 'foreign policy', 'trade' and 'competition'. All the laws mentioned to date ultimately involve trade. Trade involves evaluating those competition principles which should regulate it. It is thus almost impossible to see internationally agreed competition laws or international enforcement of those laws unless the United States at least recognises the following:

- That public international law does not authorise the application of competition laws of a country to acts carried out by foreigners abroad on the grounds that the acts have had an economic 'effect' on that country. At the very least, U.S. law should recognise that a country may legislate to control the conduct of corporations incorporated in its jurisdiction or doing business in its jurisdiction and that such legislation is to have primacy above other legislation which may conflict with any applicable 'effects' legislation.

The above may mean that the agreed primary jurisdiction of countries should be something akin to that expressed in s.5(1) of the Australian *Trade Practices Act*. This extends the Act to the engaging of conduct outside Australia but only in relation to conduct engaged in 'by bodies corporate incorporated in Australia or carrying on business in Australia or by Australian citizens or persons ordinarily resident in Australia.' Further, conduct under the *Trade Practices Act* has to be evaluated in relation to a 'market' and 'a market' is defined as 'a market in Australia'.

The above Australian constraints on jurisdiction were specifically drafted to avoid transgressions of internationally accepted law. If the United States were to limit its jurisdiction in a manner akin to that adopted by Australia, then significant concerns about the excessive jurisdiction claimed by the United States would be answered. United States legislation should, at least, be limited to give primacy to the territorial writ; and

- That, in relation to bans on the re-export of U.S. technology and other limitations on its use, the United States should accept that these should be effective only if the applicable United States law is in force at the time of the relevant contract being entered into. Many countries simply regard the 'submission' concept as a form of bullying which they are powerless to resist. There is much to be said for this when the very thing paid for is incapable of being used for the purpose for which it was purchased yet there was, at the time of contract negotiations, no indication of this possibility.

It is not likely in my view, that the United States will accede to these basic principles. However, if international agreement or enforcement of competition laws is to be achieved, then it would seem that acceptance of at least these principles is a prerequisite. If international competition law agreement or enforcement is a desirable thing, then compromises will have to be made. It is suggested that the above compromises by the United States would be a good start. More, however, is still needed.

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Cuba Compensate U.S. Titleholders for Nationalising their Property?' (1998) 6 *The Journal of Political Philosophy* 306. Story concludes that the United States was virtually the author of all the problems caused in relation to Cuba. In order to punish Cuba for the overthrow of the corrupt Batista regime, the United States imposed trade sanctions on Cuba. However, these sanctions simply have not worked to topple the Castro regime, and do not look like doing so.

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### United States trade protection policies

Competition law cannot be considered independently of trade law and trade inhibitions. Competition is about trade and how it is carried out. True it is that trade inhibitions have decreased. This liberalisation has occurred in the context of both bilateral and multinational treaties. Ultimately, however, for international competition to work, competition law and its enforcement has to reach to those hallowed areas which are protected by trade barriers in many developed countries. It is no use a country signing up to an international competition enforcement treaty when its enforcement will not occur on a reciprocal basis. In such a case a submitting country may well both face trade barriers and competition enforcement which will operate only to its detriment. For this reason, unless trade barriers are virtually abolished, it seems that any agreed international competition laws or enforcement arrangements must be doomed to failure.

Australia has, over many years, embarked on a trade liberalisation policy which the Department of Foreign Affairs and Trade estimates to date to have added 1.5 per cent to Gross Domestic Product.<sup>15</sup> For this reason, Australia may well be prepared to take the next step in agreeing international competition laws and their enforcement — if there is reciprocity in all respects.

Trade liberalisation of itself gives greater competition and re-allocates world resources. However, like internal competition policies, the gains may be uneven and they may be painful. We all seem to recognise this in relation to internal competition policies. Most developed countries are prepared to pay the price for the efficiency benefits delivered. When it comes to international trade, however, even developed nations have erected a veritable barrage of barriers which prevent or severely inhibit even the most basic acts of trade taking place or taking place on anything near a level playing field.

It is appropriate to look at some of the trade inhibitors imposed by the United States. I am taking only the most well known and publicised of these. I do not think that I can even pretend to have sleuthed out anything but a small number of the relevant inhibitions.<sup>16</sup>

### General comment on United States policy over time in relation to trade liberalisation

The United States has usually not been too willing to make those short-term sacrifices for the ultimate benefits which trade liberalisation will bring. No doubt this is because the United States is economically powerful and its government frequently feels that, politically and economically, short-term sacrifices are simply not worth the consequences. Thus, in the context of an international competition law discussion, it is relevant to note that the United States has strongly opposed giving competition a 'home' in the World Trade Organisation. Indeed, given the history of the negotiation of trade agreements, all of these have been negotiated with United States concepts and self interest firmly in mind. The ironic position is that, though the WTO and its predecessor, The General Agreement on Tariffs and Trade ('GATT'), have, no doubt, assisted in reducing trade barriers, the United States has been careful to write in procedures which ensure that it cannot be too disadvantaged.

### The use by the United States of trade retaliations

A particular irony of world trade negotiations is that many of the world's trade retaliations were invented by the United States. Retaliations are supported by powerful United States domestic forces which are strong on protectionist rhetoric and endowed with strong political clout. Also the statutory language invoking trade retaliations is frequently so discretionary that it hardly articulates a coherent rule of law.

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<sup>15</sup> *Trade Liberalisation : How Australia Gains*. Release of Australian Department of Foreign Affairs and Trade 16 April 2000. See also fn 29.

<sup>16</sup> For possibly the most recent evaluation of significant United States import restraints, see 'The Economic Effects of Significant U.S. Import Restraints' (Second Update: May 1999) Investigation No 332 United States International Trade Commission (USITC). This report deals with United States import restraints and their effect in fields as diverse as textiles and apparels, agriculture (dairy, fruit, meat, sugar, cotton, tobacco and peanuts); services (maritime, trucking, air transport, telecommunications and financial services), footwear, leathersgoods, glass, tiles, cutlery, roller bearings and jewellery. The report is an update of earlier USITC Reports in 1993 and 1995.



The GATT Agreement in 1947 mentioned all the standard United States trade retaliatory methods and, far from forbidding them, expressly acknowledged their legitimacy within certain parameters. This, of course, encouraged other nations to enact mechanisms for similar retaliations. So, in 1979, the only actively antidumping nations were the United States, the European Union, Australia and New Zealand. However, a decade later there were some 20 more.<sup>17</sup> Now more than 40 nations<sup>18</sup> have antidumping laws and even non-WTO countries such as The People's Republic of China have begun to enact them.<sup>19</sup> The United States' record is that it has: 'Imposed more dumping penalties against low-priced imports than ... any other government in the world.'<sup>20</sup>

and has instituted more antidumping investigations than any other nation.<sup>21</sup> Similarly, the United States has vigorously imposed countervailing duties. One figure is that in the period 1979 to 1986, the United States initiated 231 countervailing cases against exports from other countries whilst the rest of the world brought only one case against United States exports.<sup>22</sup> Indeed, it seems that the United States has imposed more penalties on subsidised imports than all other countries in the world combined.<sup>23</sup>

### Trade Act sanctions

A major United States trade sanction is in *Trade Act* procedures (known as s.301 procedures<sup>24</sup>). Under these procedures the United States can formally, either on its own initiative or at the request of private United States groups, make an accusation to another nation of unfair trading and thereafter threaten retaliation unless the practice complained of ceases. The United States has used these procedures aggressively both to reduce imports into the United States and to achieve greater access for United States exports abroad. Section 301 is a United States invention and was, until 1984, 'virtually unique in the world'<sup>25</sup> and to many foreign governments was the classic symbol of American unilateralism. The purpose of this practice was seen to be to drive other countries to the negotiating table in order to negotiate so called 'voluntary' restrictions on imports to the United States and to obtain market opening agreements in other countries (the word 'voluntary' is always put in inverted commas because non agreement has the consequence of legal restrictions).

The WTO Safeguards Agreement requires that these agreements be phased out and that the duration of new ones be limited. However, the United States President still retains the power to make bilateral trade protection agreements. The United States' acceptance of the Uruguay Round negotiations specifically entrenches the legitimacy of s.301 procedures and also makes Uruguay Round obligations subject to both United States state and federal legislation. (This point is discussed in greater detail below.)

It is interesting to note that the establishment of many of the Japanese Export Cartels has been directly caused by the operation of s.301 and akin stratagems. One Japanese commentator has said on this point:

Ironically the establishment of [Japanese] export Associations has been encouraged to a very considerable extent by the American government, which has sought to meet the opposition of domestic American Industry to Japanese imports by obtaining 'voluntary quotes' that restrict the volume and maintain the price of Japanese exports to the United States<sup>26</sup>.

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<sup>17</sup> A M Dunn, *Antidumping* (The World Trade Organisation) 282.

<sup>18</sup> J J Schott, 'The Uruguay Round : An Assessment' (1994) 152 *Institute for International Economics* 78.

<sup>19</sup> Dunn above n 17, 283.

<sup>20</sup> J Bovard, *The Fair Trade Fraud* (1991).

<sup>21</sup> B Hoekman and M Kosteci, *The Political Economy of the World Trading System* (1995) 172.

<sup>22</sup> M J Anderson and G Husisian, *The Subsidies Agreement* 302.

<sup>23</sup> Bovard, above n 20, 169.

<sup>24</sup> This reference is to s.301 of the *Trade Act 1974* (now 19 USC s.2411).

<sup>25</sup> J H Jackson, *The World Trading System* (1989) 105.

<sup>26</sup> Kanazawa, 'The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly

Exporters to the United States regard the potentiality of *Trade Act* sanctions with great concern if they do not 'voluntarily' accept restrictions on exporting to the United States. They have good reason to believe that the Department of Commerce protects United States domestic trade far beyond that level of protection which it needs. The *Bombardier Case*<sup>27</sup> illustrates the concern. It is something of a cause celebre in the area. Bombardier of Quebec was the successful tenderer for a \$US600 to \$US800 million contract for the supply of rail cars to the New York Metropolitan Transit Authority. The Department of Commerce received a petition from Budd Company, a wholly owned United States subsidiary of a West German company alleging that manufacturers of rail cars in Canada received subsidies which were materially injuring or threatening to injure a United States industry. The relevant American Unions were named as co-petitioners in the Budd Company petition. Upon investigation, it was found that Budd, the United States domestic company involved, did not at that point in time manufacture light railway shells; that light railway shells were the only goods to be imported by the Canadian Company, Bombardier; that light railway shells were the only item subject to Canadian subsidy; and that Budd was likely to import its shells from Europe because it lacked the capacity to manufacture them in the United States. Notwithstanding these facts, the Commerce Commission voted 4 : 1 that there was a threat of injury to a domestic industry of the United States because finance offered at 9.7 per cent by the Export Development Corporation of Canada implied a threat of material injury to United States industry, that is, it was foreseeable that United States industry in the form of Budd would be injured. The Commission so found even though only carriage shells were to be imported into the United States and all other components were to be manufactured in the United States. In his dissenting judgment, Commissioner Stern pointed out just how far this took the concept of injury. He pointed out that 'material injury' in this case equated only to loss of a contract. Further Budd was so committed to a backlog of work that it was highly unlikely that it would produce the rail cars itself in the United States. He concluded that in any event Budd would not have won the contract because of its poor delivery record and the fact that its models were unreliable. In this, he was supported by the New York Metropolitan Transport Authority. Quite logically, it seems, Commissioner Stern concluded that there was no foreseeable likelihood of railway shells being manufactured in the United States and that the importation of railway shells from Canada could not possibly constitute a threat to United States domestic industry in the future.

#### Jones Act sanctions

The *Merchant Maritime Act* 1920 (known as the *Jones Act*) also illustrates the manner in which United States trade sanctions can impact upon exporters to the United States. This Act does not require proof of any injury to an American industry. It simply provides that all cargo moving between United States ports be carried on United States owned and built vessels. A similar provision applies pursuant to the *Passenger Vessel Act* of 1886 to the carriage of passengers. The law protects the United States shipbuilding industry in relation to the construction barges operated on inland waterways, freighters operated on the Great Lakes, passenger ferries and deep sea ocean carriers serving Hawaii, Alaska, Puerto Rico and Guam.

The effect of this restriction, which has been in force in relation to passenger vessels for over a century, is that Australian builders of high speed catamaran passenger ferries, which hold about 30 per cent of the world market, have lost in the order of \$A120 million per year because of denial of access to the United States market. This is an Australian industry which exports about 90 per cent of its product — valued at \$A1 billion in 1998–1999. The denial of access to the United States market is obviously a significant impediment to this Australian export trade. Only three countries — Brazil, Indonesia and Peru — have cabotage laws as extensive as those of the United States. Brazil, wishing to play a major maritime role in South America, is easing its laws. Great Britain, one of the greatest maritime nations in the world, has no restrictions whatsoever.<sup>28</sup>

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Power' (1963) *Law in Japan* 497, 502–505.

<sup>27</sup> Investigation No 701–TA–182, *Rail Passenger Cars from Canada*. See paper of J McDonnell and W Goode, Trade Policy Branch, Department of Trade presented at a Conference on 'Doing Business with the United States' organised by the Law Institute of Australia and North America 25 June 1983.

<sup>28</sup> See generally *Understanding United States Coastwise Laws and their impact on Australian Marine Exports* Australian Trade Commission, Atlanta (April 1999); see also discussion in 1999 United States International Trade Commission Report (n 14).

### United States public procurement policy

Public procurement is, of course, big business — particularly when it is the procurement of the government of the world's leading economy and the 50 states of that economy.

*The Buy America Act* is certainly direct in its terms. Unless a federal agency believes the costs of products to be unreasonable or that the products are not reasonably available in the United States

... only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States shall be acquired for public use ...<sup>29</sup>

The Act further provides that every contract for construction, repair or alteration of any public building or public work is to have a provision that only United States products are to be used unless an agency certifies that no such products are reasonably available or that the costs of such products are unreasonable. Most states of the United States have akin legislation.

Necessarily there are exceptions for non-United States products. These are set out in a schedule to the Act. However, even here, the relevant federal authority has to make a report justifying its decision to use a scheduled product. The permitted exemptions to American product sourcing all relate to products which the United States does not itself produce. Some interesting permitted exceptions are opium and cobra venom. There are also exemptions for parts for foreign machines but only if such parts are not domestically available. Text, trade, technical and scientific books and publications are likewise exempt but only if they are not printed in the United States or United States domestic editions are not available. One exemption, strangely, relates to hog bristles for brushes. I should have thought this would be a product which the United States would be capable of producing in abundance — but apparently not so.

### The Atomic Energy Act

The use of the *Atomic Energy Act* to protect United States domestic uranium producers has given rise to perhaps the greatest backlash against the 'effects' doctrine of American antitrust legislation yet seen. The United States Secretary of Energy, acting under the above Act, in the late 1970s and early 1980s barred imports of uranium into the United States, the world's largest market for U308, on the basis that such a restriction was needed to ensure, and, in fact would ensure, the maintenance of a viable domestic uranium industry. At that time Australia had the largest uranium reserves of any non-Communist country in the world and had been a reliable and stable supplier of uranium to the United States. United States electrical utilities had entered into long-term contracts through to 2005 to purchase more than 15,000 short tons of uranium from Australia worth hundreds of millions of dollars. Australia was a signatory to the nuclear non-proliferation treaty which had been a key United States foreign policy initiative. The Australian uranium industry had made very substantial decisions in reasonable reliance on the expectation of continued access to the United States market. The ultimate irony of the uranium situation was that, when overseas producers entered into a defensive cartel to counter United States actions in dumping 50,000 tonnes of U308 on the world market thus depressing world uranium prices, they were found to be in breach of United States antitrust laws because of the operation of the 'effects' doctrine. This was so notwithstanding the fact that the cartel could not, and did not purport to, operate in relation to the United States market<sup>30</sup> and would never have been formed in any event had it not been for United States discriminatory trade sanctions.

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<sup>29</sup> *The Buy America Act* 41 USC.

<sup>30</sup> The conduct of the overseas parties, in response to the United States executive action, was said to have the 'effect' of raising United States uranium prices on the domestic United States market. The cartel had an impact, of course, on world prices. To the extent that United States producers could sell either on the United States domestic market or the overseas market, domestic prices were, therefore, influenced by, and increased by, cartel activities at the world market level. If the world price of uranium was higher than would otherwise have been the case, then clearly United States domestic prices would also be correspondingly increased. Reasonably enough, the non-United States uranium producers and their governments did not regard this secondary effect on United States commerce as a matter which could, or should, give rise

### Conclusions in relation to United States trade protection policies

The above examples illustrate some of the more obvious and more resented United States inhibitions on free trade. Internationally, free trade cannot be truly 'free' unless free access is given to the world's largest economy. If this is not to be, then any thought of an international agreement on the principles of competition laws or their enforcement is illusory as necessarily any such policy will have inherent bias in favour of the United States without corresponding benefit to other participating countries. Two final comments deserve mention. First, in all likelihood, many non-United States countries would regard access to the United States market as a sufficient incentive for them to give up their own trade blocks. The major area where there may be difficulty in this regard is in cultural matters (eg requirements for local content television programs) but in the overall scheme of things, this should not be an insuperable obstacle to significantly freer world trade. Second, United States readers of this paper may well claim that not enough credit is given to the United States for the part played by it in the reduction of world trade barriers. The United States has, of course, been 'globalised' along with the rest of the world. Much may have been done to liberalise world trade.<sup>31</sup> But much remains to be done. Also, in this, as in other fields, much depends upon impression. World impression certainly is that the United States protects much of its trade for quite blatant domestic political and economic reasons. It frequently is impression which counts. For impression is reality unless significant steps are taken consciously to change the impression held. Highly publicised exclusions such as United States bans on Australian built ferries can undo the good of many quiet liberalisations.

### United States competition law

What has previously been said in relation to the 'effects' test of the United States *Sherman Act*,<sup>32</sup> the theory of 'extended personality' and the theory of 'submission' will not be here repeated.

It is beyond the scope of this paper to discuss American antitrust law in detail. Suffice it to say that the Australian *Trade Practices Act* is modelled significantly on it and the core provisions of the American law are akin to those in Australia. A significant variation is that treble damages can be awarded in the United States for a breach of the *Sherman Act*. For present purposes it is relevant to note that both Australian and the United States laws take an uncompromising position in outlawing price-fixing arrangements and collective boycotts.<sup>33</sup>

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to sufficient United States nexus so as to make the cartel's activities justiciable under United States antitrust laws. In particular, non-United States uranium producers and their governments (Australia, Great Britain, Canada and South Africa) were incensed by the fact that the cartel was formed solely as a defensive measure to United States executive action and was then the subject to suit under United States antitrust laws. The litigation was eventually settled but not before an array of 'blocking' legislation to prevent the running of the United States writ in many jurisdictions throughout the world. The fact that a settlement could be extracted from the non-United States companies illustrates the point made throughout this paper that United States assets and trade are a significant lever which can be used against companies outside the United States but trading with it. Probably this litigation did more than anything else to make the world suspicious of United States antitrust law. For commentary on the Uranium litigation, see W J Pengilley: 'Extraterritorial Effects of United States Antitrust Law: A View from Downunder' (1993) 16 *Vanderbilt Journal of Transnational Law* 833; W J Pengilley: 'The Extraterritorial Impact of U.S. Trade Laws – Is it not time for "ET" to "Go Home"?' (1997) 20 *World Competition Law and Economics Review*.

<sup>31</sup> There can be no doubt that Australia has significantly benefited from trade liberalisation. Specific benefits have flowed from the 1994 *Agreement establishing the World Trade Organisation* and annexed agreements. These are estimated to increase Australian exports by \$A5 billion and Australian GDP by \$A4.4 billion by 2002. The Uruguay Round of tariff reductions has achieved tariff reductions of up to 50 per cent. (See *Australian and International Treaty making kit: Australia's Participation in Treaty Regimes — How Australia benefits from Treaties* (Department of Foreign Affairs, Australia March 1999, p.29). See also Departmental Publication referred to at fn 13) Note, however, as to the United States' reservations in relation to its acceptance of the Uruguay Round negotiations.

<sup>32</sup> See above.

<sup>33</sup> See n 2 for minor variations of the law between each country.

### The Webb Pomerene exemption

It is an important aspect of United States law that the *Webb Pomerene Act* of the United States exempts from the *Sherman Act* cartels solely relating to the export of goods from the United States which do not constrain domestic competition or artificially enhance or depress prices in the United States. Although the scope of the *Webb Pomerene Act* exemption has been considerably cut down by court decisions, its effect has been summarised as being that:

... U.S. antitrust law insists that foreign exporters or purchasers act competitively in the international market, while U.S. Webb Pomerene and export trading company laws permit U.S. exporters to act collusively in the same markets.<sup>34</sup>

Whilst the United States recognises the rights of its export cartels to operate collusively abroad, it staunchly refuses to recognise the right of foreign corporations to utilise foreign laws to operate similarly in the United States.

A Federal Trade Commission Report in 1967<sup>35</sup> found that about 66 per cent of United States sulphur exports were subject to cartel activities. More than 80 per cent of motion picture and TV exports from the United States were subject to cartel activity. Other products subject to exemption from the United States antitrust laws as export cartels included coal, rice, lumber, machine tools and railway equipment. In addition there were specific legislative competition exemptions for agriculture, fishing, defence, insurance, banking, land, sea and air transport, communications, entertainment, electric power, atomic energy and so on.

It can well be argued that the *Webb Pomerene Act* is not achieving its purpose, even in terms of benefit to the United States. In a study of the Act, David Larson concluded, for example, that small producers (a claimed *Webb Pomerene* class of beneficiaries) were not the typical *Webb Pomerene* users and neither did the Webb Pomerene Associations have overall large export effects. They did, however, have an anticompetitive impact on the United States domestic market.<sup>36</sup> Published statistics support the fact that only 2.4 per cent of United States merchandise export income, between 1958 and 1962, came from Webb Pomerene Associations and, by 1976, this was 1.5 per cent.<sup>37</sup>

I know of no more modern statistics though I have no doubt that these exist. One's guess is that Webb Pomerene benefit to the United States has continued its downward path. It would be hugely symbolic for this Act to be repealed or for it to be amended so as not to apply in relation to any market in which there was no corresponding legislation applicable to United States markets.

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<sup>34</sup> See Waller, 'Symposium in Honour of Professor James A. Rahl: An International Challenge: The Ambivalence of United States Antitrust Policy towards Single Country Export Cartels' (1989) 10 *Journal of International Business Studies* 98. See also *Daishowa International v North Coast Export Co* 1982-2 Trade Cases 64,774.

<sup>35</sup> Federal Trade Commission *Economic Report : Webb Pomerene Associations – A Fifty Year Review* 1967. For statutory exemptions referred to below see Chapman (fn 35). The Federal Trade Commission Report concluded that:

'The most active [Webb-Pomerene] Associations have held dominant positions in world markets ... high domestic concentration allowed each of these associations to represent all, or almost all, of the domestic capacity for its products. Thus each of the associations had a large enough share of export capacity to determine the export price and allocate sales among its members.'

See also discussion of a number of the above industries in the context of import restrictions in 1999 United States International Trade Commission Report (n 14).

<sup>36</sup> D A Larson, 'An Economic Analysis of the Webb Pomerene Act' (1970) 13 *Journal of Law & Economics* 461.

<sup>37</sup> *Report of the 1979 National Commission for the Review of Antitrust Procedures*; Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge* (1973) 6 *Vanderbilt Journal of Transnational Law* which provides interesting comments on various international cartel activities. See also *FTC Report* fn 33.

### The Export Trading Company Act

The sadness, however, appears to be that, through the *Export Trading Company Act* 1982, the United States export cartel immunity provisions are enhanced and not removed. This Act extends favourable antitrust treatment to services for the first time and has permitted certification in relation to activities in export markets (and thus favourable antitrust treatment) for practices *per se* banned in the United States such as the joint allocation of territories and customers and the joint establishment of prices and export quotas. Such a trend is hardly one which the world can regard as being conducive to international competition law harmony.

The United States antitrust laws do not recognise their breach by an 'Act of State' unless a breach is 'compelled' by a foreign power

The United States does not recognise any breach of its laws which is blessed by a foreign government. Thus any foreign government provision authorising a cartel in terms akin to the United States *Webb Pomerene* legislation is irrelevant to a United States court. Similarly an Authorisation granted by the Australian Competition and Consumer Commission on Australian public benefit grounds would be unrecognised by United States courts should a question of the breach of United States laws arise. The basic premise of United States courts is that the act of a foreign government in its own territory cannot be questioned in legal proceedings in the United States.<sup>38</sup> This principle is based on comity of foreign law recognition. In order for an Act of State to be recognised as a defence to a breach of United States laws, the foreign government must, however, have 'compelled' a violation of such laws.<sup>39</sup>

In *Mannington Mills*, the 'Act of State' defence was spelled out in highly restrictive terms. In order to succeed, the following has to be demonstrated:

- the foreign decree has to be basic and fundamental to a party's course of action and not merely peripheral to a course of conduct;
- the foreign government's behaviour must be independently conceived rather than arranged at the instance of the defendants;<sup>40</sup>
- foreign government *approval* is not adequate. 'It is necessary that a foreign government must have coerced the defendant into violating the American antitrust law'; and
- the defence is not available if a defendant legally could have refused to accede to the foreign power's wishes.

Effectively, the 'Act of State' doctrine is a defence only to a decree of a totalitarian regime. This is surely a perverse result in the case of competition legislation. Significantly, the United States *Sherman Act* has been

<sup>38</sup> *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

<sup>39</sup> *Mannington Mills v Congoleum Corp.* 595 F2d. 1287 (1979).

<sup>40</sup> Read literally, no defence would be available if industry itself had requested a foreign government to legislate. Yet, of course, in nearly all cases, the initial request for exempting legislation comes from industry itself. Legislation is not conceived in Heaven as a matter of economic purity but is the result of very hard lobbying. One might expect that, of all places, this would be best known in the United States.

At least one commentator has suggested that: 'if private parties ... influence foreign government legislation as part of a conspiracy to restrain United States foreign trade, the government sanction of some of their activities will not justify their conspiracy.'

W Fugate, *Foreign Commerce and the Antitrust Laws* (1958).

This somewhat unrealistic view of politics may not be held as fervidly as previously, see, eg, U.S. *Department of Justice and FTC Enforcement Guidelines for International Operations* (April 1995). However, it is not known whether the courts adopt this more restrained approach. Of course, the views of administrative agencies cannot bind litigants in instituting civil actions.

hailed by the United States Supreme Court as a 'Charter of Freedom'<sup>41</sup> and as 'the Magna Carta of free enterprise'<sup>42</sup> 'Act of State' laws that may permit, but not compel, certain arrangements, give no exemption from, and are totally subservient to, United States competition legislation. A regime has completely to deny all free-enterprise concepts and compel certain activities in order to obtain an exemption from United States antitrust law. Only totalitarian regimes, therefore, can obtain the benefit of an exemption from the United States competition laws. Free-enterprise regimes remain subject to the United States writ in relation to their 'permitted' non-competitive activities.

#### The ever expansive claims by the United States in relation to the reach of its antitrust laws

The United States is nothing if not expansive in claims as to the increasing jurisdictional reach of its legislative writ. Two examples will suffice. They relate to the claimed reach of the United States legislative writ in relation to Japanese import restrictions and in relation to the jurisdictional basis for the *Helms Burton Act* (discussed previously).

In relation to Japan, the United States, whilst apparently feeling free to control imports by 'voluntary restraints' under s.301 of the *Trade Act* (discussed earlier) and finding this action completely compatible with United States antitrust laws, nonetheless believes that its own antitrust laws prevent Japan from doing the same thing. United States Antitrust Attorney-General Barr has thus stated that Japan should open its markets to United States goods because: 'our (i.e. the United States) antitrust laws are designed to preserve competition and, in today's economy, competition is international'.<sup>43</sup>

The United States view as expressed above is not a belief in competition law and its universality. It is a belief in the advancement of United States interest masquerading under the guise of competition law and the universality of this. Of perhaps greater concern is one jurisdictional base claimed by the United States under the *Helms Burton Act* in relation to its sanctions on Cuba, and on companies and countries which trade with Cuba. The conduct upon which United States jurisdiction is based occurred totally in Cuba. The United States legislation can benefit only people who were Cuban citizens at the time but have subsequently left Cuba and migrated to the United States. Nonetheless, says the *Helms Burton Act*, in claiming jurisdiction in relation to actions which occurred some decades earlier in Cuba: 'International law recognises that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory'.<sup>44</sup>

The above assertion of jurisdiction plus the other extraordinary rationales for the enactment of the *Helms Burton Act* must strike fear into all of us who believe that countries can do as they wish within their own borders without fear of retaliation from Uncle Sam. The *Helms Burton Act*, however, gives rise to the extraordinary proposition that the legality of the conduct of a foreign government in relation to its own citizens can, under the United States 'effects' doctrine, be retrospectively evaluated some several decades later under the laws of the United States.<sup>45</sup> Even more extraordinary is the assertion that the United States can impose sanctions on companies and

<sup>41</sup> *Appalachian Coals Inc v U.S.* 288 US 344 (1943).

<sup>42</sup> *U.S. v Topco* 405 US 596 (1972).

<sup>43</sup> Statement 3 April 1993 cited in D I Baker and D B Ayer, 'Antitrust Imperialism' Editorial (1993) 3 *European Competition Law Review*. Baker and Ayer, in relation to Barr's comment, say that American authorities, with high sounding rhetoric, have identified themselves as a latter day Royal Navy, flying Adam Smith's ensign to keep the lines of commerce open to competition and American trade.

<sup>44</sup> *Helms Burton Act* s 301(9).

<sup>45</sup> There are some extraordinary other bases on which United States jurisdiction is justified under the *Helms Burton Act* in relation to Cuba. The recital to the *Helms Burton Act* invokes United Nations resolutions in relation to Haiti as justification for what it has enacted in relation to Cuba. The link between the two escapes the writer. Particularly is this so when the United Nations has itself positively called upon the United States to drop its economic sanctions on Cuba. A 1996 organisation of American states resolution passed 32-1 (the United States being the sole dissenter) condemning United States sanctions of Cuba was dismissed by the United States delegate to the OAS, Harriett C Babbitt as 'diplomatic cowardice'. (See L Rohter, 'Latin American Nations take a swipe at U.S. for Cuban embargo' (1986) *New*

nations such as Australia with no United States affiliations or loyalty because their conduct in relation to Cuba allegedly 'affects' United States commerce. Interestingly, the *Helms Burton Act* specifically provides that no 'Act of State' doctrine may be raised by defendants as a defence to proceedings under that Act. Even if a country 'compels' trade with Cuba and all the requirements of *Mannington Mills* (above) are satisfied, United States law, nonetheless, forbids and punishes obedience to such law.

### Do United States trade sanctions benefit the United States?

There will be winners and losers and short-term adjustment costs as well as long-term benefits from liberalisation of trade and competition regimes. The question which the United States has to determine is whether the long-term benefits justify the relevant adjustment costs. So far as I can ascertain all, or virtually all, of the specific United States blocks on trade have returned a negative benefit to the United States itself.

### United States foreign policy trade sanctions

The cost of United States foreign policy trade sanctions has been calculated.<sup>46</sup> United States trade sanctions in 1995 may have reduced United States exports to 26 target countries by as much as between \$US15 billion and \$US19 billion. This calculation concludes that this would mean a loss of 200,000 jobs in the relatively high-cost wage export industry and a cost of nearly \$US1 billion annually in export sector wage premiums. The study concluded that, even if the loss of exports has zero effect on total employment, it certainly reduces the number of good paying jobs. If the United States continues for the next 20 years to apply trade sanctions at the same rate as it is currently doing, the loss of cumulative wage premiums would be \$US20 billion. This is a heavy cost. The study also found that American sourced products were replaced by foreign sourced products. In the case of China, for example, not surprisingly, firms from Canada, Australia and Germany exported more than size, income and geography would suggest. In the case of Cuba, the same conclusion followed in the case of Belgium, Canada, France, Germany, Ireland, Italy, Mexico, The Netherlands and Spain. A further study of American trade sanctions concluded that: 'only in a handful of ... cases could an arguable claim be made that the sanctions changed the behaviour of the targeted government'.<sup>47</sup>

### United States shipping import bans

A study of the *Jones Act* (The *Merchant Marine Act* 1920 and akin statutes such as *The Passenger Services Act* 1886, discussed above) suggests that the Act's restrictions result in a \$2.8 billion loss to the economy. If the Act's restrictions were lifted on ocean trades, rates would fall by about 26 per cent triggering an increase in demand for waterborne transportation. There would also be an improved international competitiveness of the United States shipbuilding industry as a result of these factors.<sup>48</sup>

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*York Times* Service.) Apparently a resolution on Haiti, coupled with an extended 'effects' doctrine justifies all. Given this, it is not surprising that the world believes that United States claimed jurisdiction for what it does is imperialistic in the extreme.

<sup>46</sup> Institute for International Economics Working Paper, *U.S. Economic Sanctions: their Impact on Trade, Jobs and Wages* (April 1997).

<sup>47</sup> Above n 13. See also E Schmitt: 'U.S. Backs off Sanctions seeing poor effect abroad' *New York Times* 31 July 1998 where the comment is made that sanctions have been successful only when the United States has been joined by many other countries.

<sup>48</sup> See 1995 International Trade Commission Study cited in *Understanding United States Coastwise Laws and their Impact on Australian Marine Exports*: Australian Trade Commission (Atlanta April 1998). See also *Jones Act Combatants take their case to GAO*: The Portal Hotline (Feb. 1998) and discussion in 1999 Report of the U.S. International Trade Commission.



### Other United States import and trade restrictions

The cost of United States import and other trade restrictions has been calculated by the United States International Trade Commission in relation to textiles and apparels; agriculture (dairy, fruit, meat, sugar, cotton, tobacco and peanuts); maritime, trucking, air transport, telecommunications and financial services; footwear, leathersgoods, glass, tiles, cutlery, roller bearings and jewellery. These calculations are too complex to set out here but they run into billions of dollars.<sup>49</sup>

### United States trade sanctions — conclusion

There is compelling evidence that leads to the conclusion that trade sanctions merit reconsideration by the United States itself in terms of export income and employment. There is also compelling evidence that, at the general level, trade sanctions do not effectively work.

### What has been the effect of the claimed jurisdictional reach of the United States law and the exemptions to them?

#### The 'effects' doctrine

The extensive reach of United States laws under the 'effects' doctrine came most prominently to world notice in the *Westinghouse Uranium Litigation*.<sup>50</sup> The primary world reaction to the United States claimed jurisdiction was one of outrage. This was not only because American courts claimed extended jurisdiction under the 'effects' doctrine but because United States courts would not recognise the policy of overseas governments if such policy was not 'compelled'.<sup>51</sup> It was of no relevance to United States courts that: 'the arrangements which were made by the Australian uranium producers were made with the approval of the Australian Government'.<sup>52</sup>

The result was predictable and constitutes probably the greatest setback to date for concerted action in relation to agreement on, and enforcement of, international competition law. In Australia the *Foreign Judgment (Restriction of Enforcement) Act* 1979 was enacted as an immediate reaction to the United States judgment that Australian cartel companies were subject to United States court jurisdiction and subject to the United States domestic antitrust law. The Australian legislation provides that overseas antitrust judgments are not to be recognised in Australia if the Australian Attorney-General believes that any such judgment was obtained contrary to international law. The Act also provides for a 'reduction' of United States treble damages if the Attorney-General believes that such damages should not be enforced in Australia. Both the United Kingdom under the *Protection of Trading Interests Act* 1980 and Australia under the *Foreign Proceedings (Excess of Jurisdiction) Act* provide that any recovery in the United States against United States assets of an Australian company is a loss which can be recovered from the judgment creditor's Australian assets. Blocking legislation of various kinds has also been enacted in Belgium, Canada and the Provinces of Quebec and Ontario, Denmark, Finland, France, Germany, Italy, the Netherlands, New Zealand, Norway, the Philippines, Sweden and South Africa. The world reaction hardly supports the United States stand in relation to the 'effects' doctrine. The result of the United States stand has been to fragment, rather than universalise, competition enforcement.

#### The Webb Pomerene Exemption

This exemption is discussed above. The general consensus appears to be that the *Webb Pomerene Act* has not achieved its stated purpose of assisting small producer exporters. Nonetheless, there is no doubt that a number of cartels have been well treated by the *Webb Pomerene Act* exemption to United States antitrust laws. The consensus, however, seems to be that *Webb Pomerene* exempt cartels have had an anticompetitive effect in the United States market. Not surprisingly, such cartels have also spawned 'counter cartels' to the detriment of

<sup>49</sup> See 1999 USITC Report.

<sup>50</sup> For the story of this litigation see the writer's articles cited at n 30.

<sup>51</sup> See discussion above.

<sup>52</sup> Note 13/78 from the Australian Embassy in Washington to the U.S. State Department 23 March 1978.

overall international competition policy. In the United Kingdom, for example, a sulphur buying cartel was sanctioned on public benefit grounds by the Restrictive Trade Practices Court on the basis that a United States *Webb Pomerene Act* sanctioned cartel had tried and would continue to try, to obtain unreasonably favourable terms for itself and that its attempts were likely to succeed unless a common buying agreement was entered into between United Kingdom manufacturers.<sup>53</sup>

#### Laws in relation to trade sanctions for foreign policy reasons

United States trade sanction laws appear to have done little to advance the United States cause. As has been noted,<sup>54</sup> only a handful of such sanctions has changed the behaviour of targeted governments. The world has reacted to United States laws by a variety of legal stratagems. Blocking legislation is one of these.<sup>55</sup> However, there have been others. The French *Fruehauf Case*<sup>56</sup> is an interesting case in point. A United States parent company controlled 70 per cent of Fruehauf France and had power to designate five of its eight directors. Fruehauf France was awarded a contract to supply 60 Fruehauf trailers for export to China. The United States directed the Fruehauf United States parent company to instruct its French subsidiary not to fulfil the contract. This direction was issued pursuant to the then United States policy of imposing trade sanctions on China. The parent complied with the United States Treasury directive. However, an application was made to the Paris Court of Appeals for the appointment of a judicial administrator to execute the contract. The French Court examined the policy issues involved, including the loss of 600 French jobs if the contract did not go ahead. The Court overruled the directive of the parent company because the court viewed it as an 'abuse of right' and contrary to the corporate interest. The United States Treasury did not prosecute the parent company or its directors because the French subsidiary was no longer under the 'control' of the parent company.

Other trade sanctions based on the extended reach of the United States jurisdictional writ have faced legal counterattacks from those nations subjected to such a claim. The United States ban on the re-export of United States technology in relation to the Siberian Pipeline<sup>57</sup> was withdrawn after a strongly worded European Union Memorandum and after seven directives under the United Kingdom *Protection of Trading Interests Act* 1980 ordering that the United States regulations should not be complied with. The Cuban sanctions under the *Helms Burton Act* have caused outrage in relation to their impact on non-United States corporations. The European Union launched a case under the World Trade Organisation's dispute settling system. Brussels has drafted regulations banning European Union companies from giving in on the *Helms Burton* laws and has drafted protecting measures. Canada threatened trade retaliations. Other planned moves are to prevent the entry of United States company executives in the same way as *Helms Burton* prevents entry into the United States of executives of corporations which have 'trafficked in confiscated property'. These strong protests have meant that the President of the United States has been compelled to put many aspects of the *Helms Burton Act* on hold because of the backlash which their promulgation would cause from valuable trading partners of the United States.

#### Conclusions as to the efficacy of United States trade sanction laws and the extraterritorial reach of the United States antitrust laws

The success of United States trade sanction laws and the extraterritorial reach of the United States antitrust laws has been far from conspicuous. Other nations have found legal stratagems by which to counter United States laws: blocking legislation, 'claw back' legislation and directives negating the effect of United States Presidential and Treasury directives. However, the basic reason for the lack of success of such United States sanctions is economic. World commerce is now increasingly composed of consortia in which there are partners throughout the world each contributing to a type of world joint venture. This is increasingly obvious in telecommunications and cable television, by way of example. The United States has the world's greatest single share of the world's

<sup>53</sup> *Re National Sulphuric Acid Association Ltd Agreement* [1963] LR 4 RP 169.

<sup>54</sup> Above n 47 and related text.

<sup>55</sup> See above.

<sup>56</sup> *Societe Fruehauf v Massady* 1968 D.S. Jur 147 (Regional Courts of Appeal).

<sup>57</sup> See discussion above.

services trade, its services export surplus amounting, on official figures, to two-thirds of its merchandise trade deficit but which, in reality, is much more than this.<sup>58</sup> This fact, and the increasing interdependence of all world service providers means that the sanctioning of one necessarily rebounds throughout the whole venture to the detriment of the United States itself.

More and more merchandise trade is, however, also becoming joint venture based. The parts for an automobile such as engines, transmissions and body panels are likely now to be produced by plants in a number of countries: perhaps the United States, Mexico, Canada, Belgium, Japan and Germany. Each country is locked into the joint venture product. A sanction imposed on any one country necessarily impacts upon all — including, of course, the United States. Whereas some decades ago, each subsidiary company in each of the relevant countries may have produced an automobile, now each subsidiary produces parts for a whole automobile. This specialisation considerably cuts costs. But it means that an individual subsidiary is practically unable to produce anything when cut off from the rest of the group.

Drucker estimates that structural and institutional 'joint venture' trade may be 40 to 50 per cent of a company's total export and income volume; for big companies and mid-sized ones alike.<sup>59</sup> The United States Department of Commerce estimates that 40 per cent or more of goods exported from any developed country go to overseas subsidiaries and affiliates of domestic companies.<sup>60</sup> Officially and legally, these transactions are 'exports'. But to regard these transactions as 'trade' is something of a legal fiction. To impose effective trade sanctions, it is necessary to see transactions such as these as being quite separate from, and having no influence on, the activities of entities physically present in the United States.

It is not, therefore, surprising that United States business leaders have formed powerful lobby groups to oppose sanctions in future. One group is the Chamber of Commerce. Another is USA Engage, a group of 676 companies which have formed a powerful coalition. These leaders proclaim that economic sanctions are ineffective at getting most countries to change and are actually backfiring because they hurt United States business. 'Unilateral sanctions only make foreign rivals stronger and taint us as unreliable suppliers' claims Bill Lane, Washington Director for Caterpillar Inc. who is Chairman of USA Engage.<sup>61</sup> Necessarily the above realities of the global economy also make it difficult to impose penalties on those who deal with, say Cuba, contrary to United States wishes.

Given the increasing interrelationship of enterprises in different world locations, it seems difficult to refute the following conclusion:

Although the United States is still the world's largest economic power — and likely to remain so for many years — the attempt to mould the world economy to American moral, legal and economic concepts is futile. In a global economy in which the major players can emerge almost overnight, there can be no dominant economic power.

Nevertheless, there is certainly need for moral, legal and economic rules that are accepted and enforced throughout the global economy. A central challenge, therefore, is the development of international law and supra national organisations that can make and enforce rules for the global economy.<sup>62</sup>

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<sup>58</sup> See P Drucker, 'New Business Realities' (1999) XLIV *The Antitrust Bulletin* 805. Drucker adds that 'it is acknowledged, even by the government statisticians who collect the figures, that U.S. services exports are grossly under reported. They may be 50 per cent higher than the official statistics tell us — and services exports are still growing fast.'

<sup>59</sup> Ibid 807.

<sup>60</sup> P Drucker, 'The Global Economy and the Nation State' (1977) 76 *Foreign Affairs*.

<sup>61</sup> E Schmitt, 'U.S. Backs off sanctions seeing poor effect abroad' *New York Times* 31 July 1999.

<sup>62</sup> Above n 60.

### International co-operation

United States trade sanctions and other United States judicial stratagems to protect its trading position have thus been, in modern times, not successful in achieving United States aims. No doubt, however, powerful pro-sanction voices will remain. Senator Jesse Helms (Republican: North Carolina), Head of the Foreign Relations Committee and co-sponsor of the *Helms-Burton Act* imposing Cuban sanctions states, for example, that: 'An effective and principled policy tool, economic sanctions are older than this Republic itself.'<sup>63</sup>

Just as in competition law itself, there should be unilateral freedom to deal, so, of course, the United States should have the freedom unilaterally to impose sanctions as it wishes. The point about United States 'unilateral' sanctions, however, is that they can usually be characterised (to use the terms of s.46 of the Australian *Trade Practices Act*) as a 'misuse of power' because they purport to bind other nations and they utilise dubious theories of international law to effect their purpose.

If the United States is not prepared to forgo its attempts to coerce others into acceding to its foreign policy and is not prepared to abandon its trade barriers, there is no hope either for internationally agreed competition laws or for some international competition enforcement body to be set up. Neither can exist without the United States. If the United States insists on retaining its present anticompetitive laws, whether these be based on foreign policy considerations, self-interest considerations or otherwise, it cannot be expected that other countries will sign on to agreed competition rules or to some form of supra-national competition enforcement body.

Obviously, it would be an even more impossible situation if every nation decided to exempt from supra international enforcement those activities which it believed to be in its own self interest. If this were to happen, then such self-interest exemptions would require copious schedules to any documented arrangements and these schedules would, no doubt, be the equivalent of a large telephone directory. The result would be a constipation of the whole process. It is, it appears, an 'all or nothing' arrangement if anything is to be done to regulate competition at the international level.

Most of the United States policies seem not to be effective and to not be in the best interests of the United States itself. However, I see no realistic possibility of the United States moving significantly from the present position it occupies. One must, therefore, look to see what sort of international competition arrangements might work. International arrangements can work between countries all of which benefit by the break-up of cartel and other arrangements. Increasingly, international cartels are seen to be supra-national organisations which directly challenge the competition policies of two or more countries. Such countries aim to prevent the worst of cartel activities and there is broad agreement, quite often, as to what these activities are. To attack such cartels involves difficulties of proof as evidence is scattered across a variety of nations. Two or more countries may have competition laws which are breached. Each country must be able to get evidence as to how this breach occurs. Often enough this will necessitate the assistance of the competition enforcement authorities. Many such co-operation treaties exist including that which recently came into force between Australia and the United States.<sup>64</sup> Both countries obviously have a common interest in prosecuting international cartels which are detrimental to both their interests. However, the Agreement provides that a request for assistance may be denied when 'execution of the request would be contrary to the public interest of the requested party'.<sup>65</sup> A request is to

<sup>63</sup> Above n 61.

<sup>64</sup> *Agreement between Australia and the United States on Mutual Antitrust Enforcement Assistance* signed at Washington on 27 April 1999. A previous Co-operation Agreement on Antitrust Matters was signed between Australia and the United States and came into force on 29 June 1982. This agreement was aimed to clarify the extent of jurisdiction of each country and was executed to resolve issues which surfaced during the *Westinghouse Uranium Litigation* (see n 28 and related text). The United States has bilateral co-operation agreements with Australia, Canada, The European Commission, Germany and Israel.

<sup>65</sup> Ibid art IVA.4.

be executed in accordance with the laws of the requested party<sup>66</sup> and the request can apply only 'to the extent permitted by the laws and other important interests of the requested party'.<sup>67</sup>

One can understand the reasons for these reservations. Clearly, however, an Australian request will not be able to be executed against a United States legally sanctioned export cartel which is breaching Australian antitrust law. Even in bilateral co-operation agreements, there are, therefore, reservations which inhibit total enforcement of each nation's antitrust laws even though the basic principles of competition law and policy may be completely agreed. I must admit to some curiosity as to how the United States will interpret the term 'important interests' as a ground for refusing an enforcement assistance request; somewhat expansively, I suspect.

Nonetheless the increase in antitrust co-operation around the world is important in relation to the international effectiveness of competition law generally. It seems, for example, that no country has any particular desire to do anything other than prosecute the international vitamin cartel. United States manufacturers were fined hundreds of millions of dollars for cartel activities in the United States.<sup>68</sup> The Chairman of the Australian Competition and Consumer Commission (ACCC), Professor Allan Fels said that, following investigations in Australia, the ACCC would be seeking penalties in the order of millions of dollars. He noted that 'virtually every vitamin company was involved ... in this worldwide conspiracy'.<sup>69</sup> In September 1999, the Federal Court of Canada imposed a record fine of \$Can884 million on five vitamin companies which pleaded guilty to price fixing and market allocation in the vitamin and food additives market during the 1990s. The fines against Swiss firm Hoffmann-La Roche were the largest ever imposed in either an antitrust case or any other criminal matter in Canada. In the Canadian case, other defendants were BASF AG of Germany, Rhone-Poulenc of France and two Japanese firms, Eisai and Daiichi.<sup>70</sup>

The vitamin conspiracy case shows how international co-operation can be effective against cartels whose activities are of detriment to all. It also shows the ability of companies throughout the world to combine to breach the laws of several countries and the desirability of international competition enforcement. It is not, however, beyond the realms of possibility that even a cartel such as the vitamin cartel could totally escape antitrust prosecution if it were able to structure its activities so as to obtain export exemption in each country for products sold to each other country. This is perhaps where the real weakness in international antitrust enforcement currently lies. What has to be done initially is to attempt to agree on some basic principles of antitrust. This should not be too difficult a task for developed nations to carry out. There are various recommendations which have been made over the years as a basis for the harmonisation of antitrust laws in developed countries. A 1991 Special Antitrust Committee of the American Bar Association, for example, recommended harmonising the laws of major trading nations and, amongst other things, suggested the following:

- Nations should adopt clear laws against cartels.
- Nations should eliminate exemptions from the anti-cartel principle including:
  - nations should enter into arrangements to repeal export cartels;
  - nations should enforce their laws against import cartels.

There was a wide range of other recommendations dealing with transnational mergers, court jurisdiction, intellectual property and the like.

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<sup>66</sup> Ibid art IXC.

<sup>67</sup> Ibid art IXC.

<sup>68</sup> Hoffmann-La Roche was fined \$US500 million (\$A833 million) which was the biggest criminal fine of any kind in the United States. BASF Corporation was fined \$US255 million.

<sup>69</sup> See *The Australian* 17 April 2000.

<sup>70</sup> See Millan Binch, *Canadian Antitrust Report: Special Issue on International Conspiracies* Winter 2000.

Mighty oaks from little acorns grow. If nothing more than clear laws against cartels are reciprocally enacted and export and import cartels are abolished, then this would be a pro-competitive step which we could all applaud. We must bear in mind, however, that, on the international scene, the world must be led by the United States. Only if the United States is seen to be principled in its beliefs will others follow. So far there is no real indication that the required United States leadership provides a buoy, let alone a beacon, by which the rest of the world can navigate its pro-competition path.

### A postscript: the United States constitutional position

Even if agreement on international competition laws and their enforcement far beyond present imagination can be achieved, many may well feel suspicious at the Constitutional set up in the United States as regards treaties. Treaties in the United States are self executing. Once passed by the United States Senate by a two-thirds majority, they are a part of the law of the United States. They are thus on the same footing as any other federal statute. In the event of a conflict between a treaty and a federal statute, the latter in time prevails.

The *Uruguay Round Agreement Act* provides that any provision of the *Uruguay Round Agreement* which conflicts with the law of the United States shall have no effect. Specifically the effect of s.301 of the *Trade Act* (discussed above) is preserved.<sup>71</sup> Further, no state law may be invalidated for inconsistency with a *Uruguay Round Agreement* except in an action brought by the United States for that purpose. Finally no person, other than the United States itself, has any right to challenge any conduct because of inconsistency with the *Uruguay Round Agreement*.<sup>72</sup>

In effect, therefore, all Uruguay Round arrangements are subject to invalidation pursuant to subsequent United States legislation. Perhaps of greater concern is that *de facto*, the Uruguay Round provisions may be invalidated by the law of any state of the United States. One is entitled to be concerned at this for two major reasons:

- it enables states, for parochial reasons, to renege on federal United States arrangements negotiated at an international level between the United States and other countries; and
- the track record of the State Supreme Courts in the United States is to define their jurisdiction expansively. Thus, to take an analogous case arising from the *Nuclear Energy Litigation* in the 1970s and 1980s, the Supreme Court of New Mexico held that non-compliance with its discovery orders in relation to documents held in Canada was contempt of the New Mexico Supreme Court. This was so notwithstanding the fact that Canada had express legislation prohibiting the documents from being produced in New Mexico. The State of New Mexico, said the Court, had a legitimate public interest in the production of the Canadian company's documentation because over one half of the United States' uranium reserves were in New Mexico. The Court expressly rejected the submission that the documents related to international antitrust issues and that these were, essentially, federal, not state, matters.<sup>73</sup> Further, even though Canadian law expressly prohibited production of the documents outside Canada, the 'Act of State' doctrine was held not to be applicable in light of New Mexico public interest considerations.

It is not hard to foreshadow parochial issues, coupled with decisions of state courts as to their extensive international jurisdiction, 'white anting' the provisions of international arrangements such as the Uruguay Round. At the very least, the United States federal government should deny state capacity to act in this regard. Sadly, however, there appears, for United States political reasons, to be a reluctance to impinge on state powers even in relation to an internationally negotiated arrangement such as the Uruguay Round.

It is little wonder that the world has its concerns as to the worth of treaties negotiated with the United States. Their provisions can be totally negated should they conflict with the parochialism of states of the United States.

<sup>71</sup> 19 USC s 3512(a)(1). It is provided that The Uruguay Code is not to affect s 301 of the U.S. *Trade Act* unless this is specifically agreed.

<sup>72</sup> 19 USC s 3512(b)(2).

<sup>73</sup> *United Nuclear Corp v General Atomic Co* 1980 - 1 Trade Cases 63639 (Supreme Court of New Mexico).

It is to be hoped that similar provisions to those in the United States legislation adopting the *Uruguay Round Agreement* will not find their way into any arrangements which may be able to be negotiated in relation to international competition law. Nations with unitary systems of government pose no problems along the above lines to parties negotiating with them. The problem of divided state-federal jurisdiction is inherent in all federated nations. In the case of Australia, however, it is highly unlikely that states can or will exercise any real jurisdiction in the case of trade or competition treaties negotiated by the federal government.<sup>74</sup>

## Conclusion

The United States Supreme Court has hailed the United States competition law as a 'Charter of Liberty' (*Appalachian Coal* above) and as 'the Magna Carta of free enterprise' (*U.S. v Topco* above). Whilst this may be the attitude internally in the United States, many will agree with the following comment of Phillip Adams in *The Weekend Australian* of 15-16 April 2000 (allowing for journalistic licence in the expression of the point) when he says:

I agree with George Monbiot in the U.K. newspaper *The Guardian*:

The U.S. Government claims to be the champion of free trade but is, in truth, emphatically opposed to it. It seeks to exercise a coercive power of central control and legislative dictate, on a scale [that] makes command economics of the old Soviet Union look like a village paper round.

There is much in this paper which supports such a view. Equally, however, there is much which indicates that freer trade and the international enforcement of at least some agreed competition rules must inevitably come to pass. There is also much which indicates that the traditional United States trade embargos and legislative imperialism not only have not worked but also have been to the detriment of the United States itself. We now have co-operation in antitrust enforcement. However, we need something more. The 'something more' is an agreement on basic antitrust principles and for some form of international competition authority to enforce these principles. The former is possibly achievable in the foreseeable future but whether countries will sign on to any such principles 'without fear or favour' must be a moot point. The latter is achievable but requires considerable rethinking of self interested issues — particularly by the United States. Thus an international competition enforcement authority is probably unlikely for some decades yet.

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<sup>74</sup> In Australia, the Federal Government has the Constitutional power to enter into treaties. In order to become part of the law of Australia, the treaty must be implemented by Federal legislation. If a treaty is entered into, Federal legislation which implements the treaty will overrule any inconsistent State or Territory laws. (*The Tasmanian Dams Case* (1983) 158 CLR). An inconsistency challenge could be mounted by any affected entity and such challenges are not restricted to governmental parties.

The Australian federal government also has constitutional power over the trading conduct of corporations. Pursuant to this power, it has enacted the *Trade Practices Act*, which is the national competition law. A *Conduct Code Agreement* between the Commonwealth and all states and territories extends the national competition law to all states and territories and requires states and territories to modify any of their laws to the extent that they are inconsistent with federal competition law.

The federal competition law applies in full to states and territories themselves to the extent that they carry on business. A *Competition Principles Agreement* compels price oversight of state and federal government activities; compels the conduct of public ownership entities on the basis of 'competitive neutrality' to 'eliminate resource allocation distortions arising from public ownership'; and compels the structural reform of public monopolies.

All of the above arrangements extend also to local government.

Compliance with the above two agreements is overseen by the Australian Competition Council, an independent statutory body set up for this purpose. It regularly reports to Parliament. Certain Commonwealth grants to states and territories are conditioned upon there being compliance with these agreements.

It is, no doubt, theoretically possible for the federal government to exempt the states and territories from treaties or the impact of competition law. However, as is clear from the above, this is highly unlikely and is contrary to all current Australian legislative trends. There is certainly no present likelihood of a federal law which would permit states or territories to exempt themselves from any trade treaties or competition treaties — negotiated at the federal level.

The United States has, to date, used its world trading position, and the necessity for virtually the whole world to trade with it, as a basis both for enacting self-interested legislation and subjecting the trading world to it. Times, however, change. The wider issue now to be faced is whether the United States will conclude, as appears to be the case, that 'the attempt to mould the world economy to American moral, legal and economic concepts is futile', and that: 'A central challenge, therefore, is the development of international law and international organisations that can make and enforce rules for the global economy.'<sup>75</sup> The reality, at least in the reasonably foreseeable future, is probably, however, that of the following comment attributed to former Australian Prime Minister, Paul Keating: 'In a race between two horses named 'Principle' and 'Self Interest', always back 'Self Interest'. It has consistent form on all tracks and you always know that it's trying hard to win.'

APPENDIX TABLE I: Australian principal merchandise export destinations 1999 (\$A million)			
Rank	Country	Exports (\$A million) 1999	% of Top 40 Export Countries (nearest 0.1%)
1.	Japan	16,705	20.4
2.	United States	8,144	10.3
3.	New Zealand	6,675	8.2
4.	Korea	6,290	7.7
5.	Taiwan	4,164	5.1
6.	China	4,087	5.0
7.	Singapore	4,084	5.0
8.	United Kingdom	3,730	4.6
9.	Hong Kong	3,019	3.7
10.	Indonesia	2,145	2.6
Source: Australia's Trade Outcomes and Objectives Statement 2000. Department of Foreign Affairs and Trade (Tabled 5 April 2000) Table I.			
APPENDIX TABLE II: Australian principal merchandise import sources 1999 (\$A million)			
Rank	Country	Exports (\$A million) 1999	% of Top 40 Export Countries (nearest 0.1%)
1.	United States	21,099	21.8
2.	Japan	13,574	14.0
3.	China	6,577	8.9
4.	Germany	5,904	6.1
5.	United Kingdom	5,396	5.6
6.	Singapore	4,135	4.3
7.	New Zealand	4,108	4.2
8.	Korea	3,864	4.0
9.	Malaysia	3,233	3.3
10.	Taiwan	2,984	3.1
Source: Australia's Trade Outcomes and Objectives Statement 2000. Department of Foreign Affairs and Trade (Tabled 5 April 2000) Table II.			

<sup>75</sup> Drucker, above n 60.



APPENDIX TABLE III: Australia's services trade 1999 (\$A million)

Rank	Country	Exports (\$A million) 1999	Imports (\$A million) 1999	Net
1.	United States	4,645	5,816	-1,171
2.	United Kingdom	3,002	3,288	-286
3.	Japan	3,362	1,705	+1,657
4.	New Zealand	1,813	1,465	+348
5.	Singapore	1,361	1,717	-356
6.	Hong Kong	1,052	1,185	-133
7.	Germany	779	843	-64
8.	Indonesia	900	586	+314
9.	Malaysia	654	759	-105
10.	China	665	643	+22
TOTAL OF ALL COUNTRIES (including countries not specified above)		27,307	28,403	-1,096

Source: Australia's Trade Outcomes and Objectives Statement 2000.  
Department of Foreign Affairs and Trade (Tabled 5 April 2000) Table III.

APPENDIX TABLE IV: Level of foreign investment in Australia as at 30 June 1998 (\$A million)

Rank	Country	Level of Investment as at 30 June 1998 (\$A million)	% share as at 30 June 1998
1.	United Kingdom	146,085	25.6
2.	United States	145,736	25.5
3.	Japan	56,764	9.9
4.	Hong Kong	15,959	2.8
5.	Singapore	13,531	2.4
6.	New Zealand	12,240	2.1
7.	Netherlands	12,223	2.1
8.	Belgium / Luxembourg	10,850	1.9
9.	Germany	10,200	1.8
10.	France	7,775	1.4
TOTAL OF THE ABOVE		431,363	75.5
TOTAL ALL COUNTRIES		570,940	100.0

Source: Australia's Trade Outcomes and Objectives Statement 2000.  
Department of Foreign Affairs and Trade (Tabled 5 April 2000)

APPENDIX TABLE V: Level of Australian foreign investment abroad as at 30 June 1998 (\$A million)

Rank	Country	Level of Investment as at 30 June 1998 (\$A million)	% Share as at 30 June 1998
1.	United States	84,257	33.8
2.	United Kingdom	40,914	16.4
3.	New Zealand	12,801	5.1
4.	Japan	11,027	4.4
5.	Hong Kong	10,001	4.0
6.	Germany	5,355	2.1
7.	France	3,798	1.5
8.	Singapore	3,698	1.5
9.	Netherlands	3,467	1.4
10.	Canada	2,420	1.0
TOTAL OF THE ABOVE		177,738	71.2
TOTAL ALL COUNTRIES		249,210	100.0

Source: Australia's Trade Outcomes and Objectives Statement 2000.  
Department of Foreign Affairs and Trade (Tabled 5 April 2000)



## **Address**



# Global Rights and Cultural Exceptionalism

Thomas M Franck\*

In May, the Taliban rulers of Afghanistan ordered a mother of seven to be stoned to death for adultery in front of an ecstatic stadium of men and children. Last year, Britain's highest court, the House of Lords, allowed two Pakistani women accused of adultery to claim refugee status because they had a well-founded fear of public flogging and death by stoning at home. Women are denied the vote and the right to drive cars in several Arab states, and harsh versions of Sharia punishment are spreading to the Sudan and Pakistan. But the Taliban is in a class by itself: denying women the right to leave home except when accompanied by a brother or husband and forbidding them all access to public education.

While the Taliban seeks to spread its militant vision to other states, it also demands the right to be let alone to implement its own brand of religio-cultural values without foreign interference. It insists that it not be judged by the norms and modalities of others.

Of course they are not the only ones. Florida's government, after several episodes of frying prisoners in a faulty electric chair, only reluctantly came into conformity with the United States Constitution's prohibition of 'cruel and unusual punishment'. When our principal Western allies tell us that the United States system of capital punishment is barbaric, we (our politicians, our courts) tend to reply that, well, it is our way, and no one else's business. Which, of course, is precisely what the Taliban say.

Let us not, however, indulge in what Ambassador Jeane Kirkpatrick has called (in another context) the 'sin of moral equivalence'. We are not the Taliban. What the Islamic fundamentalist regime of Afghanistan is doing violates well-established global law and, in October 1999, was duly censured by a unanimous resolution of the United Nations (UN) Security Council. The General Assembly, too, has refused to accept the credentials of the Taliban's delegation. Article 7 of the International Covenant on Civil and Political Rights (ICCPR), with 140 state parties, echoes the United States Constitution, proclaiming that 'No one shall be subject to cruel, inhuman or degrading treatment or punishment,' which certainly covers stoning and flogging, but not execution by lethal injection or (functioning) electric chair. And the 1980 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) prohibits almost everything the Taliban has introduced to constrict and subordinate women, while it globalises many of the rights women have won in the West.

To this the Taliban and similar radical fundamentalist forces in Pakistan, the Sudan and elsewhere reply that their codes have reintroduced social cohesion, decency and family values into societies corrupted by colonialism and globalism. They point scornfully to the degradation of Western women through pornography, prostitution and other forms of exploitation, whereas their wives and daughters have been liberated from public obligations to focus on home and family. In one sense, however, their arguments do parallel ones used by United States courts and politicians: we have a sovereign right to be let alone, not to be judged by international human rights standards. The United States insists, for example, in the right to execute persons who committed crimes as minors. Never mind that this violates our obligations under the ICCPR. It is our way, our values, our situational ethics.

Some such assertion is made nowadays by many varieties of cultural exceptionalists. For 50 years after the collapse of Hitler's own extravagant form of cultural exceptionalism, this sort of claim tended to be suppressed, or at least muted. The Universal Declaration of Human Rights, and the several ensuing legal treaties setting out civil, political, cultural and economic rights as well as the rights of children, women, racial groups and religions, have all tended to create a global safety net of rights applicable to all persons, everywhere. Although these legal instruments allow some restrictions in time of national emergency, they brook no cultural exceptionalism.

The post-war flourishing of human rights has featured two dynamic elements: globalisation and personalisation. Against both of these there is now a backlash.

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Globalisation has been achieved by drafting basic codes of protection and (to the extent possible in a decentralised international regime) monitoring and promoting compliance. Inevitably, this has generated conflict with notions of sovereignty. When the Commission of Experts overseeing compliance with the ICCPR found violations in Jamaica's treatment of death penalty cases, the government responded by denouncing its adherence to the provision of the treaty allowing individuals to petition the Commission. The argument for being left alone is always the same: it's our way. Respect our exceptionalism, our culture, our unique problems. When it comes to the treatment of our own people, we want sovereignty, not globalism.

Sovereignty, however, is not what it used to be. Since the mid-1950s, the global system has not much hesitated to tell even quite seriously sovereign states — Belgium, Britain, France, Holland, the United States — to emancipate their colonies. And they did. By 1965, the Security Council was imposing mandatory sanctions on a white racist regime in Rhodesia and, in 1977, on South Africa. They, too, had asked in vain to be let alone to pursue the cultural exceptionalism of apartheid: 'It's our way. Leave us alone!'

By last fall, the Secretary-General of the UN, Kofi Annan, felt emboldened to tell the General Assembly that their core challenge was

to forge unity behind the principle that massive and systematic violations of human rights — wherever they may take place — should not be allowed to stand ... If states bent on criminal behaviour know that frontiers are not the absolute defence; if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign immunity.

He called for redefinition of the national interest that will 'induce States to find far greater unity in the pursuit of such basic Charter values as democracy, pluralism, human rights, and the rule of law'. This drew quite a bit of flak from member states.

Governments seeking to preserve their sovereignty, however, are not the only ones offended by this most recent call for the enforcement of global values. To some cultures, the global human rights canon is perceived as a threat to their very identity. The Taliban, who govern most of Afghanistan, do brandish national sovereignty as a shield. But, even more, they see themselves as militant guardians of a religion and culture that is entitled to exemption from a system of human rights that is inimical to Islam as they practice it. Other governments, notably that of Singapore, have also advanced their claim of exceptionalism by seeking to broaden its support-base from that of a state to a culture ('Asian values').

By taking their stand on cultural exceptionalism, the Taliban has wisely made common cause against global human rights, not primarily with rather tired nationalist defenders of state sovereignty, but with a powerful and growing subset of cultural rejectionists. These include some traditional indigenous tribes, theocratic national regimes, fundamentalists of many religions, and, surprisingly, a mixed bag of Western intellectuals who deplore modern human rights' emphasis on individual autonomy. While they have little else in common, these rejectionists all share an antipathy to the whole human rights systems: the treaties, intergovernmental assemblies, councils, committees and commissions, rapporteurs of the Secretary-General and the supporting coterie of non-governmental organisations, each seeking to advance the cause of personal self-determination and individual rights. The whole kibosh is seen as a corrodent of social cohesion and solvent of community, undermining the social customs, traditions and decencies that become unsustainable once the individual ceases to be subordinate to the group.

Although the struggle for human rights as seen through the prism of, say, Amnesty International or Human Rights Watch, is mostly a tug-of-war between governments and individual dissidents, the real action has moved elsewhere: to the battle-lines between the forces of religio-socio-cultural communitarian conformity and the growing network of free-thinking, autonomy-asserting individualists.

What communitarians assert is well-paraphrased by Professor Adeno Addis of Tulane University: 'One cannot have a right as an abstract individual. Rather, one has a right as a member of a particular group and tradition within a given context.' To this the Princeton Institute's Michael Walzer adds that the recent emphasis on individual rights has fostered a 'concept of self that is normatively undesirable' because it 'generates a radical

individualism and then a radical competition among self-seeking individuals'. This, Addis asserts, 'breeds social dislocation and social pathology among members of the group'.

So, while there is undoubtedly a struggle going on 'out there' for control of Chechnya's hills, the Khyber Pass and the White Nile, there is also a crucial intellectual struggle 'in here' between the forces of Lockean individual liberty and those championing communitarian values.

Harvard Professor Michael Sandel, in his recent book *Democracy's Discontents*, has been highly critical of the accommodations of United States law — judge-made law, in particular — to an ethos of individual rights that he says, undermines the civic virtues which sustains the American people's sense of communitarian responsibility. He complains that the emphasis, in recent years, on individualist-liberalism has neutered the state and elevated personal rights above the common good. At the international level, the same view is espoused by Malaysian Prime Minister Mahathir Mohamad. In 1997, he urged the UN to mark the 50<sup>th</sup> anniversary of the Declaration of Human Rights by revising or, better, repealing it, because its human rights norms focus excessively on individual rights while neglecting rights of society and the common good. Australia's former Prime Minister, Malcolm Fraser, has dismissed the Declaration as reflecting only the views of the Northern and Eurocentric states which, when it was adopted in 1948, dominated the General Assembly. Former German Chancellor Helmut Schmidt, too, has said that the Declaration reflects 'the philosophical and cultural background of its Western drafters' and called for a new 'balance' between 'the notions of freedom and of responsibility' because the 'concept of rights can itself be abused and lead to anarchy'.

The argument against this cultural relativism and exceptionalism weaves together three strands of exegesis. The first demonstrates that those advancing the exceptionalist claim do not genuinely and legitimately represent those on whose behalf that claim is made. The second shows that the norms of human rights are grounded not in a regional culture but in modern transcultural social, economic and scientific developments. The third maintains that individual rights are not the enemy of the common goods, of social responsibility and community but, rather, conduce to the emergence of new, multi-layered and voluntarily-entered kinds of affiliation to supplement those traditionally imposed by tradition, territory and genetics.

First, the matter of exceptionalist legitimacy. Many prominent voices in non-Western societies refute the exceptionalist claim. Sri Lanka's President, Chandrika Kumaratunga, has pointed out that 'the free market has become universal, and it implies democracy and human rights'. She has dismissed talk about 'a conflict of values' as 'an excuse that can be used to cover a multitude of sins'. Dato' Param Cumaraswamy, former Chair of the Malaysian Bar Council and a UN Special Rapporteur on the Independence of Judges, has pointed to widespread non-Western ratification of human rights treaties as demonstrating their 'universal acceptance'. Boutros Boutros-Ghali has said bluntly that there 'is no one set of European rights, and another of African rights ... They belong inherently to each person, each individual ...'

Then how to explain the increasing frequency and vehemence of exceptionalist claims made on behalf of cultural 'values'? It often turns out that oppressive practices defended by leaders of a culture, far from being pedigreed, are little more than the current self-interested preferences of a power elite. If Afghan women were given a chance at equality, would they freely choose subordination as an expression of unique communitarian values? We are unlikely to find out. Some guidance can be drawn, however, from the parallel case of Sandra Lovelace, a Maliseet Indian from New Brunswick. Under Canadian law, which incorporated Indian customary law, she lost her right to live on tribal land when she 'married out' of the tribe. When Ms Lovelace took her complaint to the ICCPR's Human Rights Committee, she pointed out that no similar penalty applied to men. The global group of experts upheld her claim. Thus pushed to conform to its international human rights obligations, the Canadian government repealed the gender-discriminatory Indian law. While that change disturbed some traditionalist leaders, they were soon repudiated in monitored tribal elections. As with much that passes for authentic custom, the rules turn out to have been imposed, often quite recently, by those who stood to benefit. In the case of the Maliseet, the discrimination against women, far from being a traditional requisite of group survival, has been shown by recent anthropological research to have been copied from male-dominated Victorian society.

The authenticity of exceptionalist claims made in the name of cultural diversity have been challenged by many in the non-Western world. Radhika Coomaraswami, the UN Special Rapporteur on Violence Against Women, says that female genital mutilation, flogging, stoning, amputation of limbs as well as laws restricting women's

rights regarding marriage, divorce, maintenance and custody are all inauthentic perversions of the religious dogma of various societies. Moreover, she insists that 'cultural diversity should be celebrated only if those enjoying their cultural attributes are doing so voluntarily'. In her landmark study of Islam and Human Rights, Professor Ann Elizabeth Mayer concludes that much of the pedigree claimed by fundamentalists does 'not represent the result of rigorous, scholarly analysis of Islamic sources or a coherent approach to Islamic jurisprudence'. The Egyptian art historian, Professor Nasr Abu Zaid, simply says 'it is the militants who are ... hijacking Islam'.

It is also demonstrable that, just as many of the idiosyncratic customs that alienate non-Western traditionalists from the human rights system are inauthentic, so also the attempt to tar these rights with accusations of Western cultural imperialism also gets no support from history. The human rights canon is full of rules that, far from being deeply rooted in Western culture, are emanations of recent developments industrialisation, urbanisation, the communications and information revolutions — that are replicable anywhere, even if they have not occurred everywhere at once. If examined historically, however, traditional 'Western culture' looks a lot more like everyone else's zealous fundamentalism. If similarity of practice is determinative, one might more accurately accuse the Taliban of being 'Western'. Acibiades, one of the commanders of the Athenian army, was condemned to death for impiety in 415BC, as was Aristotle a century later. For that matter, stoning for blasphemy is recommended by the Old Testament (Leviticus 24:16).

There is nothing remotely 'Western' about religious freedom and toleration. Islamic fundamentalists insist that toleration is not for them: that non-Muslims will not be allowed to proselytise in their societies, that Islam's followers may not exit the 'true' religion and that blasphemy is to be punished severely. As it happens, Western Christian civilisation for most of its first two millennia insisted on much the same. Saint Augustine, citing his favourite text ('compel them to come in': Luke 14:16–23) advocated death for heretics. According to Saint Thomas Aquinas, heretics 'by right ... can be put to death and despoiled of their possessions ... even if they do not corrupt others, for they are blasphemers against God' and thus commit 'high treason'.

There was certainly no trace of religious toleration in Tudor England. The first hundred years after the establishment of the Church of England, hundreds were executed by zealots. During the brief restoration of Catholicism under Mary (1553–58), 273 subjects, including four bishops and an archbishop, were burned for heresy. Meanwhile, in Geneva, the reformer John Calvin was burning the anti-Trinitarian Michael Servetus. Under Cromwell's Protectorate, dissenting Protestants were jailed, whipped, hanged or had their tongues bored through with hot irons at the insistence of the Presbyterian establishment. In the 1729 case of *Rex v Woolston*, Sir William Blackstone, the great jurist of the common law, declared blasphemy a criminal libel which consisted of a 'public affront to religion and morality, on which all government must depend for support'.

The last blasphemy prosecution to have succeeded in England was brought in 1979 against James Kirkup, a poet teaching at Amherst who had depicted Jesus as homosexual. In the House of Lords, his conviction was sustained by Lord Scarman who thought it essential to protect 'religious beliefs ... from scurrility, vilification, ridicule and contempt'.

In the United States, criminal blasphemy convictions resulting in imprisonment, with solitary confinement and large fines, were imposed throughout the nineteenth century under state laws or common law. In New York, in 1811, Chief Justice Kent admonished a convicted blasphemer 'that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity and not upon the doctrines of worship of those impostors Mahomet and the Grand Lama'. Kent, himself, was a Unitarian, nowadays a rather liberal faith, but he believed that religion was the bulwark of social order and that expressions of irreligiosity had to be punished because they 'strike at the roots of moral obligation, and weaken the security of the social ties'. The Ayatollah Khomeini could not have said it better. The last prosecution for blasphemy in an American state was brought in 1971 by Pennsylvania against a shopkeeper who had displayed a poster featuring Jesus with the legend 'Wanted for sedition, criminal anarchy, vagrancy and conspiracy to overthrow the established government'. It failed.

Other parts of the human rights canon have little more claim to be 'Western' than does freedom of religion. France did not extend the franchise to women until the end of the second world war. The Harvard Law School began admitting women only in the 1950s. The first American female candidate for a medical degree was Elizabeth Blackwell, who graduated from a rural medical college in Geneva, New York, in 1849 but had to complete her training in Paris. Slavery, sanctioned by the Old Testament (Exodus 21:2, 26, 27, 32), was



abolished in the United States only in 1865 and the Supreme Court, in an 1897 decision, ruled that seamen could be compelled, on pain of criminal penalties, to perform indentured labour because, as a class, they were 'deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults' and should thus be recommitted to shipowners as their putative 'parents and guardians'. Until quite recently in many Western countries only children or close relatives of members of some licensed guilds — barbers, plumbers, electricians — could hope to enter those reserved professions, a restriction on freedom of employment reinforced by religious, quotas and racial taboos.

What brought about the transformation to personal autonomy in religion, speech and employment as well as to equal legal rights for the races and sexes? While these recent developments occurred first in the West, they were caused not by some inherent cultural factor but by new developments occurring, at different rates, everywhere: universal education, industrialisation, urbanisation, the rise of a middle class, advances in transportation, communications and the spread of new information technology. These are driven by developments in science capable of affecting equally any society. It is this, and not some historic or social determinant, which — almost as a byproduct — has generated the move to global human rights.

In Britain, it was the growth of a capitalist middle class in the eighteenth century industrial revolution that fuelled the demand for quality children's education and thereby compelled the admission of women to the teaching profession. The demographic consequences of the American civil war gradually forced an opening for women in medicine and law. After the second world war, veterans' benefits, and the need for a large peacetime army profoundly affected the opportunities of African-Americans. Improved and cheaper transportation has brought about a loosening of the ties that long bound people to the place where they were born and generated a demand to be allowed to travel and to emigrate. The advent of information globalisation through CNN and the internet have had a profound effect on persons' individual capacity and will to participate critically in foreign and domestic political discourse, just as the invention of the printing press and Gutenberg's vulgate bible unleashed the social forces leading to the Reformation.

These changes, wherever they have occurred, transformed the capacity of persons for individual autonomy, and, in consequence, fuelled the demand for more personal liberty. Does this, as the cultural exceptionalists assert, presage the unravelling of community and social responsibility? Elites in authoritarian societies have always professed to think so. When in 1867 the Boston School Committee rejected a petition signed, among others, by Harvard President Thomas Hill and the poet Henry Wadsworth Longfellow calling for abolition of corporal punishment, the Board, employing the common Benthamite communitarian litany, defended beatings as advancing 'the greatest good of the greatest number'. Modern individualists believe that the good of the greatest number should not be achieved by sacrificing the human rights of even the smallest number. They also believe that, set free of unnecessary communitarian constraints, individuals will not retreat into social anomie but, on the contrary, freely choose multi-layered affinities and complex, variegated inter-personal loyalties that redefine community without loss of social responsibility.

Modern human rights-based claims to individual autonomy primarily arise not out of a deconstructive opposition to community but from the desire of modern persons to utilise intellectual networking and technological innovation to supplement and enrich their continued traditional affiliation with genetically and territorially-determined community. Liberated from the absolute requirement to be defined by a given racial, religious and national identity, persons still freely choose to be powerfully affiliative. This threatens the state and the traditional group only to the extent that traditional communities are no longer able, alone, to resolve some of the most difficult global problems facing humanity: epidemics, trade flows, environmental degradation, global warming. Few quarrel with Aristotle's observation that 'He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a God'. But many, freed to do so, now define themselves, at least in part, as 'new communitarians' seeking additional fora of association in functionally effective transnational affinities.

According to Hazel Henderson, 'Citizen movements and people's associations of all kinds cover the whole range of human concerns ... The rise of such organizations [is] one of the most striking phenomena of the twentieth century ...' For example, where there were five international non-governmental organisations (NGOs) in 1850 and 176 in 1909, there are now more than 18,000 listed by the UN, which reports that 'people's participation is becoming the central issue of our time'. Most of these NGOs, from *Medecins Sans Frontières* to

the International Confederation of Free Trade Unions, are engaged globally in the exercise of some form of new communitarian social responsibility for the well-being of others.

So, it appears that the globalisation of human rights and personal freedoms is rarely an affront to any legitimate interest in cultural self-preservation; does not represent Western cultural imperialism but, rather, the consequence of modernising forces that are not culture-specific; and that the social consequences of expanding human rights has been far more benign than traditional communitarians have feared. To the Taliban claim of cultural exceptionalism one might more specifically reply: first, that their interpretation of the culture they claim to defend is considered incorrect by most Islamic historians and theologians; second, that their claim to speak on behalf of Afghani culture is illegitimised by their silencing of half the population; third, that the force of individual, personal rights is, anyway, likely to be irresistible in a world of globalising fiscal, commercial, cultural and informational forces, as also of powerful transnational affinity groups in support of human emancipation and equality; and fourth, that many persons freed to choose the elements of their identity will still include religious, cultural and national elements in the matrix of their chosen affiliations.

These arguments are unlikely to carry weight with those whose claim of cultural exceptionalism is a flimsy disguise for totalitarian tendencies. To some, the problem with freedom is not cultural or social but political. After the recent victory of reformists in Iranian parliamentary elections, for example, the Ayatollah Mesbah-Yazdi was reported to have said that the victorious reformers were more dangerous to the system than a military coup because they promote greater freedom for Iranians to write, read and behave as they wish. Not much can be done to reason with that. It will be addressed, eventually, by ineluctable forces of modernisation and the demands for personal freedom those forces unleash. Meanwhile, however, it is essential for all who enjoy its benefits to defend the universality of human rights and expose cultural exceptionalism's self-serving fallacies.

**International Environment Law:  
Covering the Gaps in the 21<sup>st</sup> Century**



# Why Domestic Environmental Law Needs a Robust International Environmental Law Regime

A Dan Tarlock\*

The first joint meeting of the Australia and New Zealand Society of International Law and the American Society of International Law is a fitting occasion to address the question: do domestic environmental law regimes need international environmental law? I argue that the answer to this question is yes, but for many this is a counter-intuitive answer. There is great resistance to the incorporation of international environmental law into domestic law even in Australia, New Zealand and the United States. All three nations have been leaders in the development of comprehensive domestic environmental protection regimes. United States environmental law, because it was developed early, has served as the world model. Australian and New Zealand law has served as the model for South Pacific and Asian environmental law regimes<sup>1</sup> and for integrated resource management.<sup>2</sup> All three nations have equally been at the forefront of the development of international environmental law, and each country has made substantial contributions to the development of international law. Nonetheless, the degree of integration of the two regimes varies among the countries and there is continued resistance to integration

The United States has contributed both core principles and political will to the development of international environmental law, but has resisted integration. Australia and New Zealand have been comparatively more receptive to integration. United States law is the basis for the core principles of international environmental law: state responsibility for transboundary harm<sup>3</sup> and the duty to prevent pollution. There is widespread consensus, at least in theory, that all states have a duty not to allow state agencies and private parties subject to the state's regulatory jurisdiction<sup>4</sup> to use its territories in a manner that causes substantial harm to other states and their

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<sup>1</sup> B Boer, R Ramsay and D R Rothwell, *International Environmental Law in the Asia Pacific* (1998).

<sup>2</sup> See D E Fisher and N McNamara (eds), *Integrated Water and Land Management: Essays on Comparative Approaches to the Integration of Water and Land Land Management* (2000).

<sup>3</sup> D Caponera, 'The Role of Customary International Water Law, in Water Resources for Asia' in M Ali, G Radoszewich and A Ali Khan (eds) (1985) 365 cited in *International Environmental Law and World Order*, L D Guruswamy, Sir G W R. Palmer, B H Weston (1994) 630.

D. Caponera, 'The Role of Customary International Water Law', in Water Resources Policy for Asia, 365, 367-68, 372, 380-81 (M. Ali G. Radosевич and A. Ali Khan eds. 1985) cited in *International Environmental Law and World Order*, L. D. Guruswamy, Sir G.W.R. Palmer, B.H. Weston (herein after G.P.W.), West Publishing Co, St. Paul, Minn., 1994, p. 630.

<sup>4</sup> State responsibility for the conduct of private parties who cause injury to the territory of another state is widely asserted in international law, although the basis for the duty and its scope remain disputed. The basic principle posits that a state must exercise due diligence to prevent conduct, if performed by the state, which would breach its primary international duties. This is thought to include the duty to regulate and to enforce regulations. 'Developments in the Law: International Environmental Law' (1991) 104 *Harvard Law Review* 1494. Publicists continue to debate whether the standard is negligence or strict liability and sometimes assert, incorrectly, that the complaining state must show a breach of a prior duty. See A E. Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 *International and Comparative Law Quarterly* 1. The general duty to prevent is endorsed in s 601 of the United States Restatement of Foreign Relations, although the scope is narrower than the general duty. Section 601 limits the state duty to take necessary environmental protection measures to 'the extent practicable under the circumstances'. D Caron, 'Reviews of the Restatement (Third) of the Foreign Relations of the United States, The Law of Environment: A Symbolic Step of Modest Value' (1989) 14 *Yale Journal of International Law* 528 describes this standard as conservative compared to the fault-based due diligence standard of international law. Australia and New Zealand invoked the doctrine in *Australia v France* and *New Zealand v France* [1974] ICJ Rep 457.

nationals.<sup>5</sup> The basic duty is now firmly grounded in modern international law,<sup>6</sup> although like many international rules it is more often invoked than applied.<sup>7</sup> The United States, along with Germany, has also played a leading role in developing the emerging precautionary principle<sup>8</sup> which posits that states have the power, if not the duty,<sup>9</sup> to prevent serious risks from materialising in the absence of provable environmental harm, if there is evidence of significant environmental risks. The principle is still vague<sup>10</sup> but it probably includes a duty to avoid foreseeable, significant risks, although the burden of proof issue is unresolved.<sup>11</sup> Precaution projects the substitution of risk for provable harm that underlies United States and European toxic pollutant regulation as an international duty among states and *erga omnes*.<sup>12</sup>

Australia and New Zealand's geography has pushed them to expand state power to manage both its sovereign resources and regional commons in which they have a special interest. International environmental law is evolving toward the recognition that states have the right (if not the duty) to minimise ecological risks both within their territories and outside their territories if the conduct of other states in common areas harms the interests of a state. Australia and New Zealand are world leaders in defining and expanding these rights and duties before international tribunals and in other appropriate fora to advance both national and international environmental interests. Australia and Japan's use of the United Nations Convention on the Law of the Sea (UNCLOS) arbitration procedures to protect migratory fishing stocks in the South Pacific and Australia's exploration of UNCLOS to protect marine biodiversity reserves in the South Pacific are excellent examples of adjudication as a method of international law creation. Domestically, Australia and New Zealand's High Court jurisprudence are models of how international environmental law can be integrated into domestic law.<sup>13</sup>

This article sets out both a positive and normative case for the integration of domestic and international environmental law. The positive case, in brief, is that integration is inevitable in the post-second world war 'decentred' world of environmental law where multiple private and public actors are necessary to implement protection regimes. The normative case is that both regimes are mutually re-enforcing and thus serve as a check,

<sup>5</sup> *The Trail Smelter, Arbitration (U.S. v Canada)* (1949) 3 UNRIAA 1938, is the basis for the two most authoritative statements of state liability which extends to the failure to police and regulate those acting within a state's territory. State liability for acts which injure the other is re-enforced by the *Corfu Channel* decision. *United Kingdom v Albania* (1949) ICJ Rep 4.

<sup>6</sup> Among the best discussions are J G Lammers, 'International and European Community Law Aspects of Pollution of International Watercourses in Environmental Protection and International Law' in W Lang, H Neuhold and K Zemanek (eds), *Environmental Protection and International Law* (1991) 115

<sup>7</sup> But cf *Commission v Greece*, Case C-387/97 ECJ (2000) (EU member state liable for monetary penalties for failing to comply with European Commission order requiring adequate waste disposal measures.)

<sup>8</sup> See E Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution' (1992) 4 *Georgetown International Environmental Law Review* 303. Eg, in 1983, the German government took the position that there was no need to wait until harm had been proved before North Sea pollution was regulated, and this review is reflected in the Second North Sea Declaration. This approach has been adopted in principle at other marine conventions, in United Nations sustainable development declarations, in the ozone convention and in regional hazardous waste treaties, but the idea of ecological risk prevention remains underdeveloped.

<sup>9</sup> G Handl, *Environmental Security and Global Change: The Challenge to International Law* (1991) in W Lang, H Neuhold and K Zemanek (eds), *Environmental Protection and International Law* (1991) 59, 99.

<sup>10</sup> For a sceptical view see G Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 22–24.

<sup>11</sup> J E Hickey Jr, 'Refining The Precautionary Principle in International Environmental Law' (1995) 14 *Virginia Environmental Law Journal* 424.

<sup>12</sup> H Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (1994) 314–45 argues that the precautionary principle is a logical product of the trend toward planned environmental management and that it has been so widely adopted in binding and non-binding agreements that it has become an 'instant' doctrine of customary international law. See P Sands, *Principles of International Environmental Law* Vol I (1995) 120–121.

<sup>13</sup> *Commonwealth of Australia & Anor v State of Tasmania & Ors (The Tasmanian Dams Case)* (1983) 158 CLR 1.

however weak against the inevitable domestic tendency to discount protection duties when they conflict with a 'higher' state priority. The article, recognises, however that integration will be the exception rather than the norm and thus it starts with the case against integration.

### **The case for and against integration**

#### **The case against integration**

The basic case is that international environmental law is either unnecessary or unwelcome. It is unnecessary because domestic environmental law has flourished in almost all countries as a parallel regime to international environmental law. This is especially true in developed as opposed to developing countries. In the latter, international law can empower both the state and non-governmental officers (NGOs), but in developed countries international law is often seen as an unwelcome constraint on the formulation and implementation of state policy that will conform to international norms.

The case against integration starts from the dualist theory of international law. This theory posits that there are two parallel regimes each performing discrete but separate functions. Thus, international environmental law should be limited to the redress of transboundary harm or to the protection of true commons such as the oceans, the stratospheric ozone layer, and the earth's climate. Outside of these relatively narrow 'true' international spheres, states have sovereign prerogatives to manage their territorial resources as they choose. This position is supported by four separate, and somewhat inconsistent, arguments: (1) 'realpolitik', (2) redundancy, (3) the 'race-to-the-bottom' and (4) equity.

#### **Realpolitik**

The 'realpolitik' argument is a positive one. It asserts that since states fear that international law will interfere with their sovereign prerogative to manage their territorial resources, they will inevitably resist integration. Thus, integration will be a futile exercise and should be foregone as a costly waste of scarce political resources. Integration will be unsuccessful and scarce political capital will be diverted from more productive domestic environmental protection initiatives.

#### **The race to the bottom**

The race to the bottom is a traditional justification for central government environmental standards to curb the tendency of subordinate units of government to compete for industry through lower pollution standards. In this context, it refers to the central problem of international law. The only basis of international law is consensus among sovereign nation states, and the price for consensus is agreement on the lowest common denominator. Students of international law know that the race to the bottom is a product of efforts to overcome the positivist paradox (the lack of a sovereign to enforce the law). From the perspective of modern Anglo-American and civil law jurisprudence, international law gains its legitimacy through consensus among states. In international environmental law, this consensus is generally reflected in treaties. The principal alternative basis of consensus, customary law, is a generally backward-looking doctrine that contributes little to international environmental law. Environmental law seeks to reverse past state practices not enshrine them into law.<sup>14</sup> To secure consensus on a treaty, it is often necessary to accept the lowest common denominator. In short, international environmental law will cause a downward rather than upward pressure on environmental standards, at least in developed countries. International environmental law is generally rejected by states either because of a fear that it will lower a state's level of environmental protection or require the state to raise it above the existing domestic level. In either case, strong state resistance will undermine the project of integration.

The trade environmental interface is an example of race-to-the-bottom concerns. General Agreement on Tariffs and Trade (GATT) and the North American Agreement on Free Trade (NAFTA) preserve the right of the state to apply their own health and safety regulations to imported products, but the trade specialists and less-developed exporting states have expressed concern that strong public and ISO 14000 standards are disguised trade barriers.<sup>15</sup> This, in turn, has led to fears among developed countries that trade dispute settlement

<sup>14</sup> Some commentators have posited the doctrine of instant custom.

<sup>15</sup> See eg, P da Motta Veiga, 'Environment-related Voluntary Market Upgrading Initiatives and International Trade: Eco-

procedures can be used as a forum for countries to accept lower environmental standards. The World Trade Organisation's (WTO) trade-environment jurisprudence fuels these fears because the WTO Appellate Panels have invalidated several United States efforts to control the process by which protections are manufactured.

The race-to-the-bottom is frequently raised by developed countries against participation in an environmental law regime. This argument was, and continues to be, raised by United States NGOs to oppose participation in NAFTA. Mexico is a one-half first world country with a long, and continuing history, of minimal environmental protection. Concern is not limited to the possibility that a United States law will hold NAFTA illegal. For example, trade has profound potential effects on the concentration of adverse environmental impacts. An analytical study of the costs and benefits of NAFTA noted that:

NAFTA-generated trade may create choke points that generate local environmental stress should trade increase or concentrate more rapidly than new transportation/transmission infrastructure can be constructed to service it ... 40% of total US exports to Mexico move south along Texas highways and railways.<sup>16</sup>

### Redundancy

The redundancy argument case makes a different assumption from the race-to-the-bottom argument. The redundancy argument posits that domestic and international regimes are converging on a common core of principles and that multi-national corporations are formulating a set of uniform environmental standards that all countries will be forced to adopt as the price for participating in global markets. Specifically, the argument asserts that domestic environmental law has developed and can continue to develop these principles independently of international environmental law. Domestic environmental law rests on universal rather than national or local norms and thus there is no need for an international norm. Environmental law is more universalist than human rights because it is driven by science and scientific imperatives tend to minimise cultural and political differences among nations.<sup>17</sup>

This is a powerful argument because the most distinctive feature of environmental law is that it is fundamentally science-based. I define science broadly to include both the physical and social sciences. The physical sciences, especially ecology, have defined the field of environmental law by disclosing the social costs of unrestrained use of natural resources. The social sciences, primarily economics, have provided the justification for public intervention to protect the environment and increasingly structure the debate about the best institutions to do so. The environmental dialogue about the nature of problems is remarkably similar from country to country. The differences comes in debates about the proper *level* of environmental protection and in the enforcement of mandates.

This argument does not deny that there is an ethical or 'cultural' component to environmental law, but it does argue that environmentalism is grounded in the western rational tradition and that any ethical or cultural claim must be supported by scientific basis.<sup>18</sup> The scientific analysis of problems holds throughout the world. The case for a universal environmental ethic is weaker given the religious and cultural diversity in the world. However, as is the case for human rights, the western case for a shift from human domination to human stewardship has been widely accepted throughout the world and no counter-environmental ethic has emerged. Asian religious and philosophical value systems have often been put forward as superior to the Judeo-Greco-Christian world view

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labelling Schemes and the ISO 14000 Series' in D Tussie (ed), *The Environment and International Trade Negotiations: Developing Country Stakes* (1999) 53.

<sup>16</sup> Commission for Environmental Cooperation, 'Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA): An Analytic Framework (Phase II) and Issue Studies' (1999).

<sup>17</sup> Human rights must deal with the argument from culture, whereas it is harder from non-western countries to make an ethical rather than economic and political case for environmental degradation. See M C Nussbaum, 'In Defense of Universal Values', (2000) 36 *Idaho Law Review* 379.

<sup>18</sup> I have argued this point at length in A D Tarlock, 'Environmental Law: Ethics or Science?' (1996) 7 *Duke Environmental Law & Policy Forum* 193.



because they lack the duality between human and nature. But, with the possible exception of India,<sup>19</sup> these traditions have not played a significant role in Asian domestic environmental law. Thus, there is a powerful convergence argument that all legal systems will converge on a common set of principles and policy instruments without the necessity for a central coordinating system.

This convergence is manifest in the similarity of environmental law throughout the world. Environmental impact assessment is practised in most countries. The level of public participation may vary but there is a quite uniform consensus on what constitutes an adequate impact statement or assessment. Most countries have accepted the idea that law formation and enforcement should be shared between NGOs and the state. Some form of the citizen suit to review administrative action or to enforce a protection mandate can be found in both civil and common law countries. Many legal systems have a form of the precautionary principle which allows regulators to act in the face of present scientific uncertainty to protect the public from low probability but potentially severe risks of human health or ecosystem impairment. This list goes on.

### Equity

Equity is the reverse of the race-to-the-bottom argument. The equity argument is a normative rather than positive one. The central premise is that international environmental law will tend to higher standards to the detriment of less-developed countries. International law, including environmental law, is a western construct and the values it advocates are those of developed, wealthy countries with the luxury to atone for the sins of the exploitation. Therefore, it is unjust to impose these standards on developing usually post-colonial countries. They often argue that international environmental law is a new form of western colonialism which saddles developing countries with high protection standards and thus deprives them of the resource exploitation and development opportunities enjoyed by Europe, America, Australia and New Zealand in the seventeenth to nineteenth centuries. Equity takes the form of either a plea for the recognition of uniform standards but differential compliance capabilities or north-south wealth transfers.

Equity is a hard argument for developing countries because it flies in the face of scientific imperatives that the ecological and human adverse impacts of resource degradation are often worse in developing countries and uneven protection regimes undermine the protection of global commons. The 1998 Indonesian forest fires are a manifestation of the regional impact of under-protection of the environment. The west has tried to side step this argument by the umbrella concept of environmentally sustainable development, but environmentally sustainable development has not yet established itself as a sustainable legal principle capable of constraining resource use.

### The case for integration

The case for integration is both jurisprudential, positive and normative. The jurisprudential case adopts the monistic theory of the relationship between domestic and international law. It does so not only on the general principle that the separation of domestic from international is artificial but because increasingly both NGOs and corporations see legal systems as seamless systems that incorporate both international and domestic elements. Many private actors will find it to their advantage to conform their conduct to a single public or private international norm. The normative case starts from the proposition that international law has important roles to play in strengthening domestic protection regimes. It can help prevent back-sliding and re-enforce domestic protection efforts. International environmental law plays the later role in many developing countries. It is vital for NGOs and public officials to invoke international norms to advocate new positions or to justify official positions. However, international environmental law is equally important in developed countries where the idea of environmental protection remains legally marginal and subject to being factored out of the policy equation when it conflicts with economic development or another traditional state interest.

Environmental law is universally marginal because the basic idea that humans should subordinate themselves to two communities, ecosystems and future generations, is a radical one in the dominant western liberal tradition. The grand objectives of environmental law are only partially related to the protection of human dignity, property and the maintenance of social order. Environmental law is both anthropocentric and non-anthropocentric; it seeks to protect society from future risks of serious health problems, such as cancer, genetic mutation and disease epidemics, and the irreversible impairment of ecosystem services. But, the actual human benefits of

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<sup>19</sup> See C M Abraham, *Environmental Jurisprudence in India* (1998).

environmental protection are hard to demonstrate and much protection is done on the belief that nature should be protected for intrinsic reasons. Thus, much of environmental law remains a very contested, radical idea which is outside the western constitutional and common law tradition.<sup>20</sup>

Paradoxically, the central defect of international environmental law which is that it is soft rather than hard law, may actually strengthen and promote integration. International environmental law is a new idea and it has been necessary to articulate first principles compared to domestic environmental law which is positive and fragmented. Thus, international environmental law often more clearly articulates the protection fundamental values at stake, such as justice between generations<sup>21</sup> biodiversity conservation and inter-generational equity compared to domestic environmental law which remains media rather than principle focused. International environmental law can thus inform, shape and ultimately strengthen the foundations of domestic environmental law.

### **'Realpolitik' and redundancy**

The 'realpolitik' argument is a substantial one, but it has its limits. The convergence argument advanced above as a reason for non-integration can be turned around. Developed countries have comparatively little to fear from international environmental law. They largely control the treaty-making process and, equally as important, the principles that treaties reflect. Stripped to essentials, international environmental law is a projection of western law, with the possible exception of the wild card of environmentally sustainable development. Thus, developed countries have already made the adjustment to the addition of environmental protection as a relevant factor in public and private decisions. More importantly private actors are making the adjustment faster than nation states.

There is a deeper problem with the 'realpolitik' justification and that is simply that international law is too useful to reject. Countries will continue to select it when it furthers their interest and reject it when it does not. But, on balance, I think that developed countries such as Australia, New Zealand and the United States will find it more often to their advantage to invoke and apply. As is well-known, United States efforts to conserve marine species in its territorial waters have been found to be GATT-illegal by the WTO and its predecessor. The Vice-President of the International Tribunal for the Law of Sea has made the provocative suggestion that extra-territorial conservation can be justified as an effort to enforce international rather than domestic environmental law.<sup>22</sup>

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<sup>20</sup> The western legal tradition identifies 'constitutionalism' as the fundamental legal basis for organising society. Nomos The basic norm of western constitutionalism is the recognition of negative liberties against the government. Government action is always measured against two standards: (1) consistency with delegated authority and (2) the non-infringement of fundamental *individual rights*. Law is also primarily negative: it gives back what was taken away. It is also a regime which treats all persons equally, recognises and protects their fundamental rights, and does so by the application of clear standards in a consistent and fair manner against both private parties and the state. The Constitution, for example, is not a source of environmental rights and the duties, because the values that environmentalism promotes are not primarily those of the Enlightenment. The Constitution is frequently defined as negative charter of liberties, but environmental protection requires the affirmative exercise of regulatory power, but the expert consensus is that constitutions should be confined to negative rather than affirmative rights. R J Posner, 'The Costs of Rights: Implications for Central and Eastern Europe and for the United States' (1996) 32 *Tulsa Law Journal* 1. J B Ruhl, 'The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up' (1999) 74 *Notre Dame Law Review* 245. The efforts of an indigenous group in Indonesia to seek redress for the cultural and environmental degradation caused by mining is instructive. The group's *Alien Tort Act* claims were dismissed because the Act only applies to shockingly egregious violations of international law that have been generally recognised. The sources cited by plaintiff were dismissed as 'merely ... a general sense of environmental responsibility ... [which] state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts.' Principle 2 of The Rio Declaration was not applicable because it (1) confirms state sovereignty over natural resources and (2) only prohibits acts which injure another nation. *Beanal v Freeport-Moran, Inc.*, 969 F. Supp. 362 (E.D.La. 1997), aff'd, 1999 U.S. App. Lexis 31365 (11th Cir. 1999).

<sup>21</sup> Professor Edith Brown Weiss's book, *In Fairness to Future Generations* (1989) is foundational.

<sup>22</sup> R Wolfrum, 'Means of Ensuring Compliance With and Enforcement of International Environmental Law' (1998) 272

### Race-to-the-bottom

The race-to-the-bottom argument reflects a real problem but it is not a compelling reason to reject integration. The race-to-the-bottom reflects the painful reality that globalisation produces costs and benefits and that countries must develop new cost minimisation strategies. In the United States, the legal cases rest on the two GATT *Tuna-Dolphin* decisions and the WTO *Reformulated Gasoline* and *Shrimp Turtle* decisions. In the *Tuna-Dolphin* and *Shrimp Turtle* decisions, United States efforts to control fishing processes to protect marine resources outside of its territorial jurisdiction were invalidated. *Reformulated Gasoline* upheld Venezuela's challenge to Environmental Protection Agency's (EPA) calculation of the baseline for reformulated gasoline on the ground that it favoured domestic over foreign refiners. The GATT-WTO decisions are the subject of enormous debate in the United States, Canada and elsewhere.<sup>23</sup> These are important issues but they are problems to be solved in the international and domestic arenas. Integration can in fact aid in the solution of these issues. International environmental law supports the assumption of environmental protection duties for areas of global commons, and eventually this expanded protection duty must be factored into WTO jurisprudence.

### Equity

Equity is a substantial reason for non-integration in developing countries, but it cannot serve as a legitimate basis for non-integration in developed countries. There is no serious case that it is unfair to make developing countries redress the social and environmental costs of unrestrained development. There are, of course, real fairness questions how the responsibility should be distributed within the country. More generally, the case for non-integration is weak in developing countries. Environmental protection is a universal value which is based on science.

### Conclusion

Integration is necessary, and I think, inevitable because the ultimate objective of both international and domestic environmental law is to move from sovereignty as a basis for unrestrained resource use to stewardship sovereignty. This will require that nations internalise and enforce universal standards of restraint and sustainability. Those that do will flourish and those that do not will not. The idea of limited rather than absolute sovereignty is now widely accepted by developed and developing nations. In the *Tasmanian Dam Case*, the Australian High Court accepted the World Heritage Convention as a restraint on its internal resource use. Stewardship sovereignty applies a basic principle of post-modern environmental ethics to international law. There is a lively debate about the source and scope of environmental ethics, but there is an emerging global consensus that we must replace the Greco-Judeo-Christian tradition that humans are despots over nature<sup>24</sup> with the principle that we are stewards of the earth,<sup>25</sup> and thus we must approach all exploitation decisions with much more caution than we have in the past.

Stewardship is an evolving concept, but it contains three core consensus building principles. The first is the principle of intergenerational equity articulated by Professor Edith Brown Weiss.<sup>26</sup> This standard permits resource exploitation subject to the constraint that we leave the resource in no worse shape than when we started. As a leading environmental philosopher has noted:

environmentalists will achieve more by appealing to the relative noncontroversial and intuitive idea that the use of natural resources implies an obligation to protect them for future users — a sustainability

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*Recueil des Cours, Academie de Droit Internationale* 62. See also A Rueda, 'Tuna, Dolphins, Shrimp & Turtles: What About Environmental Embargoes Under NAFTA' (2000) 12 *Georgetown International Environmental Law Review* 647.

<sup>23</sup> See, eg, L Guruswamy, 'The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation', *The Environmental Law Reporter*, News & Comment, 30 ELR 10261, April, 2000.

<sup>24</sup> J Passmore, *Man's Responsibility for Nature* (1974) remains the leading exponent of this position.

<sup>25</sup> See R Attfield, *The Ethics of Environmental Concern* (2nd ed, 1991) for a forceful exposition of this provocative thesis.

<sup>26</sup> E Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989).

theory based on inter-generational equity, rather than exotic appeals to hereto unnoticed inherent values in nature.<sup>27</sup>

The second principle is that sustainable rather than unrestrained development must be the norm of the future and follows from inter-generational equity. The final core idea is the precautionary principle which re-enforces the first two because all development decisions, especially those in shared commons, must be made with an eye toward the preservation of options for future generations. This is a joint project of domestic and international law.

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<sup>27</sup> B G Norton, 'Why I am Not a Nonanthropocentrist: Callicott and the Failure of Monistic Inherentism', (1995) 17 *Environmental Ethics* 341, 356.

## **Issues in International Arbitration**



# Issues in International Arbitration

Derek S Firth\*

## A brief summary of the New Zealand position

In 1996 the New Zealand Parliament enacted the *Arbitration Act 1996* which came into force on 1 July 1997. By that legislation, New Zealand has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law for both international and domestic arbitrations, with some minor modifications. The (slightly revised) Model Law is the First Schedule to the Act and it applies to all arbitrations. In many situations, but not all, the Model Law permits the parties to 'agree otherwise'.

There is an important Second Schedule which has provisions dealing with default appointment of arbitrators, consolidation of arbitral proceedings, additional powers relating to the conduct of arbitral proceedings, determination of a preliminary point of law by the Court, appeals on questions of law (with leave), costs and expenses of an arbitration, and extensions of time for commencing arbitration proceedings. If the arbitration is an international one,<sup>1</sup> then the Second Schedule does not apply unless the parties opt into it. If the arbitration is a domestic one, then the provisions of the Second Schedule apply unless the parties opt out of them or some of them.

Even if the place of an arbitration (any arbitration) is outside of New Zealand then certain Articles in the First Schedule apply, namely:

- Article 8, Stay of New Zealand Court Proceedings.
- Article 9, Interim Measures in New Zealand by the Court (including orders for the preservation or interim custody of goods, securing the amount in dispute, appointing a receiver or other orders to ensure that any award will not be rendered ineffectual, and the granting of an interim injunction.
- Article 35, recognition and enforcement.
- Article 36, grounds for refusing recognition or enforcement.

Under the Act itself (Section 12) an arbitral tribunal may, '... award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court ...'. In practice, this means that an arbitral tribunal in New Zealand may (assuming the scope of the arbitration clause is wide enough) make equitable orders such as for rectification and specific performance, and orders for damages for breach of the trade practices and fair trading legislation. Section 14 provides that, unless otherwise agreed by the parties, an arbitration agreement '... is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings'. There is limited immunity under Section 13 which provides that an arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.

New Zealand has a sound and workable arbitration regime for both international and domestic arbitrations. New Zealand has, for some time, ratified the Geneva Protocol on Arbitration Clauses (1923) the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

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<sup>1</sup> Places of business in different States, or the place of arbitration is situated outside of the State in which a party has a place of business, or if a substantial part of the obligations are to be performed outside the State in which the party has its place of business, or by agreement.

The New Zealand Court of Appeal has endorsed the enforceability and finality of international arbitrations. The former President of the Court (now Lord Cooke of Thorndon) said in *CBI NZ Ltd v Badger Chiyoda*<sup>2</sup>

The provision of a system of justice is a basic function of any civilised State, but there is nothing uncivilised in accepting that an award duly obtained in New Zealand under an ICC or similar arbitral system should be enforceable here without being exposed to review by the New Zealand Courts on questions of law

Although this comment was made during the currency of the *Arbitration Act 1908*, (which permitted curial review for ‘misconduct’ interpreted to include an error of law on the face of the award,) it would apply all the more under the 1996 Act.

### **Security for costs as an example of interim measures in international arbitrations<sup>3</sup>**

#### **Background**

I am assuming that the reader is reasonably familiar with some fundamental matters relating to international arbitration, for example:

- The contract in dispute may or may not state the law to govern the interpretation of the contract.
- The contract may or may not state the place where disputes are to be resolved.
- The contract may or may not state the law to govern the procedure when determining disputes.
- The law of the place where the arbitration is to be held may or may not empower the arbitral tribunal in relation to procedural matters and it may or may not empower its own courts to make orders of a procedural nature in relation to arbitrations in that place.
- The law of the place of the arbitration may or may not address enforcement of interim measures or the final award.

State courts do not grapple easily with international arbitration

#### **Australia**

An interesting recent Australian case relates to the claim by mercenaries against the Government of Papua New Guinea for compensation when their contract was prematurely terminated: *The Independent State of Papua New Guinea v Sandline International Inc*, heard in the Queensland Supreme Court in March 1999. The seat of the arbitration was Brisbane in Queensland, Australia, but the law of the contract was English law. The law of questions of law (but not appeals on question of fact). Under Australian law, because the tribunal was sitting in Australia but applying English law, issues relating to English law were questions of fact and not questions of law. Consequently, it was held, there could not be any appeal on the questions of law as these were really issues of fact in the circumstances of that case. I understand that the case was settled before the inevitable appeal was heard.

It might be said that this demonstrates how much care is required when choosing the seat of an international arbitration. But it might better be said the parties were confronted with an unpredictable line of reasoning which reflects badly on the Queensland Court.

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<sup>2</sup> [1989] 2 NZLR 669, 667.

<sup>3</sup> S R Bond, *Conservatory and Provisional Measures in International Arbitration: The Nature of Conservatory and Provisional Measures* (1993).



## United States

In the United States there has been a total lack of consistency when dealing with the enforcement of interim measures in international arbitrations. In a well-known line of cases in the federal and state courts in the United States (see most notably *McCreary Tyre & Rubber Co v CEAT*<sup>4</sup> and *Cooper v Ateliers de la Motobecane*<sup>5</sup> it has been held that, under the 1958 New York Convention, courts are precluded from granting pre-award attachments, the reasoning being that the interest of the New York Convention is that there be no significant judicial intervention until after an arbitration award is made.

The decisions are, on their own, surprising, but even more surprising in view of the fact that these were cases involving arbitrations under the International Criminal Court (ICC) rules which, having been adopted by agreement by the parties, expressly provide for interim measures and expressly exempt interim and conservatory measures from the waiver of judicial jurisdiction.<sup>6</sup>

Other US courts have granted interim relief in similar circumstances and contrary to *McCreary* and *Cooper* (see *Matrenord, S.A v Zokor International Limited*<sup>7</sup> and *Rogers, Burgun, Shahine & Deschler, Inc v Dongson Construction Co*<sup>8</sup>).

## United Kingdom

In the United Kingdom, the courts have an unsatisfactory history of dealing with security for costs in international arbitrations. At the hearing before the English Court of Appeal in *Bank Mellat v Helliniki Techniki*<sup>9</sup> the case was fought on the agreed basis that an order for security for costs was outside the scope of the ICC Article providing for 'interim conservatory measures'. That was an extraordinary thing to happen and the contrary view was certainly adopted by the House of Lords in *Coppee-Lavalin v Ken-Ren Chemicals and Fertilizers Limited*.<sup>10</sup> But even in *Ken-Ren* the House of Lords were criticised for dealing with security for costs, not so much because of the fact that security was ordered, but because the courts considered they had jurisdiction when the matter should probably best have been left to the arbitrators. In that regard, the decision of the House of Lords has now been reversed by statute in that under the *English Arbitration Act 1996* sections 38 and 44, the English courts no longer have power to order for security for costs.

The English courts also seem to get a little confused by drawing, in some instances, on jurisdiction from the well-known rules relating to 'foreign claimants'. Those rules were developed with English court proceedings in mind where the defendant was a United Kingdom person or company. For international arbitrations where only the seat of the arbitration is in London, being 'foreign' is not in itself, a distinguishing feature. There developed, therefore, in England, a situation where there were three categories of grounds for security for costs, (1) under the Companies Act relating to impecunious plaintiffs, (2) under RSC Order 23 of the Civil Procedure Rules 1998 for security where '... the claimant is ordinarily resident out of the jurisdiction or ...', and (3) the short-lived rules laid down in cases such as *Ken-Ren* which were devised for applications for security for costs in international arbitrations where the seat of the arbitration is in England.

## The best test for security for costs

A much more appropriate test, I suggest, is the approach recommended by Redfern and Hunter.<sup>11</sup>

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<sup>4</sup> 501 F. 2d 1032 (3d Circ. 1974).

<sup>5</sup> S.A 456 N.Y.S 2d 728 (1982).

<sup>6</sup> E A Schwartz, *The Practices and Experience of the International Criminal Court*.

<sup>7</sup> No 84-1639, ship.op. (ED. III. December 19 1984).

<sup>8</sup> 598 F Supp. 754 (SDNY 1984).

<sup>9</sup> SA [1983] 3 All ER 428.

<sup>10</sup> [1994] 2 All ER 449, 460.

<sup>11</sup> A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (3<sup>rd</sup> ed, 1999) [7-32].

In practice, however, arbitrators are unlikely to order security for costs where their eventual award is enforceable under the New York Convention or similar treaty, unless it is shown convincingly that the losing party will almost certainly be unable to meet an award of costs against it.

Even in such a case (of an impecunious claimant) an arbitrator must have a very wide discretion and can take into account such considerations as whether or not the impecuniosity may have been brought about by the conduct of the respondent, whether the claim is being brought in good faith, whether it is being brought for the principal purpose of putting unfair pressure on the respondent; indeed, there is probably no limit to the range of factors which, on a commonsense basis, may be taken into account. Similarly, with regard to the amount of security, the same factors which influence whether or not to order security must surely loom large in determining the amount.

#### Rely on agreed jurisdiction if possible

Under Article 2 of the Geneva Protocol on Arbitration clauses (1923) it is provided

The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country and whose territory the arbitration takes place. ...

The 'will of the parties' will often be found, in the case of an international arbitration, in nominated rules such as the rules of the AAA in the United States, or the rules of the ICC in Paris or the rules of the London Court of International Arbitration, or similar bodies. These rules, where adopted, become the 'will of the parties'. For this reason arbitrators will usually endeavour to link their jurisdiction to order interim measures back to the 'will of the parties' rather than any other law, such as the law of the seat of the arbitration.

#### Make an order, rather than an award

For similar reasons, it is now becoming the general practice of international arbitrators to require forms of interim measure, such as security for costs, in the form of an order, rather than in the form of an award because some jurisdictions would not enforce an award. So, on the one hand, the losing party could request the nullity of the award from the courts of the place of arbitration and, on the other hand, the courts of the losing party's place of business could refuse the enforcement of the award.

# Issues in International Arbitration

Gavan Griffith QC\*

Those of us who signed off the text of the model law adopted at Vienna on 21 June 1985 appreciated that it was premised upon the principles of party and of state autonomy. We accepted the capacity of the parties otherwise to agree. And, as a model law, each enacting state was to be free to adapt and modify its terms. Further, the model law was never intended to stand as a code. Rather it was to operate within the framework of applicable domestic laws, which we expected would support, and even enhance, the substantive operation of the model law. We knew we had by no means provided for all matters ripe for attention. Our text dealt with the essentials. We were aware that some matters were incompletely provided for. We necessarily had to be somewhat cautious to ensure our law might be acceptable to both civil and common law jurisdictions, with different familiarities with the arbitral process.

In the 15 years since the adoption of the model law some states have chosen to enact it verbatim, sometimes augmented by mandatory or optional provisions. Some states have had difficulty in accepting the interests of commonality of approach justified the abandonment of their domestic laws applicable to international arbitration. Some states have gone to the other extreme, and enacted the model law as their domestic, as well as international, commercial arbitration regimes.

In the context of its own success, the model law usefully may be revisited by United Nations Commission on International Trade Law (UNCITRAL). The issue is how to enhance, and to make more effective, its purpose of providing a truly international model law for international arbitration. The aims must be one of 'improvement'. So long as supplementary articles are complementary to the basic text, the advantage of a model law over a convention is that additional optional articles are as capable of being carried into domestic law by those states who already have applied the model law as those who have yet to pick it up. Hence the mechanism of model law usefully avoids the chaos of successive treaty regimes, as, for example, is the case with the competing terms of The Hague, the Hague Visby and the Hamburg Rules. As to the subject of further articles and subjects for inclusion in an Annex, there are some obvious issues for consideration, some foreseen in 1985, and some identified since.

## Arbitrability and parties

Although Lord Mustill recently repeated his 1985 position that UNCITRAL does not have power to deal with arbitrability, it is suggested that there is scope for the model law to address this issue. It may be useful to define further the matters which, subject to the public policy of domestic law, may be arbitrated. For example, disputes involving matters falling in the area of anti-trust or restraint of trade, or matters pertaining to intellectual property. For the moment, the model law is silent as to the identity of parties. There should be scope for further definition of who may be parties to an international arbitration. For example, non-governmental organisations (NGOs) are specifically embraced by the recently promulgated Rules of the Permanent Court of Arbitration, which themselves were based on the model law.

## Definition of arbitration agreement

UNCITRAL may now more clearly be said to have been unduly cautious in requiring signed or written exchanges for a valid submission. With the wisdom of hindsight, the Commission itself should have been ready to follow the suggestions by its present Secretary, made in 1985, in anticipation of the development of more fluid mechanisms for the completion of agreements, including terms for arbitration. Various state laws might be used as a source for broader definitions of what constitutes an agreement. There is a strong case for a more expansive definition of agreement in writing. The practices of electronic commerce should be directly and usefully embraced. This seems mandatory upon the passing by Congress of laws permitting electronic signatures to contractual documents.

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### Confidentiality

There is now an appreciation, sharpened by the controversial Broken Hill Proprietary Company Limited (BHP) decision by the High Court of Australia, that the parties' requirements for confidentiality of the proceedings are not adequately protected. This issue is not touched upon, and is as ripe for coverage in the model law as it is in most state laws.

### Consolidation

Some states have enacted optional provisions enabling consolidation of arbitral proceedings. Consolidation is not something to be forced upon the parties, but optional provisions, such as in the Australian law, usefully could be considered as an approach to be picked up by the model law itself.

### Interest

The power to award interest, both as an element of damages in the award and also as a separate entitlement until payment under an order, is a gap partly filled by domestic laws and partly by specific agreement between the parties. But it is a subject which specifically should be covered by a complete model law. In commerce, time is money. At least the model law should enable orders for compensation by the party who pays late.

### Costs

Against a background of the compromise between the civil law and the differing common law approaches on the issue of costs, it is not surprising that the model law was not ambitious enough to make provision for costs. It would have been useful to establish a default position that the tribunal should have power to make an award for costs unless the parties otherwise agree. Again, this is an issue often covered by agreement between the parties, and by municipal laws. But it is a matter which now may be embraced by specific terms of the model law.

### Immunity of arbitrators

Particularly by aggressive litigators within the north-American hemisphere, there is an emerging tactic of recalcitrant parties engaging in personal attacks upon the independence of the arbitration process. It is not uncommon for arbitrators now to be threatened with proceedings and claims against them personally if they do not act in a particular manner. Obviously arbitrators should be liable for a want of honesty. Possibly they should be liable if they wilfully abandon an arbitration, and put the parties to unnecessary expense. But when arbitrators are honestly discharging their duties, even if one party believes imperfectly, there should be immunity from personal liability in the same manner as is usual for a judge. Some state laws already provide for an immunity more or less equivalent to that of a judge, such as section 28 of the *International Arbitration Act 1974*. Such minimal protections should be universal.

### Interim measures

As a matter of commercial reality, an incapacity to make effective interim measures may entirely destroy the integrity of the arbitral process. If the subject matter of dispute, or, in other cases, the funds to meet an eventual award, may be spirited away before final award enforcing of orders for interim measures, it must follow that the procedures of the model law will have hollow content. In this area, the 1999 decision of the Supreme Court of the United States in *Grupo Mexicana* may have an inhibiting effect. There is scope to enhance powers for interim awards made in support of the arbitration. Whether made by arbitrators or by courts such awards should become enforceable beyond the place of arbitration. To some extent, the issue relates to the further definition of what is meant by an award.

**Other matters**

Other matters conveniently for attention are:

- Capacity
- Representation of parties
- Security for costs
- Dismissal for want of prosecution
- Resort to *travaux* in interpretation issues (as in section 12 of the *International Arbitration Act* 1974)
- Effect of setting aside
- Effect of death of a party
- Replacing arbitrators during an arbitration.

**Summary**

The concept of the model law was radical in 1985. The child of UNCITRAL now has the precocious self-confidence of success. UNCITRAL has recently and efficiently produced its most useful *1996 Notes on Organising Arbitral Proceedings*, and now it is engaging in consideration of matters to improve its model law.



**Antarctica and the Southern Ocean:  
40 Years of the Antarctic Treaty**





# The Interplay of the Antarctic Treaty System and the Law of the Sea — an Australian Perspective

Jonathan Thwaites\*

I should like to explore briefly the interaction between the Antarctic Treaty and Law of the Sea regimes, with particular reference to two areas: the delineation of continental shelf boundaries, and the conservation and management of marine living resources in the southern oceans. Both Antarctic and sea law regimes are of global significance, and the business of finding ways for them to coexist when overlap, inconsistency, imbalance or incompatibility are in question is a matter of enduring importance to Australians and, I have no doubt, New Zealanders. It is equally important for us to find ways in which the two regimes can complement and strengthen each other.

## Antarctic continental shelf limits

In Australia's case, sovereignty has been claimed over the area of the Australian Antarctic Territory since 1936, and Australia declared its rights in the continental shelf adjacent to that territory by Proclamation of 11 September 1953.<sup>1</sup>

That the rights of a coastal state over the continental shelf are incidental to its sovereignty over the adjacent land territory was well-founded in international law at the time of entry into force of the Antarctic Treaty. The Australian Proclamation of 1953 remained consistent with the Geneva Convention on the Continental Shelf of 1958, and with customary international law when the Antarctic Treaty became binding on its parties on 23 June 1961. The general principle of customary international law that the continental shelf is the natural prolongation of a coastal state's land territory was confirmed by the North Sea Continental Shelf cases.<sup>2</sup>

Article IV of the Antarctic Treaty places a prohibition on new or enlarged territorial claims, but preserves existing claims while the Treaty remains in force. This remarkable compromise — taken together with the dedication of Antarctica to peace and science — represented a truly historic achievement, highlighted against the Cold War back-drop of the times. Through the mechanism of Article IV, Australia, New Zealand and the other existing Antarctic claimant states maintained their territorial claims and the rights incidental to them.

The 1982 Convention on the Law of the Sea (UNCLOS) codified much existing customary law, but also introduced new law. The question of the application of UNCLOS in the Antarctic was the subject of much discussion in the Law of the Sea negotiations, but the subject is not addressed in the Convention. In the absence of clear indication to the contrary, however, and given the manifest intent that UNCLOS be a global regime, its provisions must be taken as intended by the parties to apply to the Antarctic. At the same time, in general terms, Article 311(2) of the Convention provides that it:

... shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Article VI of the Antarctic Treaty, for its part, *does* specifically contemplate application of the law of the sea south of 60 degrees South. It says:

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<sup>1</sup> See generally G Triggs, *International Law and Australian Sovereignty in Antarctica* (1986) 107-111.

<sup>2</sup> [1969] ICJ Reps 1, 22; see also Triggs, above n 1, 225; F Orrego Vicuna, 'The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction' in C Joyner and S Chopra (eds), *The Antarctic Legal Regime* (1988) 99.

The provisions of the present Treaty shall apply to the area south of 60 degrees South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any States under international law with regard to the high seas within that area.

On the entry into force of UNCLOS on 16 November 1994, coastal states parties were acknowledged to have rights over an exclusive economic zone, of no greater breadth than 200 nautical miles, adjacent to their territories, with a requirement under Article 75 that the outer limits of the EEZ be designated, but no time limit specified. When Australia proclaimed its EEZ in 1994, it extended the Proclamation to its external territories, including the Australian Antarctic Territory.

In areas where the continental shelf extends *beyond* 200 nautical miles from the territorial sea baselines, Article 76 of UNCLOS, taken together with Article 4 of Annex II to the Convention, requires that, if the coastal state intends to establish the limits in a final and binding manner, it shall submit the particulars, and the scientific and technical data needed to support them, to the Commission on the Limits of the Continental Shelf (CLCS) set up under that annex, within ten years of the entry into force of the Convention for that state.

Complex though the expression of these provisions may be, this is still a lot easier (and a lot less expensively) said than done. Australia, one of the few developed countries to commit to ratifying UNCLOS while it was still open for signature — so as to be an original party — has done the bulk of the work, and will be submitting the data relating to areas of extended continental shelf adjacent to Australia and its (non-Antarctic) external territories in time to meet its 16 November 2004 deadline. Moreover, the Australian government has recently decided to undertake the difficult and costly survey work to collect the data that will be needed to keep open the option to include in Australia's submission to the CLCS particulars relating to the extended continental shelf adjacent to the Australian Antarctic Territory. If that option is exercised in 2004, Australia's action will represent no more than a decision to describe, in accordance with the requirements of UNCLOS, the limits of a longstanding claim preserved by Article IV of the Antarctic Treaty.

It is perhaps ironic that Australia, by its commitment as an original party to UNCLOS, should at the same time have committed itself to the earliest deadline for a submission on the outer limits of its extended continental shelf. This also means that Australia is the first of the seven Antarctic claimant states to face the UNCLOS deadline.

The functions of the Commission, under Article 3 of the Annex, will then be to consider the data submitted and make recommendations. In doing so, it will no doubt be assisted by its own rules of procedure, which include reference in rule 44 to cases of unresolved land or maritime disputes. In the context of the Commission's deliberations, in cases where the outer limits of the Antarctic continental shelf are the subject, maintaining the optimal relationship between the Antarctic Treaty and Law of the Sea regimes should be a central concern, since both are of global import.

### **Antarctic marine living resources**

The Convention on the Conservation of Antarctic Marine Living Resources entered into force in 1982 and now has 29 parties, of which 23 are Members of the Commission established under the Convention, with its Secretariat in Hobart. The Convention represents another very significant intersection of the Antarctic Treaty and UNCLOS regimes.

The CCAMLR Commission looks and acts very much like the regional fisheries management organisation it is, but it is also a conservation regime, essentially for waters south of 60 degrees South, a regime which falls within the Antarctic Treaty System and is covered by the provisions of Article IV and Article VI of the Treaty. The Convention affects EEZs, including the zone surrounding the Australian territory of Heard Island and the McDonald Islands and the 200 nautical mile zone adjacent to the Australian Antarctic Territory. CCAMLR conservation measures govern activity in the southern oceans by Antarctic claimant and non-claimant states

alike, to protect not only targeted fish stocks such as toothfish, but also untargeted species, seabirds and marine mammals.<sup>3</sup>

To meet its greatest concern — the practice of illegal, unregulated and unreported fishing, which afflicts all of the world's major fisheries — the Commission adopted last year a Catch Documentation Scheme for toothfish species, which came into effect on 7 May 2000.<sup>4</sup> The scheme, essentially a WTO-consistent trade-related measure addressing a major international environmental problem, is an example of the trend in fisheries management to look beyond traditional law of the sea bases for the means of control of unsustainable fishing activity. The principal basis of control under UNCLOS, flag state jurisdiction, is not always adequate, given that vessels can re-flag at sea by fax in a matter of hours. There are signs already that scheme is working, as informal reports indicate that the price for toothfish accompanied by a catch document is substantially higher than for undocumented fish. It is possible to hope that the successful adoption of this Catch Documentation Scheme by CCAMLR signals a re-invigoration of the organisation, promoting effective conservation and management of living resources in waters which are subject to both the Antarctic Treaty and UNCLOS regimes, and thereby providing an encouraging instance of their compatible coexistence.

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<sup>3</sup> On CCAMLR generally, see <[www.ccamlr.org](http://www.ccamlr.org)>.

<sup>4</sup> For a copy of Resolution 170/XVIII (1999) which contains the Catch Documentation Scheme, see <[www.ccamlr.org](http://www.ccamlr.org)>.



# Antarctica: Unfinished Business

Felicity Wong\*

The Extreme conditions of Antarctica mean it has not yet been tamed by people. Its extraordinary value is that it remains as a largely wilderness area, and is internationally designated as a natural reserve devoted to peace and science. Robert Falcon Scott however would no doubt be surprised to now put a phone card in the pay phone at Scott Base and call home, or observe tourists surfing, kayaking, mountain climbing and sky diving in Antarctica.

There is some public uncertainty about the current legal situation in Antarctica. The Ross Dependency (New Zealand's actively managed Antarctic territory) has a separate legal system in which all New Zealand law (including the Common Law) applies, to the extent it is relevant. In addition to legislation of general application, there is also specific legislation enacted by the New Zealand Parliament for this area (for example, the *Antarctica Act*, *Citizenship Act*, *Territorial Sea and Exclusive Economic Zone Act*, *Antarctic Marine Living Resources Act*, and *Antarctica (Environmental Protection) Act*). To complete the legal coverage in the Ross Dependency and elsewhere in Antarctica, some important international negotiations remain unfinished however.

The Protocol on Environmental Protection to the Antarctic Treaty, concluded in 1992, contained an 'undertaking' by the parties in Article 16 to 'elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty Area'.<sup>1</sup> Since 1992, the parties have taken productive steps to implement a corollary obligation, contained in Article 15, to formulate and implement contingency plans and procedures for immediate notification of, and co-operative response to, environmental emergencies.

At the XXII Antarctic Treaty Consultative Meeting in Tromsø, 1998, parties adopted the 'Guidelines for Oil Spill Contingency Planning'. Those guidelines recognised that 'most oil spills in Antarctica are likely to be small and confined to a station or base and the adjoining waters'.<sup>2</sup> The notable exception to this was the Argentinean vessel *Bahia Paraíso* which ran aground in January 1989 near the United States' Palmer Station in the Antarctic Peninsula. Although it was primarily a resupply vessel for Argentinean bases, the vessel was also carrying some 80 tourists. There has been speculation that had the vessel not been carrying those tourists it may have taken a different route from the disastrous one leading to its grounding, and subsequent rescue and clean up with the assistance of the United States program.<sup>3</sup>

Effects of this spill of more than 100,000 litres of fuel in a pristine area are still apparent in some areas near Palmer Station which remain contaminated. Although local bird populations have largely recovered, the lichens (Antarctica's main vegetation), have not. Clean up cost the United States program some \$US2,500,000 which it was not able to recover.

The Council of Managers of Antarctic National Programmes (COMNAP) reported last year that national Antarctic programs have however since made considerable progress with the development and implementation of oil spill contingency plans for the Antarctic Peninsula, Prydz Bay and Ross Sea areas.<sup>4</sup>

In its paper to ATCM XXIII in Lima, May 2000, the Antarctic and Southern Ocean Coalition (ASOC) and the International Union for the Conservation of Nature (IUCN) noted that although COMNAP had identified that

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<sup>1</sup> Article 16, Protocol on Environmental Protection to the Antarctic Treaty.

<sup>2</sup> 'Guidelines for oil Spill Contingency Planning', ATCM XXII Final Report, Tromsø 1998.

<sup>3</sup> Noted in presentation by Eric Chang, Director Polar Operations, US National Science Foundation, to the Antarctic Tourism Workshop, Christchurch, June 2000.

<sup>4</sup> COMNAP paper 'Contingency Planning and Emergency Response', ATCM XXIII/WP3 March 1999.

environmental emergencies largely resulted from oil spill incidents, the guidelines alone did not address the full range of environmental impacts that may result from human activities in Antarctica, beyond emergencies alone.<sup>5</sup>

ASOC/IUCN noted that while emergencies from fire, fuel spills and transport were identified by COMNAP, there had not been sufficient focus on incidents such as sewage, waste disposal, or chemicals and that contamination of soil or ice, long-term accumulation of hydrocarbons and other polluting substances from land-based incidents needed specific attention. ASOC/IUCN advanced the view that the purpose of developing a liability regime was not only to pay for the costs of recovery and remediation ('polluter pays') but to form part of a preventive system that aims to stimulate greater care on the part of operators to avoid environmental harm and adverse impact on the other values recognised as important by the Antarctic Treaty System, including its value for scientific research.

A comprehensive liability framework for dealing with accidents or emergencies in Antarctica giving rise to environmental damage, however, has yet to be agreed.<sup>6</sup>

The question currently before international Antarctic negotiators is how to resolve this unfinished business? Over six years, some nine meetings of a Legal Experts Group were held by parties to discuss liability. In 1998 the Chairman of these discussions, Rudigar Wolfrum submitted his 'Eighth Offering'. The basic framework of this draft text was as follows:

- Operators conducting activity in Antarctica incur liability if they cause damage to the Antarctic environment.
- Damage is defined as any harmful effect of an impact on the Antarctic environment, which is over a particular threshold (to exclude *de minimus*), with certain exceptions including for impacts identified during an environmental evaluation process.
- Liability is strict (and also probably joint and several where several operators are involved).
- An operator is required to take reasonable precautionary measures, and also to take response action where an incident occurs.
- When an operator does not take response action another state party, or in certain circumstances another entity or person, may do so.
- The operator is then liable to reimburse the reasonable costs of the other party for the response action they have taken.
- Where damage to the environment cannot be repaired, the operator has to contribute an amount to an 'Environmental Protection Fund', by processes yet to be determined.
- The Fund would be used to compensate states and other entities for the costs of response action in those situations where liability (and reimbursement) do not attach.
- There would be financial limits on liability.
- Non-state operators would be required to take out insurance or other financial security to cover liability.
- State parties would have residual liability for damage caused by their operators, but only to the extent that they have failed to carry out their own obligations as a state party.

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<sup>5</sup> ASOC/IUCN paper to ATCM XXIII/IP 91, May 1999.

<sup>6</sup> UK paper 'Emergency Response Action and Contingency Planning' ATCM XXII/WP 2 April 1998.

- A dispute settlement regime would be included.

This would be a comprehensive and complex regime.<sup>7</sup>

As an alternative, the United States advanced a simpler version which took a more practical, albeit less comprehensive approach. The United States' approach was to focus on 'environmental emergencies'. Under this approach, liability would attach to a party that failed to take specific response action in the event of emergencies.<sup>8</sup>

The basic framework of the United States' approach was as follows:

- States conducting activities in Antarctica incur liability if they fail to provide prompt and effective response action to environmental emergencies.
- 'Environmental emergencies' is defined as all unplanned or accidental events ... that result in, or threaten, any significant and harmful impact on the Antarctic environment.
- 'Environmental emergencies' can be caused by either non-governmental activities (eg Tourism) or governmental activities.
- Liability is strict.
- When a party does not take response action another state party, may do so.
- The liable party is then liable to reimburse the reasonable costs of response action.
- Where response action is not undertaken by the liable party it must pay the costs of that response action to an 'Environmental Fund'.
- The fund would be used to compensate parties which did undertake response action and for which no compensation has been received.
- There would be financial limits on compensation and immunity for liability in respect of naval ships, and in the event of a natural disaster rendering response unreasonable.
- State operators would be required to take out insurance or other financial security to cover liability and states would ensure non-state operators were financially acceptable.
- The Environmental Protocol's dispute settlement regime would apply.

In substance the two versions were not significantly far apart.

In an attempt to bridge this gap between the two approaches, at ATCM XXIII in Lima in May 2000, New Zealand proposed a 'compromise approach' designed to make the work more manageable. As the discussion of Antarctic Liability had developed, there was an increase in the magnitude and number of issues needing to be negotiated, which added to the complexity of pulling together the package. There was also the inevitable danger that the negotiating process would flag. Moreover, the outcome needs to be adopted by consensus, and to be an outcome that could be realistically ratified by all parties within a reasonable time. Size and complexity was unlikely to assist such an outcome.

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<sup>7</sup> 'Liability', Report of the Group of Legal Experts, ATCM XXII/WP1, April 1998.

<sup>8</sup> Ibid.

At the end of the further negotiations on liability at the Lima meeting, chaired by Don MacKay (Deputy Secretary of the New Zealand Ministry of Foreign Affairs and Trade), a possible 'third way' or 'compromise approach' was put forward in a genuine effort to break this cycle. This new approach would comprise the following:<sup>9</sup>

- A framework for the possible development of a single approach, over time, to the question of comprehensive liability.
- The inclusion of all generic issues where there is convergence between the 'Eighth Offering' and the United States proposal, for example: the liability of parties; its strict nature; its limits; the establishment of the fund; and other similar issues.
- The Annex would be binding but it would leave open the possibility of additional stages (Annexes or schedules) being negotiated over time.
- First, preventative measures; liability for response action and remedial action would be included.
- Issues such as liability for damage to the environment; unrepaired and irreparable damage would be left for a later stage.
- The approach would have the advantage of reducing the work to reasonably digestible bites. It would enable a step-by-step approach while meeting the positions of delegations wanting a single annex setting out a framework for a comprehensive coverage in due course.

In this way, while activities in Antarctica remain largely conducted by states, a proportional approach could be developed.

This last summer season in Antarctica has seen the highest number, more than 14,700, of tourists visits.<sup>10</sup> At present, in a continent larger than Australia, this still reflects a relatively low level of non-governmental human activity. But we have an obligation to lay the foundations for securing protection where that protection is clearly required. Although cumulative impacts are very important, they remain at a relatively localised level for the time being. For the time being it is very important to ensure that there is liability for serious emergencies such as disease introduction, oil spills and incidents such as the *Bahia Paraíso* by ensuring operators, including tourists, have sufficient insurance and are financially accountable should they cause such environmental emergencies.

States which have the national capacity to enact domestic law applicable to their Antarctic territory, such as Australia and New Zealand, may also wish to supplement these proposed rules with either a clearer application of existing domestic law or through enhanced legislative measures covering hazardous wastes, chemicals and discharges. Harmonisation of such measures between states would be beneficial.

We cannot afford to linger another decade without clear and innovative rules that establish the real cost of doing business in Antarctica. This will ensure all parties take their obligations under the Environmental Protocol to the Antarctic Treaty seriously, and put real effort into developing effective contingency and response planning for Antarctica.

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<sup>9</sup> Personal Report of the Chairman of the Liability Discussions in Working Group 1, ATCM XXIII/WP41, June, 1999.

<sup>10</sup> IAATO presentation at Antarctic tourism Workshop, Christchurch, June 2000.



## **Litigating International Law in National Courts**



# The Immunity of International Organisations for Human Rights Abuses

Alison Duxbury\*

## Introduction

On 10 January this year, the headlines of the Melbourne newspaper, *The Age*, proclaimed that the 'UN faces genocide suit'.<sup>1</sup> The opening paragraph of the story stated that '[f]or the first time in its history, the United Nations is being sued for its alleged complicity in the crime of genocide'.<sup>2</sup> Similar stories appeared in newspapers in the United States, the United Kingdom and Canada following this article. The suit is being brought on behalf of two women alleging that their husband and brother respectively were killed during the 1994 genocide due to the failure of the United Nations to provide the protection which had been promised to them.<sup>3</sup> It is claimed that the United Nations troops breached their international obligation to prevent crimes committed under the Genocide Convention and the Torture Convention. The claim however is not being made in a domestic court due to the broad immunity enjoyed by the United Nations under the Convention on the Privileges and Immunities of the United Nations ('General Convention').<sup>4</sup>

It should perhaps come as no surprise that an international organisation is being sued for human rights abuses. It has frequently been stated that since the Second World War the number of international organisations and the range of activities in which they are participating have proliferated. This increase gives rise to a conflict between the functions of international organisations (which require a maximum of autonomy in the host state) and the ever-widening scope of their activities which demand some form of supervision and means of redress for third parties.<sup>5</sup>

Another development since the Second World War has been the growth in international human rights law. Despite the fact that most human rights treaties are perceived as expressing obligations of the state towards their citizens, in recent years there has been a greater emphasis on the responsibility of other entities for human rights abuses. At the international level, the responsibility of individuals for international crimes has been enhanced by the creation of the two tribunals for the Former Yugoslavia and Rwanda and the adoption of the Rome Statute for the International Criminal Court. Apart from individuals, there have been increased calls for other non-state actors, such as multinational corporations to be held directly liable for human rights abuses in domestic legal systems.<sup>6</sup> Such liability could proceed through direct international regulation or through legislation via the home or host state. Suggestions have been made that the protection of human rights would be enhanced by the use of transnational law litigation whereby states develop civil and criminal responses to violations of human rights,

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<sup>1</sup> P Bone, 'UN faces genocide suit' *The Age*, 10 January 2000, p. 1.

<sup>2</sup> Ibid.

<sup>3</sup> The Secretary-General explicitly acknowledged the failure of the United Nations and expressed his 'deep remorse' for what happened in Rwanda. See *Statement on Receiving the Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, 16 December 1999, <[http://www.un.org/News/press/docs/1999/sgsm\\_rwanda.htm](http://www.un.org/News/press/docs/1999/sgsm_rwanda.htm)>.

<sup>4</sup> Convention on the Privileges and Immunities of the United Nations (1946) 1 UNTS 15. A similar treaty operates with respect to the United Nations' specialised agencies: Convention on the Privileges and Immunities of the Specialised Agencies (1947) 33 UNTS 261.

<sup>5</sup> A S Muller, *International Organisations and Their Host States* (1995) 151.

<sup>6</sup> See S Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) *Netherlands International Law Review* 171.

wherever those violations take place.<sup>7</sup> The possibility of such a system was dramatically enhanced by the House of Lords decision in *Pinochet* [No. 3] in which sovereign immunity was denied to a former head of state.<sup>8</sup>

To date, international organisations have not been subject to the same sort of scrutiny in domestic legal systems. International organisations are viewed as the promoters and protectors of human rights, rather than potential violators. The purposes of the United Nations, as well as other international and regional organisations, place human rights aspirations at the forefront of their objectives. In the face of such constitutional provisions, it would appear unlikely that an international organisation would be responsible for the violation of rights. Such a conclusion is heightened by the fact that although the topic of the Relations Between States and International Organisations was on the agenda of the International Law Commission for many years, the possibility of human rights abuses was not considered.<sup>9</sup> Discussion of the jurisdictional immunities of international organisations, has been sidelined in favour of the topic of sovereign immunity for human rights abuses.

Today I am going to leave aside the question of the United Nations' liability under international law for what occurred in Rwanda, although I think that there are some very interesting questions about what constitutes complicity to commit genocide.<sup>10</sup> The panel today is about international law in domestic courts and I wish to explore whether or not an international organisation, such as the United Nations, enjoys immunity from the adjudicative jurisdiction of domestic courts in the face of allegations that it has committed human rights abuses. The human rights abuses may not necessarily be on such a large scale as those committed in Rwanda, but are abuses nonetheless. I just want to note at the outset that I will be focusing on immunity from jurisdiction, rather than immunity from execution.

### Immunity of international organisations

It is frequently stated that the immunity of international organisations from the jurisdiction of domestic courts is based on different rationales to other international immunities, such as sovereign immunity and diplomatic immunity. Sovereign immunity is founded on the sovereignty of nations, equality of sovereigns and comity.<sup>11</sup> However, the same considerations do not apply to international organisations, which are not sovereign in their own right, but are created and composed of sovereign members.

The reasons behind granting immunities to international organisations have been based on the need to ensure the political independence of the organisation, to ensure its impartiality and financial independence, and as an indication of its prestige and authority.<sup>12</sup> The overarching rationale for the immunities of international organisations, and in particular, the United Nations as explained in the Charter is the doctrine of functional necessity. According to the functional necessity approach an international organisation is entitled to immunities to the extent that it requires them for the effective fulfilment of its tasks. It is believed that the work of international organisations would be seriously hampered if individuals could institute legal proceedings against an organisation, thus allowing courts to make pronouncements over the organisation's policies.<sup>13</sup> Functional necessity not only explains why privileges and immunities are granted to international organisations, it also helps to delimit their scope, that is, what specific privileges and immunities are granted, to whom they are applicable and in what circumstances should they be waived by the organisation.<sup>14</sup> The functional necessity

<sup>7</sup> W Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation' (2000) 41 *Harvard International Law Journal* 129.

<sup>8</sup> *R. v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No 3) [1999] 2 WLR 837.

<sup>9</sup> For a summary of the ILC's work in this area, see P Bekker, *The Legal Position of International Organisations – A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) 23-35.

<sup>10</sup> *The Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T, section 6.3.2.

<sup>11</sup> See S Riesenfeld, 'Sovereign Immunity in Perspective' (1986) *Vanderbilt Journal of Transnational Law* 1, and P Sutherland, 'The Foreign Sovereign Immunity Question' *Western Australian Law Review* 409.

<sup>12</sup> Bekker, above n 9, 100-108.

<sup>13</sup> Muller, above n 5, 151.

<sup>14</sup> H G Schermers and N M Blokker, *International Institutional Law* (3<sup>rd</sup> ed, 1995) 236.

approach has been confirmed by a number of writers and the International Court of Justice in its advisory opinion in the *Cumaraswamy Case* in the context of UN experts.<sup>15</sup> Bekker believes that the more controversial and political the functions and purposes of an international organisation, the stronger will be the need for protective privileges and immunities.<sup>16</sup> Following this reasoning, the United Nations, the most political of all international organisations, with a vast range of functions, including the promotion of human rights would require the most concrete immunities. Indeed, it has been argued that the United Nations, by virtue of its history and status, should have jurisdictional immunity even for human rights abuses.<sup>17</sup>

### Sources of the immunity of international organisations

The immunity of international organisations is found in a number of sources — the constituent treaty of the organisation, bilateral agreements between international organisations and their host states, general multilateral conventions, domestic legislation and court decisions, and also customary international law.<sup>18</sup> For the United Nations, the starting point is Article 105 of the Charter, which provides that, 'The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.'

The immunity provided in the Charter is not unusual in the practice of international organisations.<sup>19</sup> The provisions in constitutional documents tend to be broad, perhaps with the exception of the financial organisations, such as the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD).<sup>20</sup> Numerous agreements between international organisations and host states (countries in which the headquarters of the organisation or its subsidiary organs are stationed) provide for immunity from domestic legal proceedings in relation to their activities.<sup>21</sup> The General Convention further elaborates upon the United Nations immunity. Article II, section 2 provides that:

The United Nations, its property and assets wherever located, and by whomsoever held, shall enjoy from every form of legal process except insofar as in any particular case it has expressly waived its immunity.

The Convention provides immunity to UN delegates, officials and experts on missions. Significantly the Convention states that the UN should make appropriate provision for settlement of disputes involving officials who enjoy immunity.<sup>22</sup> This underlines that although international organisations may be immune from jurisdiction, this does affect their liability to others. In certain situations the UN has settled claims with those that have claimed damage from its operations. In the case of armed forces engaging in UN-controlled operations, the UN has generally accepted responsibility for any illegal acts which have been committed by its forces, and in the past has accepted liability for activities carried out by peace-keeping missions.<sup>23</sup>

Domestic legislatures have enacted immunity provisions into local law. In Australia, the *International Organisations (Privileges and Immunities) Act 1963* (Cth) provides broad immunity from suit and other legal

<sup>15</sup> *Case Concerning the Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ. A copy of the judgment can be found at <<http://www.icj-cij.org>>.

<sup>16</sup> Bekker, above n 9, 116.

<sup>17</sup> M Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 *Virginia Journal of International Law* 53, 163.

<sup>18</sup> Bekker, above n 9, 122.

<sup>19</sup> See Charter of the Organisation of American States, arts 133-4; and Constitution of the International Labour Organisation, art. 40.

<sup>20</sup> Articles of Agreement for the International Bank for Reconstruction and Development, art VII, s 3.

<sup>21</sup> Eg, the Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the Legal Status of the Committee in Switzerland (1993) Articles 11-12.

<sup>22</sup> General Convention, Article VIII, section 29.

<sup>23</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organisations* (1996) 242.

process to an organisation, and its property and assets.<sup>24</sup> In the United States the position is slightly more complicated due to the link between the *International Organisation Immunities Act* and the *Foreign Sovereign Immunities Act 1976*. The first piece of legislation provides International Organisations with the same immunity from suit and judicial process 'as enjoyed by foreign governments'. At the time that this legislation was enacted, foreign governments enjoyed absolute immunity from suit. The *Foreign Sovereign Immunities Act* enacted the distinction between restrictive and absolute immunity into United States law, leaving the question of the immunity to be enjoyed by international organisation open. United States courts have failed to definitively resolve this conundrum, either choosing to classify a particular action as non-commercial (and therefore subject to immunity) or to concentrate on explicit waiver of immunity.<sup>25</sup>

## Existing case law

### Human rights issues

An allegation of a breach of human rights against an international organisation could be brought as either a criminal or a civil claim. Typically cases against states and foreign officials have been brought as civil, rather than criminal actions, particularly in the United States where the *Alien Tort Act of 1789* and the *Torture Victim Protection Act, 1991*, have been utilised. Genocide claims have also received judicial attention. In one recent example five Rwandan plaintiffs were awarded \$US104 million against a Hutu defendant on behalf of relatives murdered in the Rwandan genocide.<sup>26</sup> In *Kadic v Karadzic*,<sup>27</sup> it was held that Karadzic was subject to United States jurisdiction despite his argument that he could not be served while on UN business. Significantly the Court found that the law of nations was not confined to state action, in certain circumstances private individuals, as well as nations can violate international law for the purposes of finding jurisdiction under the *Alien Tort Act*.<sup>28</sup> Criminal actions have also been pursued, the most example being in the form of an extradition request in the *Pinochet Case*.

Most cases concerning international organisations in domestic courts have arisen in the context of employment disputes between employees or contractors and the organisation. Such disputes have human rights consequences as they often involve an allegation of the denial of labour rights. The Italian courts have come to differing conclusions in such cases. For instance, *Porru v Food and Agricultural Organisation* involved a dispute between the FAO and an employee who had been denied certain employment benefits because he had been appointed on a series of short-term contracts over a number of years. The Tribunal held that an international organisation was only entitled to jurisdictional immunity with regard to public law activities by which they pursued their specific purposes, and not for private law activities. However, it concluded that the acts by which an international organisation arranges its internal structure are subject to immunity.<sup>29</sup>

Plaintiffs in such cases have attempted to rely upon arguments based on fundamental rights.<sup>30</sup> In some instances, Italian courts have rejected the concept of absolute immunity for international organisations.<sup>31</sup> Courts

<sup>24</sup> *International Organisations (Privileges and Immunities) Act* (Cth) 1963, s 6 and First Schedule.

<sup>25</sup> See eg, *Mendaro v World Bank* 717 F.2d 610 (DC Cir 1983), *Broadbent v Organisation of American States* 628 F.2d 27 (DC Cir. 1980), and *Boimah v United Nations General Assembly*, 664 F. Supp. 69 (1987). See also M Gordon, 'International Organisations Immunity — *Broadbent v Organisation of American States*' (1980) 21 *Harvard International Law Journal* 551; and A Farrugia, '*Boimah v United Nations General Assembly*: International Organisations Immunity is Absolute not Restrictive' (1989) 15 *Brooklyn Journal of International Law* 497.

<sup>26</sup> *Mushikiwabo v Barayagwiza* 1996 US Dist. LEXIS 4409.

<sup>27</sup> *Kadic v Karadzic* 70 F.3d 232 (2d Cir. 1995).

<sup>28</sup> *Ibid* 243.

<sup>29</sup> *Porru v Food and Agricultural Organisation* (1969) 71 ILR 240, 241 (Italy, Tribunal of First Instance (Labour Section)).

<sup>30</sup> *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies v Jasbez* (1977) 77 ILR 602, 604 (Italy, Court of Cassation (Joint Session)).

<sup>31</sup> *Food and Agricultural Organisation v Inpdai* (1982) 87 ILR 1, 8 (Italy, Court of Cassation (plenary session)).

in the United States have also had to deal with such arguments. *Mendar v Work Bank*<sup>32</sup> concerned an allegation by an employee that she had suffered sexual harassment and discrimination during her employment by the Bank. The Court refused to take jurisdiction on the basis that Mendaro's claim concerned employment practices, holding that it would be almost impossible for the Bank to adopt the local employment policies of its member countries.<sup>33</sup> Jurisdictional immunity has been upheld in a case involving an allegation of wrongful arrest and imprisonment, and also in the face of allegations of racial discrimination.<sup>34</sup>

Last year the European Court of Human Rights considered whether the jurisdictional immunity provided to the European Space Agency (ESA) by Germany itself violated human rights, in particular the right of access to the courts embodied in Article 6 of the European Convention.<sup>35</sup> The plaintiffs argued that the German courts had disregarded the priority of human rights over immunity rules and that the proper functioning of the ESA did not require immunity from jurisdiction in the circumstances of the case.<sup>36</sup> The Court rejected the argument finding that the rule of immunity had both a legitimate objective (to ensure that proper functioning of an international organisation), and secondly was proportionate to the objective of enabling the ESA to perform its functions efficiently.<sup>37</sup> In assessing the requirement of proportionality, the Court appeared to rely upon the possibility of an alternative remedy, and the fear that requiring the ESA to be subject to German labour legislation would thwart the proper functioning of the organisation.<sup>38</sup>

Beyond the employment context, these are other cases where individuals have attempted to sue the United Nations. In Brussels an individual sued for damage claimed to have been suffered as a result of abuses committed by UN troops in the Congo. Jurisdiction was denied on the basis of the General Convention.<sup>39</sup> On appeal, the result was upheld, with the Appeal Court stating that the courts would be exceeding their authority if they were to arrogate to themselves the right of determining whether the immunities granted the General Convention were or were not necessary.<sup>40</sup> The Court acknowledged that the present state of international institutional law means that there is no court that can hear such disputes involving the United Nations, which does not seem to be in keeping with the principles of the Universal Declaration of Human Rights.<sup>41</sup>

The cases therefore demonstrate a reluctance to take jurisdiction, even where human rights are directly in issue. Of course in such cases there is often an alternative forum, for instance the administrative tribunals set up specifically to deal with such claims. It is where there is no alternative forum that difficulties arise.

### Waiver of immunity

If allegations of the violation of human rights are not enough per se to remove immunity, then another possibility is to rely upon implied waiver. Treaty provisions, such as those contained in the General Convention, do acknowledge the possibility that immunity can be waived. It would appear that courts require express waiver

<sup>32</sup> *Mendaro v World Bank* above n 25.

<sup>33</sup> *Ibid.* 618-9.

<sup>34</sup> *Boimah v United Nations General Assembly*, 664 F. Supp. 69 (1987).

<sup>35</sup> *Waite and Kennedy v Germany*, Application No. 26083/94, 18 February 1999; and *Beer and Regan v Germany*, Application No. 28934/95 (1999). See A Reinisch, 'Waite and Kennedy v Germany, Beer and Regan v Germany' (1999) 93 *American Journal of International Law* 933.

<sup>36</sup> *Waite and Kennedy v Germany*, above n 35 [60].

<sup>37</sup> *Ibid* [63]-[73].

<sup>38</sup> See A Reinisch, above n 35, 937-8.

<sup>39</sup> *Manderlier v United Nations and Belgian State* (1966) *United Nations Juridical Yearbook* 283 (Brussels Court of First Instance).

<sup>40</sup> *Manderlier v United Nations and Belgian State* (1969) *United Nations Juridical Yearbook* 236, 236-7 (Brussels Appeals Court).

<sup>41</sup> *Ibid* 236, 237.

in cases dealing with international organisations. The Nigerian Supreme Court has held in the context of the African Reinsurance Corporation that, 'Waiver is not to be presumed against a sovereign or an organisation that enjoys immunity. If anything, the presumption is that there is *no waiver* until the evidence shows to the contrary.'<sup>42</sup> Similar results have been reached in the United States courts.<sup>43</sup>

Arguments involving implied waiver of immunity have been brought in the context of section 1605(a)(1) of the *Foreign Sovereign Immunities Act*. It has been suggested that a state impliedly waives its immunity when it becomes a party to a treaty which covers the subject claim. However, this argument was dismissed by the Supreme Court in *Amerada Hess*, where it was held that an implied waiver of immunity to suit could not be deduced from the mere signing of an international agreement, where no reference is made to waiver.<sup>44</sup> United States courts have also rejected suggestions that violations of a *jus cogens* norm may amount to an implied waiver of immunity.<sup>45</sup> Similarly, the treaty exception contained in Section 1604 has been held to apply only to those treaties which create a private right of action to recover compensation against a foreign state in a United States court.<sup>46</sup>

The *Pinochet Case* has recently demonstrated that powerful doctrines such as sovereign immunity and international human rights law can 'clash in a spectacular fashion'.<sup>47</sup> In the context of criminal jurisdiction, the majority in the first *Pinochet Case*<sup>48</sup> before the House of Lords, held that international crimes such as genocide, torture and hostage taking clearly amounted to conduct falling outside the functions of a head of state. Lord Nicholls found that international law has made it clear that certain conduct is not acceptable on the part of anyone.<sup>49</sup> The result in the *Pinochet Case (No. 3)* turned more fully on the application of United Kingdom law and the requirements of extradition and double-criminality, with the majority differing in their opinions as to why immunity was not required. Lord Millett highlighted that the continued immunity for ex-heads of state was inconsistent with the provisions of the Convention Against Torture.<sup>50</sup> Lord Goff, in dissent, treated head of state immunity as a type of state immunity, and found that neither an express nor an implied waiver of immunity could be found by the ratification of the Convention Against Torture.<sup>51</sup> The same could not be said of the Genocide Convention, which specifically removes immunity for crimes of genocide from rulers, public officials or private individuals.<sup>52</sup>

## Conclusion

In the face of such advances in the law of sovereign immunity it would seem odd that international organisations would retain their absolute immunity from suit. If sovereignty, comity and dignity are no longer adequate rationales for denying jurisdiction in the face of allegations of human rights abuses in such circumstances, why should functional necessity still protect an international organisation? In the case of a conflict between jurisdictional immunity of an international organisation and an allegation of a human rights abuse a municipal court must determine whether human rights concerns demand that it takes jurisdiction regardless of the

<sup>42</sup> *African Reinsurance Corporation v Abate Fantaye* (1986) 86 ILR 655, 674 (per Eso JSC).

<sup>43</sup> *Boimah v United Nations General Assembly*, 664 F. Supp. 69 (1987), and *Mendaro v. World Bank* above n 25.

<sup>44</sup> *Argentine Republic v Amerada Hess* 488 US 428, 442-3 (1989). See R Garnett, 'The Defence of State Immunity for Acts of Torture' (1997) 18 *Australian Year Book of International Law* 97, 110.

<sup>45</sup> See *Siderman De Blake v Republic of Argentina* 965 F 2d 699, 714-717, and *Princz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994).

<sup>46</sup> *Argentine Republic v. Amerada Hess* above n 44.

<sup>47</sup> A Mitchell, 'Leave Your Hat On? Head of State Immunity and Pinochet' (2000) 25 *Monash University Law Review* 225.

<sup>48</sup> *R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* [1998] 4 All ER 897.

<sup>49</sup> *Ibid.* 939.

<sup>50</sup> *R. v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* above n 8,

<sup>51</sup> [1999] 2 WLR 837, 859-60.

<sup>52</sup> Convention on the Prevention and Punishment of the Crime of Genocide (1948), art 4.



organisation's functional needs.<sup>53</sup> But functional necessity is not a 'panacea' for all problems connected with the jurisdictional immunity of international organisations.<sup>54</sup> For instance, it would be easy to simply answer 'no' to the question whether an international organisation has a need to perform an act which violates human rights, and therefore it has no need to retain immunity in such circumstances.<sup>55</sup> But this answer fails to resolve the issue whether an organisation's policy decisions, particularly high-level discretionary decisions should be subject to municipal jurisdiction. As was recognised in the *Mendaro Case*, '[b]y definition, activities of international organisations are designed to resolve problems spanning international boundaries, with a benefit to be reaped collectively by the organisation's member nations.'<sup>56</sup> It was also stated that international organisations owe their primary allegiance to the principles and policies established by their organic documents, and not to the evolving legislation of any one member.<sup>57</sup>

Municipal courts may not be the most appropriate places to adjudicate disputes against international organisations, and the courts themselves have on the whole denied their ability to act as the forum in a claim against an international organisation. (Although at the same time they have taken a greater role in adjudicating claims relating to sovereigns and foreign officials.) But international organisations should not be outside the human rights system. It is clearly preferable that an international judicial body or administrative tribunal would deal with allegations of violations of human rights by international organisation. But where such remedies are not available, or are unsatisfactory, the question remains whether a plaintiff should be able to attempt to obtain a remedy in a domestic forum. Of course an organisation may not actually be liable under domestic or international law for the abuses alleged.

International actors, created under international law with international rights and responsibilities, should ensure that their conduct conforms to international legal principles.<sup>58</sup> In particular their activities should conform to international human rights law. In cases where international organisations do not offer appropriate remedies, serious consideration needs to be given to the question whether their immunity from domestic jurisdiction should be lifted. The domestic court system is perceived as a valuable mechanism to enforce international human rights law against individuals, foreign officials, and also corporations. Even taking into account these advances, it may be that absolute immunity is still appropriate for international organisations. But in a world where the prospect of transnational litigation is being seized against individuals and corporate entities accused of human rights abuses, serious consideration should be given to the reasons why international organisations should remain immune in the face of allegations of human rights abuses.

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<sup>53</sup> Singer, above n 17, 135.

<sup>54</sup> Muller, above n 5, 182.

<sup>55</sup> Singer, above n 17, 150.

<sup>56</sup> *Mendaro v World Bank* above n 25,.

<sup>57</sup> Ibid.

<sup>58</sup> Singer, above n 17, 163.



# The Uniform Interpretation of the Refugees Convention in National Courts

Peter Nygh\*

## Is there an obligation to arrive at a uniform interpretation?

It is quite obvious that there is no obligation as such on national courts to arrive at a uniform interpretation. The Vienna Convention on the Law of Treaties (which incidentally does not apply to the 1951 Refugees Convention, see Article 4) does not contain any reference to such an obligation. However, Article 31.1 of the Vienna Convention provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

A 'good faith' interpretation clearly rules out an interpretation given for a parochial or local political purpose. The provision also imposes an obligation to interpret in accordance with the ordinary meaning and in the light of its object and purpose. This clearly implies that the search must be for a single 'object and purpose' and not different ones depending on national perspectives. But it does not impose an obligation to follow (or even consider) the decisions of other national courts, even if they have arrived at a common opinion. A judge who in good faith believes that the ordinary meaning of the words used and the object and purpose of the treaty is clear, is entitled to follow that opinion.

The International Law Association (ILA) had for some time a Committee on International Law in International Courts whose Chair was Judge Gilbert Guillaume, the current President of the International Court of Justice (ICJ). One of the co-rapporteurs was Professor Ivan Shearer and one of its members was the then Australian Solicitor-General, Dr Gavan Griffith QC. It conducted an inquiry into the practice of national courts towards achieving uniformity and the degree of notice given to decisions of other national courts. In its second Report<sup>1</sup> the Committee stated:

Where the treaty is incorporated into national law by statute, there may be an understandable inclination by the national court to interpret the terms of the treaty according to the same methods of interpretation as are applied by it in relation to statutes. Yet, if the treaty is interpreted as belonging primarily to the international legal order, there is an obvious case to be made for applying the international law approaches and rules of interpretation, as codified in the Vienna Convention on the Law of treaties. There is a further argument to be made, in the interests of promoting a uniform interpretation and application of the treaty among all states adhering to it, that a purely local or parochial approach should be avoided by taking into account decisions of international and other national courts and tribunals relating to the same treaty, and to the published opinions of jurists, and commentators on the treaty.

As regards the practice in relation to the decisions of other national courts, the Committee reported:<sup>2</sup>

Increasingly recognised as appropriate and permissible is reference to the decisions of other national courts applying international law. However, it is not yet firmly established as a principle. In the first place, it may be thought by a national court that its own interpretation of a treaty is more plausible or more conducive to the objects of the treaty than a different view of a foreign court. Yet if the decisions of a number of national courts all tend to favour a particular interpretation of a treaty, such as to constitute a significant tendency in the jurisprudence, then a national court should hesitate to adopt a conflicting interpretation. In the second place, it may not always be appreciated by courts and counsel

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<sup>1</sup> ILA Report of the 67<sup>th</sup> Conference, Helsinki, 1996, 571, 581–2.

<sup>2</sup> Ibid 582.

that access to national court decisions on questions of international law, including treaty interpretation, is available from a number of sources, especially the International Law Reports. No National report gave any example, however, of a national court falling into manifest error by adopting an idiosyncratic interpretation of a treaty, clearly out of line with that adopted elsewhere.

Later the Report remarks, after referring to the use of non-national sources, including the decisions of national courts in other states:<sup>3</sup>

A further general conclusion is that such sources are used sparingly, often only by way of incidental confirmation of the existence of a clearly established rule. Where the rule is unclear, courts tend to be reluctant to enter into a detailed weighing up of the evidence, preferring to decide the case on the basis of national law or national policy.

One can deduce from these statements the following conclusions:

- There is no obligation to follow, or take notice of, the decisions of other national courts in respect of the interpretation of a treaty;
- There is an increasing practice, however, to consider decisions of national courts;
- This is often done, not so much for the sake of uniformity, but to buttress the court's own views on the matter; and
- When the chips are down, national law and national policy will prevail.

The purpose of this paper is to examine those propositions in the light of the Australian interpretation of the 1951 United Nations (UN) Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. As is well known, Australia is a party to both instruments. The United States is a party to the 1967 Protocol only. But this makes no practical difference to its obligations, see *Katz J in MIMA v Savvin*.<sup>4</sup>

First, Art 5 thereof expressly permitted accession to the 1967 Protocol, not only by States which were parties to the 1951 Convention, but also by States which were not. In fact, as of 9 September 1999, there were a number of States which were parties to the 1967 Protocol, but not to the 1951 Convention, most notably, the United States of America (see [www.unhcr.ch/refworld/refworld/legal/instrume/asylum/51engsp.htm](http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/51engsp.htm) (Web page accessed 9 March 2000)).

Secondly, any State which did accede to the 1967 Protocol, whether or not already a party to the 1951 Convention, undertook in Art 1(1) thereof "*to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined*". Then, Art 1(2) of the Protocol provided (emphasis added):

2. For the purpose of the present Protocol, the term 'refugee' shall ... mean any person within the definition of article 1 of the Convention as if the words '*As a result of events occurring before 1 January 1951 and ...*' and the words '*... as a result of such events*', in article 1A(2) were omitted.<sup>5</sup>

Thus, any State acceding to the 1967 Protocol, whether or not already a party to the 1951 Convention, was, as a result of Art 1 thereof, doing two things. First, it was undertaking certain obligations identical to those which were imposed on it by the 1951 Convention (or would have been imposed on it, had it been a party thereto). Secondly, it was agreeing that those obligations were to be undertaken in respect of a class of persons defined by reference to the definition included in the 1951 Convention, but incorporating that definition by reference into the 1967 Protocol as if certain words were omitted from it.

<sup>3</sup> Ibid 584.

<sup>4</sup> (2000) 171 ALR 483, 509–510

<sup>5</sup> The words which I have just emphasised are the same words as those which I emphasised when setting out Art 1A(2) of the 1951 Convention in [118] above.

### The 1951 Convention and 1967 Protocol

It is not the purpose of this paper to analyse the Convention in any detail. It suffices to point out that its most important part is the definition of 'refugee' in Article 1. However, a refugee as such does not get many entitlements. Most notably there is nowhere in the Convention an obligation on a contracting state to accept a 'refugee' for indefinite residence or an entitlement for such a person to remain in the country of refuge. Article 32.1 imposes an obligation not to expel 'a refugee lawfully in their territory' except for reasons of national security or public order. 'Lawfully' means, as Goodwin-Gill explains in *The Refugee in International Law*,<sup>6</sup> 'admission in accordance with the applicable immigration law, for a temporary purpose, for example, as a student, visitor, or recipient of medical attention'. The applicable immigration law is the national law which can determine that persons whose temporary visa has expired or been cancelled are no longer 'lawful'.

In relation to persons who have either arrived unlawfully or are now present unlawfully, because of expiry or cancellation of their visa, there is no such obligation to refrain from expulsion. Only under Article 31.1 an obligation not to impose penalties 'on account of their illegal entry or presence', 'provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. Article 31.2 provides that such persons shall not have their movements restricted (in other words, detained) 'other than those which are necessary and such restrictions shall only be applied until their status is regularized or they obtain admission in another country'. Again, the method 'regularization' is a question for the law of the admitting country, being recognised as a refugee is not enough. A refugee may be required to go to another country. Until he or she is admitted, the refugee may be detained.

There is only one obligation towards a refugee which a contracting state cannot evade. In Article 33.1 it is provided:

No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

To sum up: a person who satisfies the definition of 'refugee' in Article 1 of the Convention is not entitled to be admitted as such in the country of refuge.<sup>7</sup> That is a matter for its national law. Such a person can be required to apply elsewhere and be detained in the meantime. Such a person can even be expelled. But he or she cannot be expelled if the result would be a return to the country where his or her life or freedom would be threatened for a Convention reason.

The *Migration Act 1958 (Cth)* provides in section 38:

- (1) There is a class of visas to be known as protection visas.
- (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

As indicated above, the only unqualified obligation which Australia has to refugees arises under Article 33. Provided it observes the minimal requirement of '*non-refoulement*', Australian law can attach such entitlements to that status as it sees fit. It has done so since 16 October 1999 by distinguishing between those who have arrived lawfully who will receive a right of permanent residence and those who have arrived unlawfully who will initially receive only a three-year visa. However, Australia has by reference in section 36 adopted the definition of 'refugee' in Article 1 of the Convention. It has not incorporated the Convention into Australian municipal law so as to make it a direct source of rights and obligations under that law.<sup>8</sup> The definition under

<sup>6</sup> G S Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed, 1996) 307.

<sup>7</sup> *SZ v Minister for Immigration and Multicultural Affairs* [2000] FCA 836, [14]. See also *T v Immigration Officer* [1996] AC 742, 754 per Lord Mustill.

<sup>8</sup> *SZ v Minister for Immigration and Multicultural Affairs* above n 7, [28] per Branson J.

Article 1A must be seen 'as belonging primarily to the international legal order' under the description given by the ILA Committee's report referred to above.

### The need for uniformity

It can be argued that, since each contracting state has such latitude in admitting refugees, there is little need for uniformity in interpretation at the international level. However, a lack of uniformity could create conflicts in the application of the one main obligation under Article 33, the obligation to avoid '*non-refoulement*'. This is illustrated by a recent decision of the English Court of Appeal in which it was held that refugee claimants could not be returned to France or Germany because French and German law had a more restrictive definition of 'refugee' which might lead to his '*refoulement*'.<sup>9</sup> I understand that attempts are being made within the European Union to arrive at a common policy on the issue raised in that case, namely whether 'private' persecution which a state is unwilling or unable to prevent, amounts to persecution or not.

### The means of achieving uniformity

#### The UNHCR Handbook

The UN High Commissioner for Refugees first issued a *Handbook on Procedures and Criteria for Determining Refugee Status* in 1978. A revised edition was issued in 1992. The *Handbook* is intended 'for the guidance of government officials concerned with the determination of refugee status in the various Contracting States'. It obviously is not exhaustive. Being relatively compact, it deals with the definition of 'refugee' in outline only. But it deals with some important issues. It seeks to define what is meant by the five Convention grounds. Further, in paragraph 65 it clearly states that persecution by non-state agents can in certain circumstances amount to persecution. Other important issues, such as refugees from war, the position of conscientious objectors to military service, and the question of the 'benefit of the doubt' are all addressed. However, in the first major decision of the High Court of *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*<sup>10</sup> Mason CJ said:

I note in conclusion that I have not found the *Handbook on Procedures and Criteria for Determining Refugee Status*, (1979), ("the *Handbook*") published by the Office of the United Nations High Commissioner for Refugees especially useful in the interpretation of the definition of "refugee". Without wishing to deny the usefulness or the admissibility of extrinsic materials of this kind in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties (see, for example, *Fothergill v. Monarch Airlines* (1981) AC 251, at pp 274, 279, 290-291, 294-296; O'Connell, *International Law*, 2nd ed. (1970), vol.1, pp 261-262), I regard the *Handbook* more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention.

This has at times been cited as authority for the proposition that the opinions expressed in the *Handbook* should not be relied upon for the purposes of the interpretation of the Convention. However, later decisions of the Federal Court have made it clear that this is not so. The issue was recently considered very fully by Katz J in the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Savvin*.<sup>11</sup> His Honour has shown that other judges, including Gummow J who is now a Justice of the High Court, have considered the *Handbook* to be useful for those purposes, albeit not of conclusive authority. In paragraphs [106] to [109] Katz J said:

<sup>9</sup> *The Queen v Secretary of State for the Home Department; Ex parte Adan and others* (1999) EWCA 25 (23/7/99).

<sup>10</sup> (1989) 169 CLR 379, 392.

<sup>11</sup> (2000) 171 ALR 483, 505-511.

First, as to *Chan*, it is instructive to compare the primary Judge's treatment of what was done by the High Court in that case regarding the Handbook with the treatment of that topic by Gummow J in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 117 and by Lockhart J in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 414.

In *Somaghi*, Gummow J said,

In deciding questions as to the meaning of provisions of treaties which arise in a matter before this Court, it is permissible to have regard, inter alia, to the commentaries of learned authors and the decisions of foreign courts as aids to interpretation: see *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 294-295. The High Court judgments in *Chan* illustrate this practice. In particular, in that case Dawson J (at 396-397, 399-400), Gaudron J (at 416), McHugh J (at 430) and Toohey J (at 405), in addition to considering the writings of various learned authors, also had regard to the handbook issued by the office of the United Nations High Commissioner for Refugees under the title *Handbook on Procedures and Criteria for Determining Refugee Status* (1979). (Mason CJ (at 392) inclined to the view that the Handbook should not be treated as providing an interpretation of the meaning of relevant parts of the Convention.)

It is apparent that Gummow J considered what had been done by the High Court in *Chan* as justifying reliance on the Handbook for the purpose of construing the Convention, because, immediately after the passage which I have just quoted, his Honour then quoted a number of paragraphs from the Handbook for the purpose of supporting a conclusion that the concept of a "refugee" under Art 1A(2) of the Convention includes a refugee "*sur place*".

In *Morato*, Lockhart J said, "It is plain from the judgments of the members of the High Court in *Chan* that the Handbook may be considered for the purpose of determining the meaning of 'refugee'; but it is simply one element for courts to consider on this question".

This passage shows that the Handbook is of relevance. Indeed in *Savvin* the decision of the primary judge who had dismissed the Handbook as irrelevant, was reversed and the interpretation given by the Handbook was followed. As Katz J concluded at [111]:

As to the cases just discussed, I put aside for present purposes what was said by Lord Lloyd of Berwick in *Adan* and Dawson J in *Applicant A*, because neither of those judges referred to the Handbook. As to *Chan*, I prefer the analysis of that case by Gummow J in *Somaghi* and by Lockhart J in *Morato* to that of the primary Judge in the present matter. As to Simon Brown LJ in *Adan*, I read his Lordship as having been more than willing to use the Handbook as an aid to construing the Convention and as having been disappointed that it had turned out to be of no assistance in the particular circumstances of the case before him. Accordingly, apart from the reasons for judgment of Mason CJ in *Chan*, nothing said in any of the cases referred to by the primary Judge suggests to me that a "*certain conservatism*" should attend the use of the Handbook as an aid to construing the Convention. Of course, what the Handbook says on any matter cannot be treated as conclusive, but, that said, it may nevertheless be a useful constructional aid, depending on the circumstances; it is simply an element for courts to consider, as Lockhart J said in *Morato*.

This is at least a step in the right direction which will lead to greater uniformity. See also the statement made by French J in *MIMA v Mohammed*:<sup>12</sup>

The Handbook has been regarded in the High Court "...more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention" — *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392 (Mason CJ). It has no binding force at international law — *R v Home Secretary, Ex parte Bugdaycay* [1987] 1 AC 514 at 524, *R v Home Secretary, Ex parte Mehari*

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<sup>12</sup> [2000] FCA 576, [28].

[1994] QB 474 at 489, *Immigration and Naturalisation Service v Cardozo-Fonseca* (1987) 480 US 421 at 438 fn 22. It has nevertheless been treated in the House of Lords as “another important source of law” — *T v Home Secretary* [1996] AC 742 at 786 and by the Council of the European Union as “a valuable aid to Member States in determining refugee status”. The latter observation is contained in a Joint position by the Council formed on the basis of Article K3 of the Treaty on European Union — see Wallace, *International Human Rights — Text and Materials* (Sweet & Maxwell 1997) p 312. In *Cardozo-Fonseca* it was said to provide “significant guidance in construing the protocol to which Congress sought to conform” — at 439 fn 22.

### The decisions of courts of other contracting states

Simon Brown LJ said in *Adan v Secretary of State for the Home Department*:<sup>13</sup>

There being, of course, no international tribunal empowered to rule authoritatively upon the Convention ... it is left to the courts of each contracting state to construe it as best they can with such assistance as may be found in the *travaux préparatoires* ..., legal commentaries past and present, the ... *Handbook* ... and, of course, the decisions of other contracting states.

His Lordship did not think much of the *Handbook* on the particular point in issue (describing it as being ‘of precious little help’. But he did consider ‘decisions of other contracting states’ to be relevant. There is no doubt that Australian courts have on many occasions referred to decisions of other states, most notably those of the United Kingdom, which are also often considered relevant in other areas of law. Reference is also frequently made to Canadian authority and to decisions in the United States. The question, however, is whether this will lead to greater uniformity, or whether foreign decisions are merely used to buttress local conclusions. An example of the latter approach can be seen once again in the judgment of Mason CJ in *Chan*:

I agree with the conclusion reached by McHugh J. that a fear of persecution is “well-founded” if there is a real chance that the refugee will be persecuted if he returns to his country of nationality. This interpretation accords with the decision of the House of Lords in *Reg. v. Home Secretary; Ex parte Sivakumaran* (1988) AC 958. There Lord Keith of Kinkel spoke (at p 994) of the need for an applicant to demonstrate “a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country” and Lord Goff of Chieveley spoke (at p 1000) of “a real and substantial risk of persecution”. Lord Bridge of Harwich, Lord Templeman and Lord Griffiths agreed with Lord Keith and Lord Goff. A similar opinion was expressed by the Supreme Court of the United States in *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2d 434 where Stevens J., with reference to a statutory provision (which reflected the language of Art.1(A)(2) of the Convention), in delivering the majority opinion, and citing *Immigration and Naturalization Service v. Stevic* (1984) 467 US 407, at p 425, observed (at p 453) that the interpretation favoured by the majority would indicate that “it is enough that persecution is a reasonable possibility”. I do not detect any significant difference in the various expressions to which I have referred. But I prefer the expression “a real chance” because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it is an expression which has been explained and applied in Australia: see the discussion in *Bouhey v. The Queen* (1986) 161 CLR 10, at p 21, per Mason, Wilson and Deane JJ. If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.

Although his Honour did not detect any significant difference, one may ask then why the formulation say of the House of Lords should not have been adopted. The truth, however, is that the ‘real chance’ test is different from that in the United Kingdom and United States. It has been contrasted by Mason CJ and other justices in *Chan* as

<sup>13</sup> [1997] 1 WLR 1107, 1114.



distinct from a 'remote chance'. Furthermore, the test preferred by Lord Keith of Kinkel 'a reasonable degree of likelihood' gets close to that propounded in para. 42 of the *Handbook*: 'if he can establish to a reasonable degree'. The effect of the 'real chance' test in Australia has led to an interpretation of not being a remote chance. The effect of the passage is that his Honour embraces an established local criterion (in relation to other matters) using the foreign decisions to justify that result.

In the recent case of *MIMA v Mohammed*<sup>14</sup> the Full Court of the Federal Court had to consider whether 'a good faith condition' was implied in making *sur place* claims. In other words, whether an act performed in the country of refuge solely for the purpose of attracting refugee status, should not be considered. Text writer opinion is divided on the point.

Grahl-Madsen argues:<sup>15</sup>

If a person has committed some act and as a result is liable to persecution because the authorities of his home country read a political motivation into his action, we have a repetition of the theme that the behaviour of the persecutors is decisive with respect to which persons shall be considered refugees: he is in fact a (potential) victim of persecution 'for reasons of (alleged or implied) political opinion' and may consequently invoke the Convention on an equal footing with those who were motivated by true political beliefs. But we may have to draw a distinction among the former, between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may not. The principle of good faith implies that a Contracting State cannot be bound to grant refugee status to a person who is not a bona fide refugee.

To the contrary, it is said by Hathaway:<sup>16</sup>

Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.

Lockhart J in the Australian case of *Heshmati v MILGEA*<sup>17</sup> refused to accept that a person could by a deliberate act create the circumstances whereby he became a refugee *sur place*:

... for to accept it would be to place in the hands of the applicant for refugee status means of unilaterally determining in the country of residence his status as a refugee and deny to the sovereign state of his residence the right to determine his refugee status.

In the very recent case of *MIMA v Mohammed*,<sup>18</sup> the Full Court of the Federal Court by majority (Spender and French JJ, Carr J dissenting) favoured the Hathaway view. French J considered authorities in the United States (inconclusive), New Zealand (qualified support for 'good faith'), a recent decision of the Federal Court of Canada (against good faith), United Kingdom (divided but the latest decision of the Court of Appeal against a good faith requirement). French J rejected the good faith requirement, but not so much because more recent

<sup>14</sup> [2000] FCA 576.

<sup>15</sup> A Grahl-Madsen, *The Status of Refugees in International Law* (1966) 251–2

<sup>16</sup> J C Hathaway, *The Law of Refugee Status* (1991) 39.

<sup>17</sup> (1991) 31 FCR 123.

<sup>18</sup> [2000] FCA 576.

international authority was inclining towards that view, but because of his direct interpretation of the Convention. As he said:<sup>19</sup>

The imposition of a good faith qualification for refugees *sur place* as a gloss upon the Convention is not warranted by its language and is capable of eroding, in its practical application, the protection that the Convention provides. That is because of its very vagueness. Moreover the problem which that gloss seeks to address is more apparent than real. There can be few, if any, cases in which political statements made from the country whose protection is sought for the sole purpose of generating the circumstances attracting Convention protection will be found to reflect any political opinion genuinely held by the person making them. And even if that obstacle is sidestepped by invoking imputed opinion, a demonstration of a well-founded fear or the necessary causal connection between apprehended persecution and Convention attribute in such a case would also be difficult. But each case turns upon its own facts. The Convention must be given effect according to its language. Even those who, notwithstanding their want of good faith, could show that the conditions for protection are satisfied are entitled to that protection. Want of good faith is a factual issue with evidentiary significance in the ultimate issue to be determined which is whether the applicant satisfies the conditions of Article 1A. It is not a rule of law to be laid over the words of the Convention.

The decision illustrates that reference to foreign decisions has essentially still a 'buttressing' character. I have little doubt that French J would have reached the same conclusion even if the trend had gone the other way.

Decisions of other national courts still rank considerably down the hierarchy, as is illustrated by the following remarks of Katz J in *Savvin*:

It was not submitted by the appellant on the present appeal that there existed any decision: first, of the High Court of Australia, binding this Court to reach a conclusion contrary to that reached in *Adan* on the question of the ability to use Art 33(1) in construing Art 1A(2); secondly, of a Full Court of this Court, dealing squarely with that question and binding this Court (unless it deliberately chose not to follow that decision) to reach a conclusion contrary to that reached in *Adan* on the question; or, thirdly, of the national courts of any State a party to the Convention other than Australia or the United Kingdom, reaching a conclusion contrary to that reached in *Adan* on the question. In those circumstances and for the reason which I have already given (see par 133 above), I adopt the approach to the question taken by the English courts in *Adan*.

## Conclusions

The position still remains much as the ILA Committee described it in 1996. There is as yet no recognition of any obligation to maintain uniformity in the interpretation of international conventions. There is, however, a growing awareness of the interpretation given to international conventions in other jurisdictions, particularly those in the United Kingdom, the United States and Canada. But, where divergences do occur, the national interpretation is likely to prevail.

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<sup>19</sup> At [46].

## **Keynote Address**



# Upholding the ‘Sword of Justice’: International Law and the Maintenance of International Peace and Security

Alexander Downer\*

## Introduction

I am very pleased to be here today at this historic joint meeting of the American Society of International Law with the Australian and New Zealand Society of International Law.

This meeting is a genuine example of the remarkable range of people-to-people links that give real depth and substance to the bilateral relationships that Australia enjoys with both the United States of America and New Zealand. I congratulate you on your achievement in organising this joint meeting of the two societies, and extend a warm welcome to those who have travelled across the Pacific, and the Tasman, to join us here in Australia.

I have drawn the title of my speech from a quotation of the author Daniel Defoe, taken from *The True-Born Englishman*. We may not all be Englishmen or women here, but — with the possible exception of anyone from the civil law state of Louisiana — we do come from jurisdictions that have inherited the common law from England, so it seems appropriate. I quote it in full:

When kings the sword of justice first lay down,  
They are no kings, though they possess the crown.  
Titles are shadows, crowns are empty things,  
The good of subjects is the end of kings.

International law plays an indispensable role in creating the conditions for peace and security in our world, in upholding ‘the sword of justice’. In the year 2000, one might have hoped that the world would be in better shape than it is. But we know that humanitarian crises are still happening with depressing frequency, and that we must continue to look towards developing effective international responses to them. The twentieth century is forever blemished by the brutalities of Nazi Germany, the ‘killing fields’ of Cambodia, and the terrors inflicted in Rwanda. Nowadays, the communications revolution, and especially the pervasive coverage of television, brings these outrages directly to our attention in all their distressing horror.

No decent human being is indifferent to the pain and suffering of others, and public opinion, especially in liberal democracies like our own, creates pressures to take action that no sensitive and sensible politician can ignore. I commend the commitment and efforts of international lawyers to work through the often difficult legal issues that are involved in the maintenance of international peace and security, and wish today to offer the perspective of a practising politician — and non-lawyer — on some of them.

## The changing nature of post-cold war conflict

Since the end of the cold war, the world has faced remarkable challenges of adjustment to new political and strategic realities. The nature of conflict has changed, so that the number of intra-state conflicts of ethnic and civil origin has increased dramatically. Australia has always strongly supported the crucial role that the United Nations (UN) plays in the maintenance of international peace and security. The Australian government is firmly of the view that our involvement in UN deliberations on such issues, and in peacekeeping and humanitarian operations, contributes to our own security through enhancing the security of the world at large. With this in mind, we have encouraged the UN to work through the ways it addresses new types of conflict such as intra-state warfare.

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\* Australian Minister for Foreign Affairs.

I wish to examine today two very different examples where Australia has recently played a significant role in the maintenance of international peace and security. The first is in the international response to last year's crisis in East Timor, and the second is in the establishment of an International Criminal Court.

These two particular issues have both been foreign policy priorities for this government. Australia's role in contributing to the development of an effective international response to the East Timor crisis is well known. Equally, as many of you may be aware, Australia has been actively engaged in international efforts towards the establishment of the International Criminal Court, including through our leadership of the Like-Minded Group. More to the point, however, I have chosen to focus my remarks on these examples because they illustrate two important means which the international community in the twenty-first century can deploy to tackle humanitarian crises involving serious breaches of human rights arising out of intra-state and ethnic conflicts. Both have international legal dimensions, of which many of you will be aware.

As a practising politician, it is not possible to talk about these issues without also bearing in mind the perennial issue of sovereignty — and the reluctance of states to cede authority to international institutions or to put the international interest in the maintenance of peace and security above narrower interests. History is replete with examples of the paramountcy of state sovereignty and consequent failure to resolve conflict or prevent abuse. Sovereignty remains as key an issue today, but the two examples on which I will focus are encouraging signs that the international community is prepared to work together to deal with these kinds of demands which challenge conventional international machinery.

### **The international response to the East Timor crisis**

It is fair to say that the response to last year's crisis in East Timor was an unusually effective example of international crisis management. In my view it was, in many respects, a unique case. The standard model of intervention in internal disputes — action authorised by the Security Council under Chapter VII of the UN Charter — may be imperfect, but is sufficient, at least for the foreseeable future. Australia's experience of the process leading to the involvement of the UN in crisis resolution in East Timor offers important insights that may prove useful in other circumstances.

There were five key elements in the process. The first was that this international action was organised under the auspices of the UN. The second was that Indonesia's agreement to the insertion of a multinational force in East Timor was secured. The third was that a strong and broad coalition of countries, committed to taking swift and effective action to address the humanitarian crisis, was put together. The fourth was that, most importantly, a decisive Chapter VII mandate for the multinational force was secured from the Security Council. And the fifth and final key element was the existence of a clear exit strategy for the multinational force. I wish to say something about each of these elements in turn.

#### **Action under the UN Charter**

On the first key element, the involvement of the UN had a number of advantages. It placed the action firmly inside the ambit of the Charter and international law. It also placed the deployment of the multinational force within the historical context of the Tripartite Agreement between Indonesia, Portugal and the UN on the future of East Timor. It helped focus international support for action, and ruled out any suggestion that the opinions of any member of the international community were being bypassed or ignored. And it may well have helped to ease participation by some countries in the multinational force.

#### **Indonesia's agreement to a multinational force**

On the second key element, it is always highly desirable that international military intervention takes place with the consent of the host government. In East Timor, it was, in my view, the critical precondition for effective action to resolve the crisis. No one, and certainly not Australia, intended that there should be a war with Indonesia on this issue, through having a multinational force enter East Timor in defiance of Indonesia's wishes. In our view, such an act would have compounded the humanitarian tragedy many times over. In these circumstances, no international support was evident at all for an intervention on the Kosovo model. It was our judgment that, without an invitation from the Indonesian government for the deployment of an international

peacekeeping force, it was unlikely that the approval of all members of the Security Council would have been obtained for the proposed arrangements.

It was, of course, not an easy task to persuade the Indonesian Government to accept an international force into East Timor for the purpose of restoring law and order. There was a great deal of discussion and negotiation. The fortuitous timing of the annual Asia-Pacific Economic Cooperation (APEC) summit meeting in Auckland early last September assisted this process considerably. Leaders from throughout the region, including Indonesia, were able to discuss the issues directly. On the margins of the summit, a Foreign Ministers' meeting on Timor was arranged, which British Foreign Secretary Robin Cook also attended on behalf of the European Union. Four out of the five permanent members of the UN Security Council — the United States, United Kingdom, China and Russia — were represented at the discussions. There was also very important support at this time from the UN Secretary General, Kofi Annan, who, although he was not present in Auckland, was directly engaged, particularly in his personal interventions with President Habibie.

### Building a strong international coalition

On the third key element, a strong and broad coalition of countries committed to taking swift and effective action to address the humanitarian crisis was put together. Australia, the United States, New Zealand, Japan, Britain and the other countries of the European Union, all played prominent roles in winning Indonesia's agreement to a multinational force, and in the negotiations within the UN on the deployment of that force. The pledge by our Prime Minister, John Howard, that substantial Australian assistance would be forthcoming in support of any international action helped to give a practical edge to proposals to end the crisis and moved forward a possible solution.

Many of Indonesia's ASEAN neighbours played a very constructive role in the discussions. And when the time came to give practical assistance, East Asian countries again stepped forward. Thailand and the Philippines, in particular, committed large numbers of personnel both to the International Forces in East Timor (INTERFET) and the United Nations Transitional Administration in East Timor (UNTAET). Singapore, Malaysia, China, the Republic of Korea and Japan also made commitments to the UN efforts. All these contributions helped to bolster support for the resolution of the East Timor crisis, and dispelled any notion that countries of the region somehow did not support these efforts, or that the United Nations was trying to impose an 'outside' solution on the region.

### Securing a decisive mandate

The fourth key element was extremely important. Securing a decisive Chapter VII mandate for the multinational force from the Security Council provided the essential precondition for undertaking an effective multinational operation in an environment where serious violence was rife. It did, nevertheless, complicate the quick achievement of a resolution on East Timor. However, continuing media reports on the high level of violence within East Timor reinforced the arguments in favour of such a mandate.

The UN Security Council's own mission to Indonesia, which visited that country during the second week of September, was able to inform the Council, and member governments, of the need for strong and effective measures to restore order. Many Security Council members, mindful of the UN's experience in places like Somalia and Srebrenica, wanted a resolution that would give the multinational force decisive power — unequivocal power — not only to defend themselves, but also to restore law and order in the territory. And this certainly accorded with the interests of Australia, as a potential provider of armed personnel. Australia is proud of the role it played with other countries, including the United States and New Zealand, in achieving a resolution which enabled the international force swiftly and decisively to restore peace and security after its arrival in East Timor.

### A clear exit strategy

The final key element was the clear statement of an exit strategy for the multinational force. In considering participation in the proposed force, the Australian government was determined that the action should have a

clearly defined end-point. One day the force would have to depart, and at that time social and political stability would need to be in place.

So far the strategy has worked well. INTERFET completed its mission successfully and handed over responsibility for security in East Timor to the official UN peacekeeping organisation under UNTAET. We are continuing our efforts in UNTAET towards the day when the organisation can withdraw, and hand over responsibility for security to the East Timorese themselves.

### Drawing some lessons

Many would argue that the East Timor action represents a triumph for traditional diplomacy, in that it was not an example of humanitarian intervention against the wishes of a state that was itself unwilling or unable to act. It also shows that the existing UN system — ‘imperfect, yet resilient’ as the Secretary-General has described it — can be made to work.

Yet, by what we achieved in East Timor, the boundaries of international crisis resolution have indeed widened. They have been extended by Indonesia’s acceptance of a multinational force, and by the effectiveness of that force under its Chapter VII mandate. Both of these factors are precedents that may ease the way for international efforts to resolve other crises in the future, and that can only bode well for international peace and security.

The success of the East Timor response does not of course mean that such action is or should be the only means of dealing with such situations. In this increasingly complex world, the international community needs to have at its disposal a series of ‘arrows in its quiver’ for responding to humanitarian crises. Conflict prevention and the strengthening of democratic values and institutions within states are fundamental means of ensuring the promotion and protection of human rights, and a significant element of my Government’s development assistance program is directed to these objectives, both in Australia’s immediate region and beyond.

Over the past decade another heartening trend has been the development of new international legal mechanisms and institutions for punishing those who commit serious abuses of human rights. I am thinking particularly of the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. While at the outset there was scepticism in relation to the establishment of the International Tribunals, they have been effective.

### Establishment of the International Criminal Court

It is, of course, only to be expected that, in virtually every humanitarian crisis situation, the question of responsibility for any crimes committed will be raised and must be addressed. For so long as the international community relies upon national courts to prosecute and punish those who commit atrocities, the potential for such people to escape justice in compliant or indifferent jurisdictions remains unacceptably high. The establishment of the ad hoc Tribunals was a further indication that the international community was ready to establish the long-debated permanent international criminal tribunal. The historic vote in Rome in July 1998 has brought this goal within reach. This is the key step towards ensuring that mass abuses of human rights, wherever they occur in the world, do not go unpunished.

Australia’s promotion of the International Criminal Court reflects the Government’s strong commitment to practical and constructive outcomes in the field of human rights. These include building the institutions that will help ensure that human rights, civil society and the rule of law are promoted and protected around the world.

Australia has been active in encouraging the signature and ratification of the Statute of the International Criminal Court. Primarily, this has been through our chairing of the Like-Minded Group, the group of 67 states committed to the establishment of the International Criminal Court, which was formed during the negotiation of the statute and continues to caucus during the preparatory commission phase of the Court’s implementation.



### Jurisdiction of the Court and third states

I am, of course, aware that not all states are as comfortable with the idea of the International Criminal Court as Australia, with some holding the view that the Court will improperly encroach upon the sovereignty of states that are not parties to the statute. In our view, this is incorrect.

It is possible that the Court will hear a case against a person against the wishes of a state that is not a party to the statute. It is equally possible that the Court will hear a case against the wishes of a state party to the statute. In neither case, however, is the Court's exercise of jurisdiction in conflict with the norms of international law.

The Court derives its general jurisdiction from the states parties to the statute, as well as jurisdiction over specific cases by other states through a declaration lodged with the registrar, or by the UN Security Council acting under Chapter VII of the Charter of the UN. The Court only inherits the territorial jurisdiction of states and their jurisdiction over their own nationals abroad. Neither of these bases of jurisdiction is controversial under international law.

Furthermore, the exercise of this jurisdiction is strictly limited to the statute crimes of genocide, crimes against humanity and war crimes — and the crime of aggression, once states parties have adopted a provision defining the crime and setting out the conditions under which the Court's jurisdiction may be exercised.

Most of the statute crimes actually attract universal jurisdiction, through the Geneva Conventions and their First Additional Protocol, the Genocide Convention and the Convention against Torture. A person of any nationality who commits any of these crimes anywhere is liable to prosecution and punishment in every country anyway.

The authority for the UN Security Council to grant the court jurisdiction over these statute crimes when committed anywhere or by anyone does not derive from the statute either, but rather from the Charter of the UN. The Charter authorises the Security Council under Chapter VII to intervene in matters that are essentially within the domestic jurisdiction of any state — irrespective of whether the state is a member of the UN. Furthermore, the Security Council's referral of a matter to the Court, like all decisions of the Security Council, would be binding upon all members of the UN, whether or not they are parties to the statute.

### Politics and the International Criminal Court

There has also been a lot of talk about the possibility of the Court being used by states or NGOs to launch politically malicious prosecutions. In our view, this is simply not credible. It is inconceivable that any politically motivated referral to the Court from a state party without sufficient merit based on evidence would satisfy the scrutiny of the Prosecutor. Similarly, politically motivated referrals to the Prosecutor from any other source would have to satisfy both the Prosecutor and the Pre-Trial Chamber of their independent merit before they could proceed further.

It is also inconceivable that any politically motivated referral to the Court could emanate from the UN Security Council. Such a referral would need the affirmative vote of at least nine members of the Security Council, including the concurrence of all five permanent members.

Undoubtedly, some states and organisations will attempt to use the Court to promote particular political agendas, but unless they are able to demonstrate the commission of a statute crime of sufficient gravity to attract the Court's jurisdiction, such attempts are likely to rebound upon themselves. It is also likely that states will criticise the operation of the Court as being politically motivated if the Court is investigating or prosecuting nationals or crimes connected with those states, as has been the case with the International Criminal Tribunal for the Former Yugoslavia. As the ICTY's experience demonstrates, neither scenario is likely to impact upon the viability or legitimacy of the Court.

The Court does, however, have a quite deliberate political function. It places a powerful incentive upon those states that ratify its statute — as well as many that do not — to ensure that they would be able to try the statute crimes in their own jurisdiction should the need arise, in order to take advantage of the principle of complementarity.

A case is not admissible before the Court if it is being or has been investigated or prosecuted by any state — party to the statute or otherwise. But this only applies if the investigation or prosecution is genuine, and not a shield against justice. The Court decides itself whether this investigation or prosecution is genuine, thus providing an impartial adjudication of a state's bona fides in investigating or prosecuting particular allegations of statute crimes which fall within the jurisdiction of the Court, or are the subject of a Security Council resolution. It will therefore be a powerful incentive for states to fulfil and enforce their existing humanitarian obligations under international law.

International support for the Court is impressive and continues to grow. One hundred and twenty states voted for its adoption and since then, 97 states have signed the statute and 12 have ratified (as of 22 June 2000). The rate at which states ratify the statute is increasing, and we can be confident that the statute is likely to enter into force within five years.

The very fact that we are so close to establishing an International Criminal Court is itself an indication of how far the international community has come in responding to the universally-held wish to see perpetrators of the worst crimes of international concern brought to justice. Symptoms of this abound, from the pursuit by Spanish courts of Augusto Pinochet, to the very encouraging efforts of Cambodia to establish an internationally credible tribunal to prosecute the crimes of the Khmer Rouge. The International Criminal Court brings home what should have been obvious from the beginning — that the actions of rogue states are the consequence of the actions of individuals, and by holding individuals accountable, new norms of state behaviour must of necessity follow.

## Conclusion

I have referred today to two examples where I believe Australia has made, or is making, a difference regarding the maintenance of international peace and security through the mechanisms provided by international law. Responding directly to humanitarian crises through the structures of the UN, and punishing the perpetrators of the most serious crimes of international concern are two important elements of creating a more peaceful and secure world. These two examples today demonstrate that international law can provide answers to real problems in international relations.

It may often seem that the progress we are making is incremental and rather tentative in the face of the many difficulties that we have to deal with in finding solutions to problems that will actually work in practice. But I believe that those of us who work in the field of international relations — whether as lawyers or in other roles — should not lose hope. In the broad historical sweep of humanity's experience, the last century has seen very considerable progress in the role played by international law in helping to provide solutions to international problems.

This joint meeting is testimony to that progress. It is clear that, in the century that lies ahead, the growth of international law will continue. All of us, as civilised human beings, can take heart from this assurance that 'the sword of justice' will continue to be upheld.

## **Is there an Asia-Pacific Regional Law**



# Cross-border Dispute Resolution in Civil and Commercial Cases: Current Developments and New Proposals

David Goddard \*

## Introduction

This panel has been asked to debate whether there is a regional Asia-Pacific law. My paper concerns a field where there is *not* any regional law to speak of, and where this absence is a cause for significant concern. The two closely related issues I propose to discuss are: the allocation of jurisdiction to decide civil and commercial disputes; and the recognition of judgments given in one country in other countries throughout the region. In short, my thesis is that the absence of any significant legal coordination in these fields hinders trade in the region and globally, in particular the development of electronic commerce involving small and medium enterprises (SMEs) and consumers, and that this gap should be addressed through a combination of multilateral initiatives and supplementary bilateral initiatives.

In this paper, I will begin by outlining the current position, and the reasons for my concern and talk briefly about the position in other regions, in particular Europe. I will describe the work that is currently being done by the Hague Conference on Private International Law to develop a multilateral response to these issues and I will conclude by suggesting ways in which countries in the Asia-Pacific region might address the same issues in more depth, and faster. In particular, I have some concrete proposals for enhanced co-ordination in this area between Australia and New Zealand.

## International arbitration

My focus today is on judicial dispute resolution. However I will begin by describing the current position in relation to arbitration of cross-border disputes, because the very effective multilateral arrangements in this closely related field contrast so sharply with the absence of co-ordination in relation to judicial dispute resolution. One of the most practically useful Conventions in the commercial world today, which underpins provisions included routinely in many commercial transactions, is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This Convention has been ratified by more than 120 countries, including Australia, New Zealand and the United States and many other countries in the Asia-Pacific region. It applies to arbitral awards made outside the state in which recognition or enforcement is sought, and other awards which are not regarded as domestic awards in that state. The Convention allows contracting states to restrict the application of the Convention to differences arising out of legal relationships which are considered to be commercial under the national law of that state: many contracting states have made this reservation, but a significant number apply the Convention without this limitation.

The New York Convention has two principal limbs. It requires contracting states to recognise and give effect to agreements in writing to submit a dispute to arbitration, where the subject matter of the dispute is capable of settlement by arbitration. The courts of a contracting state are required to decline to hear a claim which the parties have agreed to arbitrate. And it provides for the recognition and enforcement in every contracting state of awards given in other contracting states.<sup>1</sup> It restricts the grounds on which recognition and enforcement can be denied, and requires the local procedure (including fees etc) not to be 'substantially more onerous' than the corresponding rules in relation to recognition or enforcement of domestic arbitral awards. There are no limits on the type of award which can be enforced, in particular, if the arbitrator awards specific performance, or grants an injunction, that award will be enforceable in every contracting state. The effect of this is that where parties to a cross-border transaction include an arbitration clause in their agreement, they know that all the states which are parties to the New York Convention will respect that agreement, and that the courts of those countries will

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\* Barrister, New Zealand.

<sup>1</sup> The convention is expressed to apply to all non-domestic awards, but allows states to limit its application to awards given in other contracting states: a significant number of states have made declarations limiting the Convention's application in this way.

decline to hear any proceedings brought in contravention of that submission to arbitration. They also know that the resulting award will, subject to very limited grounds for review, be recognised and enforced in any contracting state.

The clarity and certainty of these arrangements significantly reduces risk for commercial parties. They know where their disputes will be tried. They know what laws will be applied (in particular, they know that there is no risk of a court in an unanticipated jurisdiction applying its mandatory laws rather than the law chosen by the parties to govern their dealings). When disputes do arise, it is very rare for time to be wasted in attempts to bring proceedings in the courts. When such attempts are made, they are almost invariably swiftly disposed of on an interlocutory basis.

### **The current position in relation to judicial determinations**

The position would be very different if, instead of agreeing to arbitration, the parties in my earlier example had agreed that the courts of a specified jurisdiction, for example, New South Wales, would have jurisdiction to decide the dispute.

The first (and by no means insignificant) problem would be to ascertain exactly what the position would be in respect of such an agreement. For there is no effective multilateral arrangement in relation to such agreements, nor am I aware of any bilateral agreements in relation to civil and commercial jurisdiction in this region. Even Australia and New Zealand, which have special arrangements in relation to enforcement of judgments and the taking of evidence, and some other procedural issues, have no special arrangements in force in relation to jurisdictional issues: the common law is applied in the same way as it is to every other country. So if the parties to this contract asked a lawyer to advise them whether their agreement would be effective, the answer would be that its effect would vary from state to state in the region, and that providing a detailed answer would be a complex task which required reference to the statutes, rules of court and case law of each relevant jurisdiction. Nor, in most cases, would the answer be clear cut. In most if not all countries, an agreement to submit to the courts of that country is effective to confer jurisdiction on those courts. But the chosen court can decline to hear the case, at least in the common law jurisdictions in the region, if it considers that there is some other court which is a more appropriate forum (the precise threshold varies from country to country, an issue I will describe later). So it is very likely, but not certain, that the chosen court would entertain the claim.

But what if one of the parties tries to sue elsewhere? Looking just at the common law position, agreements to refer a dispute to another jurisdiction are given significant weight, but are not treated as conclusive. Because they are not conclusive, an application for a stay needs to canvass all the other factors relevant to the question of which forum is more appropriate to try the issue. It is not enough, as it is in international arbitration cases, simply to exhibit a copy of the agreement and explain the nature of the dispute sufficiently to show that it falls within the arbitration clause. Evidence is required on relative cost, timeliness of disposal of proceedings, availability of witnesses and evidence generally, and so forth. So making and defending such applications is much more expensive, and their disposal by the courts takes longer. The uncertainty involved encourages such applications to be made more frequently than where there is an applicable arbitration agreement. Nor can it be predicted with any confidence that a judgment given by the chosen court will be enforced in every other country in the region. Some countries will only enforce judgments from countries with which they have a treaty, and have entered into few such treaties.<sup>2</sup>

Most common law jurisdictions will enforce a judgment given by a court to which the parties agree to refer the dispute in question, even where that judgment was entered by default. However, one very significant limit on this proposition is that most common law jurisdictions will only enforce foreign decisions which are final judgments for a money sum. If the result of the proceedings in the chosen court is an order for specific performance, or injunctive relief of some kind, there is no mechanism in Australia or New Zealand or in most other common law countries for enforcement of that decision. At best, the decision will be treated as giving rise

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<sup>2</sup> See the discussion of the position in the ASEAN countries in P M C Koh, 'Foreign Judgments in ASEAN — a proposal' (1996) 45 *International Comparative Law Quarterly* 844, and see generally D Campbell (ed), *International Execution against Judgment Debtors* (2000).

to a cause of action estoppel or an issue estoppel, which may enable summary judgment to be obtained in new proceedings in the second jurisdiction. And there is no provision for enforcement of interim decisions of foreign courts. Also where a judgment is enforceable, the procedure for enforcing it will vary significantly from country to country. There are some arrangements in place for registration of foreign judgments (mostly between Commonwealth countries). But in many cases, it is necessary to take proceedings of some kind to enforce the foreign judgment, resulting in significant additional cost and delay.

The problems thrown up by the example considered above illustrate just how unsatisfactory the law relating to jurisdiction and enforcement of judgments currently is. At a general level, the problems can be summarised as follows:

- the courts in most (if not all) countries in the region are willing to exercise a much broader jurisdiction than that which they recognise as exercisable by foreign courts, when questions of recognition or enforcement arise;
- many claims can be brought in more than one jurisdiction, and there is no common test for deciding which of several available courts should deal with the claim. Even as between Australia and New Zealand the test differs, with New Zealand applying the English test (is there another available jurisdiction which is more appropriate for the resolution of the dispute, in the interests of the parties and of justice?), while an Australian court will ask whether Australia is a clearly inappropriate jurisdiction, in the sense that continuation of the proceedings in Australia would be oppressive and vexatious to the defendant.<sup>3</sup> This encourages forum shopping by all parties, wasted costs and delays resulting from uncertainty, and strategic behaviour;
- most countries in the region will enforce some foreign judgments. But the jurisdictional requirements are stringent, and the types of judgment that will be enforced are generally very limited — in all common law jurisdictions that I am aware of, only money judgments will be enforced, though as noted above other judgments may give rise to cause of action estoppels or issue estoppels;
- the procedure for enforcement is often complex. Some sort of proceeding, or originating application, is often required. There are arrangements in place between various (mostly Commonwealth) countries in the region for enforcement of certain judgments by registration. However these arrangements provide few (if any) practical advantages;
- the position becomes particularly unclear and unsatisfactory where the dispute has a public policy aspect, and involves the potential application of mandatory laws of the jurisdiction called on to stay its proceedings, or to enforce a judgment from another jurisdiction. One area where this concern is particularly acute today, with the development of B2C internet activity, is consumer protection legislation. A lawyer who is asked to advise on the effectiveness of a clause in the standard terms posted on a website which provides for all claims to be brought in a particular jurisdiction, subject to a particular law, faces a nightmare of a task.

### **Bilateral arrangements in relation to enforcement of judgments**

I mentioned above the existence of a number of bilateral arrangements within the region relating to enforcement of judgments by registration. Most of these are very old. They apply between many Commonwealth countries, and also as between certain Commonwealth countries and a number of other states with which the United Kingdom entered into bilateral arrangements earlier this century. These arrangements are based on reciprocity of treatment, and do not have treaty status. They find their only formal expression in domestic legislation of the

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<sup>3</sup> For the English position, see Dicey and Morris, *The Conflict of Laws* (13<sup>th</sup> ed, 2000) ch 12; for the New Zealand cases adopting the English approach see D Goddard, 'Conflict of Laws: Jurisdiction and Foreign Judgments' in *Laws of New Zealand* (1992) [26–32]; for the Australian position see P E Nygh, 'Conflict of Laws' in *Halsbury's Laws of Australia* [85–350], [85–470].

relevant states, which typically provides for certain money judgments of superior courts of states to which the regime has been extended to be enforceable by registration, and limits the grounds for denying registration of such judgments. The relevant states are not bound to continue to afford reciprocal treatment to judgments of the others' courts: the legislation expressly contemplates the possibility of ceasing to apply the statutory registration procedure to judgments from a state to which the regime formerly had been extended.<sup>4</sup>

I have explained elsewhere the limits of these arrangements, and the reasons why in many cases a plaintiff would do just as well, if not better, by seeking summary judgment in an action to enforce the foreign judgment.<sup>5</sup> New Zealand and Australia have recently reviewed their reciprocal enforcement arrangements, which resulted in an extension of the registration system to include: judgments of inferior courts, judgments for taxes and, provision for enforcement of classes of non-money judgments (final or interim) to be specified in regulations. However this limb of the reforms has never been brought into force in either jurisdiction.

New Zealand and Australia also have special arrangements for enforcement of judgments in certain competition cases, brought under specified provisions of the *Trade Practices Act 1974 (Cth)* or the *Commerce Act 1986 (NZ)*. These arrangements are complemented by special provisions on taking evidence in competition cases, and sittings of courts from one jurisdiction in the other.

What all of these regimes have in common, however, is that they are concerned solely with enforcement of judgments, and do not address the question of which court has jurisdiction to decide the initial dispute. The result is that it is up to each country to decide what disputes its courts should entertain, without reference to the prospects of enforcement elsewhere. On a number of occasions I have been called on to advise on the possibility of enforcement overseas of a judgment obtained in New Zealand, and have had to advise the 'successful' plaintiff that there was no realistic prospect of enforcement of the judgment elsewhere: although the New Zealand courts had been willing to enter judgment against a defendant resident overseas, for example in Australia, the circumstances in which the judgment was entered meant that it would not be enforced in the defendant's home jurisdiction, or anywhere else outside New Zealand for that matter.

### The reasons for concern

This level of uncertainty, and the additional cost and delay that it brings, does nothing to facilitate trade within the region. The significance of this lack of co-ordination as a barrier to trade has been mitigated in the past by the fact that most cross-border transactions were entered into between reasonably sophisticated (and often substantial) parties which understood these issues, or involved members of trade associations that had experience with these issues, with the result that their agreements expressly addressed the question of dispute resolution. In particular, where the agreement referred disputes to arbitration, this muddle was avoided and the more sensible New York Convention regime applied instead. Or at least the parties agreed on a forum, with the result that there was a greater measure of certainty about where the case would be tried than would otherwise have been the case.

There may be room for debate about whether, until recently, these issues were acute enough to merit high priority on the law reform agenda. In my view, that doubt has been removed by the development of the internet, and the dramatic effect that the internet and modern technology generally have had on the ease of dealing across borders. Many other commentators have emphasised the need for increased co-ordination of laws in response to the dramatic increase in cross-border dealings brought about by the internet, and other modern technologies.<sup>6</sup>

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<sup>4</sup> A number of conventions concluded between the United Kingdom and certain European states in the 1920s and 1930s in relation to the conduct of civil and commercial litigation were extended to then Dominions, including Australia and New Zealand. But these treaties do not address questions of jurisdiction or enforcement of judgments: their focus is on other issues such as service of proceedings, taking of evidence, requirements to provide security for costs, and the provision of legal aid.

<sup>5</sup> If permitted to do so — many of these regimes preclude use of other methods of enforcement, with the result that the judgment creditor does not enjoy a choice of procedure.

<sup>6</sup> See, eg, P Sirinelli, 'L'adéquation entre le village virtuel et la création normative — remise en cause du rôle de l'Etat?' and C Kessedjian, 'Rapport de Synthèse' in Boele-Woelki and Kessedjian (eds), *Internet – Which Court Decides? Which*



The ease of dealing across borders — indeed, in many cases the invisibility and (apparent) irrelevance of borders when using the internet — means a dramatic increase in the number of cross-border transactions, and in particular of transactions of relatively low value entered into by individuals or small and medium-sized businesses with no particular experience in dealing across borders, who are less likely to appreciate the special issues that arise when transactions cross borders, or to address those issues expressly in their dealings.

More generally, whenever anyone makes information available on the web, the default position is that it is available the world over. The internet has dramatically enhanced the ability of anyone, even a private individual, to communicate with a broad audience, across borders. Information posted on the web is also exposed to unanticipated (and possibly undesired) access from anywhere in the world. It is possible to limit access to a site to certain persons (for example, with a password), but making a site publicly available subject to geographical limitations is not practicable.

One of the great attractions of the internet is the promise of a world-wide market, unconstrained by borders and the tyranny of distance, delivering significant benefits to consumers through an increased number of potential suppliers and increased access to information. The internet has reduced the transaction costs involved in identifying distant suppliers, and dealing with them, and also in some cases of delivering the product in question (consider music, or software, or services provided on-line). This means more competition, greater choice, lower costs and over time stronger incentives for providers of goods and services to seek out new and improved ways to satisfy their customers.

Among the most significant remaining barriers to development of a global marketplace, and the benefits that will bring, are legal barriers created by uncertainty as to which countries' rules will apply to particular on-line dealings, and where and how those rules might be enforced. There is also the (apparent) need for a supplier of goods and services to comply with the mandatory laws of all jurisdictions into which those products might be sold, or perhaps even all jurisdictions in which the website might be accessed, and there is the risk of exposure to legal proceedings (civil or criminal) in multiple jurisdictions.

Users of the internet today confront a complex and costly legal Babel, with many rules clamouring to be applied. The paradox is that few of these putatively applicable rules (sometimes none) are capable of effective application and enforcement. This results in risks which are difficult to assess and manage, and significant costs for those who attempt to do so. We can no longer afford to ignore these issues. Legal barriers to cross-border commerce are now relatively significant. It is the responsibility of policy makers to ensure that they are removed, so far as possible, so that the law facilitates rather than impedes the benefits that can be obtained from use of modern technology. How might we go about this?

### The European model

One region that has addressed these issues very comprehensively, and by and large successfully, is western Europe. All member countries of the European Union (EU) are parties to the Brussels Convention of 1968 on Civil Jurisdiction and Judgments. The parallel Lugano Convention of 1988 extended the regime, with limited modifications, to Austria, Finland, Iceland, Norway, Sweden and Switzerland.<sup>7</sup>

The Lugano Convention (like the 1968 Brussels Convention) is a 'double convention', which allocates jurisdiction in civil and commercial matters, and then requires any civil or commercial judgment of a convention country to be enforced in any other convention country, with minimal grounds for reviewing or challenging such judgments.<sup>8</sup> Each country has exclusive jurisdiction in certain matters, and concurrent jurisdiction in others.

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*Law Applies? Quel tribunal décide? Quel droit s'applique?* (1998); D Goddard, 'Does the Internet require new norms', *International Law Forum* (2000 forthcoming). For a general analysis of the rationale for legal co-ordination across borders, and an approach to setting priorities at regional and multilateral levels, see D Goddard 'Making Business Law: The CER Dimension' (Report for New Zealand Ministry of Commerce, 1999) available at [http://www.med.govt.nz/gbl/bus\\_pol/bus\\_law/cergoddard/index.html](http://www.med.govt.nz/gbl/bus_pol/bus_law/cergoddard/index.html).

<sup>7</sup> Austria, Finland and Sweden have since joined the EU.

<sup>8</sup> On the Brussels and Lugano conventions, see generally Dicey and Morris above n 3, 349–394, 530–542.

(Certain types of claim in which a court has no jurisdiction are also specified, essentially for clarity rather than by way of substantive provision, since jurisdiction must be based on one of the positive grounds specified.) If the court does not have jurisdiction under one of the heads specified in the convention, it cannot exercise jurisdiction over a defendant domiciled in a convention country. If the court has concurrent jurisdiction with the courts of another country, in most cases the court first seized of the claim will hear it: other courts are required to stay proceedings in favour of the court first seized. The doctrine of *forum conveniens* has no application (subject to a couple of possible, somewhat controversial, exceptions). If the conventions allocate jurisdiction to a court, it must exercise that jurisdiction, and cannot decline to do so. This 'double' approach, in which jurisdiction is the backbone of the convention, with enforcement and recognition flowing out of that allocation of jurisdiction, ensures greater predictability for both parties as to where a dispute will be tried. Also reduced costs of disputes on jurisdiction and applications for stays (these are largely eliminated), and greatly reduced costs of enforcement of judgments.

The Brussels and Lugano conventions are certainly not beyond criticism. They are currently being revised to address a number of widely held concerns, a process that is almost completed, and which will also result in the incorporation of the Brussels Convention into a regulation of the EU. There are also real questions about the suitability of some of the provisions of these conventions (especially those relating to jurisdiction in consumer and employment matters) in the context of electronic commerce: an issue which is prompting some controversy in Europe at present. But the conventions represent a significant plank in the infrastructure of the common market, reducing uncertainty and risk and other costs of cross-border dealings. There is much that we can learn from them.

### The position in South America

The other region that has addressed a number of these issues is South America. The Montevideo Convention of 8 May 1979 on the extraterritorial validity of foreign judgments and arbitral awards, negotiated within the framework of the Organisation of American States, is a 'simple convention' which is concerned solely with enforcement of judgments meeting certain criteria, and not with the allocation of jurisdiction. It is now in force in ten states.<sup>9</sup> This Convention was supplemented by the La Paz Convention of 1984, addressing questions of jurisdiction: however as only one state has ever ratified the 1984 Convention, it has never entered into force.<sup>10</sup> The Member States of Mercosur have also entered into a number of agreements in relation to jurisdiction, provisional measures and enforcement of judgments.<sup>11</sup>

### Current work by the Hague Conference on private international law

In 1992, the United States proposed to the Hague Conference on Private International Law that work commence on a new convention on jurisdiction and judgments in civil and commercial matters.<sup>12</sup> A proposed draft Convention has been prepared by a special commission of experts, meeting over a period of several years.<sup>13</sup> The draft convention is a 'mixed convention'. That is, it addresses jurisdictional issues and enforcement of

<sup>9</sup> For the text of the Convention, see <http://www.oas.org/EN/PROG/Juridico/english/treaties/b-41.htm>. For the current status of the Convention, see <http://www.oas.org/EN/PROG/Juridico/english/sigs/b-41.html>.

<sup>10</sup> For the text of the Convention, see <http://www.oas.org/EN/PROG/Juridico/english/treaties/b-50.htm>. For the current status of the Convention, see <http://www.oas.org/EN/PROG/Juridico/english/sigs/b-50.html>.

<sup>11</sup> Hague Conference, Special Commission on International Jurisdiction and the effects of foreign judgments in civil and commercial matters Working Document 185 (submitted by the representative of Mercosur).

<sup>12</sup> The Hague Conference on Private International Law prepared a convention on recognition and enforcement of foreign judgments in civil and commercial matters in 1971. But the convention was not a success: it was only ever ratified by three countries. The convention's lack of success has been attributed to a number of factors, including the success of the Brussels Convention and subsequent Lugano Convention, the complex structure of the convention (which required bilateral arrangements between each pair of countries to supplement its operation), and the fact that it was a *convention simple*, which failed to address the underlying issues of jurisdiction.

<sup>13</sup> For the text of the proposed draft Convention, see <http://www.hcch.net/e/conventions/draft36e.html>.

judgments. However it is not a complete code in relation to the exercise of jurisdiction in civil and commercial disputes by Contracting States. In short, the proposed draft:

- applies to civil and commercial matters, with certain specified exceptions (Article 1);
- sets out a number of grounds on which Contracting States are able to exercise jurisdiction (the ‘white list’) (see Articles 3–16, and for the scope of application of these provisions see Article 2(1));
- sets out a number of prohibited grounds which are insufficient for the exercise of jurisdiction, and which must not be relied on to found jurisdiction against a habitual resident of another contracting state (the ‘black list’) (Article 18);
- expressly contemplates that contracting states may, in their domestic law, provide for grounds of jurisdiction which are not included in the white list, provided that those grounds are not precluded by the black list (Article 17). Where jurisdiction is exercised on a ground falling within this ‘grey zone’, the enforceability of any resulting judgment in other contracting states is not governed by the Convention. Rather, it falls to be determined by the domestic law of each contracting state, which is free to allow or decline enforcement, or impose additional conditions on enforcement;
- provides for a court which is exercising white list jurisdiction to decline to hear proceedings, where that court considers that some other available forum is clearly more appropriate. However this discretion to decline to hear a case is not available where the court has exclusive jurisdiction under the Convention, for example where there is an exclusive choice of court agreement or the claim is brought by a consumer, or the proceedings concern rights *in rem* in immovable property etc (see Articles 4, 7, 8, 12);
- provides for enforcement of a judgment given by the courts of a contracting state based on ‘white list’ jurisdictional grounds in all other contracting states. The enforcing state can only decline enforcement on specified, and very limited, grounds. One of those grounds is that the court which granted the judgment did not have white list jurisdiction, that is, the enforcing court reviews the existence of jurisdiction, a significant practical difference from the position under the Brussels and Lugano Conventions; and
- extends beyond money judgments to injunctions and other forms of relief, and to certain interim orders as well as to final judgments.

A considerable amount of work remains to be done before a Convention is finalised and signed. There remain some significant differences between participants in the Hague Conference process. A number of articles of the proposed draft are very controversial. And subsequent meetings have confirmed that several of the articles require modification to address issues raised by electronic commerce, and modern technology generally. The current timetable contemplates the Convention being completed through a two-stage diplomatic conference, with the first meeting in June 2001, and the final meeting in early 2002.

The basic concept of a mixed Convention addressing these issues seems to me to have great promise. It enables issues on which agreement is reached to be included in the white list or the black list, as the case may be, with issues that cannot be resolved in a manner that commands widespread acceptance being relegated, at least for the time being, to the grey zone, effectively preserving the status quo. Even if the Convention were to do no more than confirm jurisdiction based on the habitual residence of the defendant or a contractual choice of forum, ensure that contractual choices of forum are respected, and provide for enforcement of resulting judgments, it would be a significant advance on the current position, comparable in practical importance to the New York Convention. In fact, it seems to me that it is possible to go well beyond this. It would be unfortunate if the aspirations of some participants to include a very large number of grounds in the white list and in the black list, with only a minimal grey zone, were to result in the practical failure of the Convention. My observation, as a participant in the process, is that this is an exercise where competing conceptions of the best outcome risk preventing the achievement of a very good outcome. That would be a terrible waste of an important opportunity, and of a great deal of hard work by participants the world over. I hope that we can avoid that pitfall.

### What should we be doing in the Asia-Pacific region?

Many countries in the Asia-Pacific region are playing an important role in the Hague Conference work. It is clearly appropriate for that to be the primary focus of efforts devoted to multilateral solutions in this field, over the next few years. However it is timely to be turning our minds to two other issues. First, assuming that the Hague Conference's proposed Convention is successful, should some or all countries in the Asia-Pacific region be pursuing a greater degree of co-ordination in this area, or seeking to achieve an earlier outcome than is likely from the Hague Conference process? Second, if the Hague Conference process does not result in a widely acceptable convention, should these issues be addressed at a regional level, until such time as an appropriate multilateral solution can be developed?

### Further coordination between New Zealand and Australia

One of the most interesting projects I worked on last year was a study, commissioned by the New Zealand Ministry of Commerce, which sought to develop a conceptual framework for co-ordination of business laws between New Zealand and Australia. Working with economists from the New Zealand Institute of Economic Research, I looked at the rationale for co-ordination of business laws generally, and how one might go about deciding whether to address a particular issue at a purely domestic level, or bilaterally, or multilaterally. I do not have time to talk in any detail about this fascinating exercise. Suffice to say that we reached some very clear conclusions about directions for business law co-ordination, and identified the potential for significant further co-ordination between Australia and New Zealand, in the light of the significant trade between the two countries, mobility of population, shared legal traditions, and other economic and social ties.<sup>14</sup> The Australian and New Zealand Governments are currently working on a revised memorandum of understanding in relation to co-ordination of business law. That memorandum is expected to identify a number of priority areas for future business law co-ordination. My own view is that one priority area is the question of exercise of jurisdiction in civil and commercial disputes, and enforcement of resulting judgments.

Whether or not the Hague Conference proposal results in a successful multilateral Convention, it seems quite clear to me that a closer degree of co-ordination is both possible and desirable at an Australasian level. A suitable model is moreover already available: these issues have been addressed as between the Australian states and territories in the *Service and Execution of Process Act 1992 (Cth)*. Essentially, this Act provides that proceedings issued in one state can be served in another state in accordance with that Act, and are then treated as if they had been served domestically. The resulting judgments are enforced throughout Australia. It is not open to a defendant to take no part in the proceedings, then contest the jurisdiction of the original court. However a defendant who considers that the court in which proceedings have been commenced is not the appropriate forum can apply to that court for a stay of proceedings on the grounds that another state's courts provide a more appropriate forum, in all the circumstances. That is, a *forum non conveniens* test akin to that applied in New Zealand and many other Commonwealth countries will be applied.

I see no reason why this regime could not relatively simply be extended to New Zealand. This would achieve a significant reduction in uncertainty and risk associated with dealings between the two countries, and would reduce the waste of costs on unnecessary and inappropriate disputes about where a claim will be decided, and about the enforceability of judgments. The importance of addressing these issues to reduce transactions' costs and facilitate trade was recognised early in the life of the European community: I urge policy makers in both Australia and New Zealand to acknowledge the significance of this issue, as one of the building blocks on which commercial activity is founded, and to address it in the next round of business law co-ordination work.

### Wider regional co-ordination?

It seems to me that there is some potential for this model to be applied to other countries in the region. However its appropriateness diminishes as the distance involved in travelling to defend proceedings increases, and as differences between legal systems, and other social and economic circumstances, increase. I cannot seriously imagine, for example, that a regime along these lines could ever be embraced by the United States. Indeed, from

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<sup>14</sup> My report can be found at [http://www.med.govt.nz/gbl/bus\\_pol/bus\\_law/cergoddard/index.html](http://www.med.govt.nz/gbl/bus_pol/bus_law/cergoddard/index.html), and the summary report prepared with NZIER at [http://www.med.govt.nz/gbl/bus\\_pol/bus\\_law/cerbuslaw/index.html](http://www.med.govt.nz/gbl/bus_pol/bus_law/cerbuslaw/index.html).

discussions in the Hague, my understanding is that there would probably be insuperable constitutional impediments to this, quite apart from questions of principle, or politics!

However it might well be the case that, once we have seen the final form of the Hague Convention, a number of jurisdictions in at this region will feel able to take the matter further. A sensible approach might be to take the Hague Convention as the foundation for any such regime, and attempt to extend it to provide a more comprehensive code. In particular, some of the compromises which are driven by differences between common law and civilian systems, or by a European desire to follow the Brussels/Lugano models as closely as possible, should be able to be avoided. But there seems little point in embarking on this work until the Hague process has been concluded, and we have achieved the best possible outcome in that forum.

Likewise, although we need to be mindful of the possibility of a regional approach if the Hague Conference fails to produce a successful multilateral solution, it seems to me that it would be premature to start work on any such exercise at this stage. Doing so would risk distracting our attention from the Hague process, which would be unfortunate and undesirable. Nor is it obvious that success will be substantially easier to achieve if a large number of countries in the region were to be involved. I see no harm, however, in reminding some of the other participants in that process that this region does have other options, and that unless sensible compromises can be reached in the Hague, those other options might well be pursued rather than ratifying an unsatisfactory Hague Convention.

### Summary

The laws in our region relating to jurisdiction and enforcement of foreign judgments are very unsatisfactory, and give rise to unnecessary risk and cost in cross-border dealings. These issues should be addressed as an integral part of reducing legal impediments to increased trade, in particular e-commerce. At a multilateral level, the brightest prospect for an early resolution of these issues lie with the Hague Conference. Until the proposed Hague Convention is completed, it would be premature to begin work on regional alternatives. However there is a very strong case for much closer co-ordination in this field between Australia and New Zealand, whether or not the Hague process succeeds. At an Australasian level, we should be able to move faster, and go further, than will ever be possible in a multilateral context. Nor does this require fundamental change to the laws of either country: the simplest solution would probably be an extension of the *Service and Execution of Process Act* regime to New Zealand. If we can achieve this, it will produce practical solutions to what is at present a very unsatisfactory position, in the nearer rather than the more distant future.



## **Recent Developments in International Criminal Law**





# Post International Criminal Court Challenges

Jose E Alvarez \*

For most international lawyers including, I suspect, most present here, the successful conclusion of the negotiations for an International Criminal Court (ICC) at Rome represented a rare triumph for the newly emerging 'global civil society.' On this view, the Rome negotiations were a hard-won revolution in international law-making, a victory for the forces of good over the 'counter-revolutionary' efforts of obvious villains such as the United States. For ICC enthusiasts Rome was a 'Grotian moment' or, for *afficionados* of Bruce Ackerman's trendy views of the United States constitution, tantamount to a 'constitutional moment' for the international system.<sup>1</sup> Assessments of what the ICC will mean in practice have been equally glowing. One recent piece argues that had the ICC been in place, the English struggles over Pinochet, the Turkish trial of Addullah Ocalan, and the case of the alleged Lockerbie bombers would all have been resolved much more expeditiously with considerably less political turmoil and uncertainty.<sup>2</sup>

Except for a few 'sore losers' regarded as apologists for the United States, most of the recent commentary on the ICC has been extremely laudatory. The ICC is seen as a potent tool for securing the uniform interpretation and enforcement of international criminal law in a politically neutral setting; the pinnacle of a system for accountability that will finally deter would-be perpetrators while preserving collective memory, mollifying victims, affirming the rule of law, and promoting national reconciliation. For most commentators the ICC improves on the ad hoc tribunal models for the Former Yugoslavia and Rwanda (the ICTY and ICTR), especially in its greater solicitude for the rights of victims. Indeed, these improvements — due in no small part to the intense lobbying efforts of various human rights and victims' non-government organisations present at Rome and in the subsequent prep coms — are part of the alleged victory for 'global civil society'.

For my purposes here I will set aside the United States' opposition to the Court and focus on other less-noted challenges facing the ICC. We should be leery of overly sanguine assessments of the ICC, even assuming that it is established according to schedule — and not just because the United States will not be a party. Our manifold goals and hopes for the Court are likely to exceed its grasp and may lead to quick (and probably unfair) disillusionment with those individuals unlucky enough to become associated with it. In my brief time, let me outline three of the many post ICC challenges.

## Challenge one: efficacy

The ICC's rules of procedure and evidence (being finalised this week in New York) do not suggest that an ICC criminal proceeding will take any less time than English efforts to extradite Pinochet nor prove any more efficient than the on-going Scottish trial of the alleged Lockerbie bombers. ICC proceedings are likely to be at least as wrought with political drama as those cases and other recent cases in national courts have been. They do not, in many respects, improve upon the models of the ICTY or ICTR.

My greatest concerns lie, ironically, with those aspects of the ICC that have won the most lavish praise from 'global civil society': the Court's intense preoccupation with the rights of victims. Under the rules of procedure and evidence, victims — defined broadly to include persons who individually or collectively have suffered any kind of physical or mental harm or substantial impairment of rights arising from crimes within the court's jurisdiction (rule Q)<sup>3</sup> — have the right to intervene, together with their legal representatives, at virtually all stages of an ICC proceeding — from the prosecutor's decision to initiate a prosecution (or refusal to do so), through jurisdictional or other hearings in advance of trial, through the trial itself and thereafter, as with respect

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<sup>1</sup> See L N Sadat and S R Carden, 'The New International Criminal Court: An Uneasy Revolution' (2000) 38 *Georgetown Law Journal* 381.

<sup>2</sup> See M J Kelly, 'Case Studies "Ripe" for the International Criminal Court: Practical Applications for the Pinochet, Ocalan, and Libyan Bomber Trials' (1999) 8 *Journal of International Law and Practice* 21.

<sup>3</sup> Note how this exceedingly broad definition of 'victims' could even encompass a victim state.

to requests for reparations. The procedures envision judges making decisions as to who constitutes a 'victim' for these purposes as well as orchestrating the thousands of victims who might be expected to come forward given the crimes at issue — as by designating proper representatives for groups of victims. At present the draft rules give victims access that is rare even for much simpler criminal cases conducted in national courts and is unprecedented at the international level. They envision victims being consulted with respect to all questions or challenges to jurisdiction or admissibility (rule 2.15, rule 5.3), being able to question witnesses, experts or the accused (rule 6.18, 6.30[C]), being able to comment on whether evidence is relevant or admissible (rule 6.5), and, of course, being closely involved, together with court-appointed experts, in determining the amount of reparations to be awarded on an individual or collective basis (rule 6.31). (To be sure, the judges have discretion to oversee or prevent any of these interventions but we can well imagine the political pressure judges would face if these victim rights were denied.) The ICC is also relatively open to non-victim groups, such as NGOs, since chambers are authorised to admit *amicus curiae* or other submissions by any state, organisation or person with respect to any issue a chamber deems appropriate (rule 6.6).

These rules are exceedingly attractive in human rights terms but their practicality, especially in terms of their effect on the length, costs, and perceived fairness of a criminal proceeding, remains to be seen. These untested rules impose on judges, prosecutors, and defence attorneys responsibilities that are closer in substance to those seen in mass tort litigation in the United States involving coordination among large classes of injured parties. Such cases have created difficult issues of competing interests and priorities, even for a wealthy state with a well-established judicial system and well-trained judges and lawyers. Yet the ICC is supposed to juggle this multitude of competing claims while mastering a new international criminal code and, of course, while respecting the criminal defendant's extensive panoply of rights. The rules also envision that the Court's registry will, apart from its usual duties, serve as combination truth commission and medical/psychotherapy unit. The registry is expected to keep all victims informed of their manifold rights and ongoing trial developments, refer them to lawyers and provide financial assistance for this purpose, obtain protective and all other medical and psychological assistance, assist them in participating at all stages and in their testimony — all while managing a victims' and witnesses' unit that will, in addition to providing witness protection and security, contain psychological expertise, gender and cultural diversity, child victims' and elderly persons' trauma experts, and, of course, specialists in social work, counselling, health care and interpretation (rules 4.1.9 [B4]).

This attempt to replicate within the ICC aspects that are more characteristic of truth commissions and compensatory or other non-criminal efforts for accountability reflects the all-embracing goals envisioned by many ICC advocates, including the diverse (and often conflicting) agendas of the many groups active in Rome and the subsequent prep coms. Adding so many bells and whistles to a criminal process may only undermine what is supposed to be the main event — the rendering of a just verdict in a reasonable amount of time — and could make that unattainable. I have spoken to no experienced prosecutors on either side of the Atlantic who are confident that a viable, fair trial can be conducted under these procedures — at least absent unlimited financial resources, extraordinarily competent personnel, and the patience to sustain interest in proceedings that are likely to make the interminable ICTY/ICTR proceedings conducted to date seem like models of efficiency. Complying with the demands imposed upon it by its own rules consistent with its broader mission will be the ICC's first challenge.

### **Challenge two: uniformity and consistency**

Many of the ICC's advocates hope that the ICC will end the proliferation of fora for handling mass atrocities, especially self-serving amnesties at one extreme and 'show' trials without benefit of due process at the other. Many hope that the establishment of a single world-wide permanent criminal court will also bring about a unified interpretation of international humanitarian law.

Some hope that ICC's silence with respect to alternatives to criminal prosecution will be interpreted to mean that nothing less than good faith individualised prosecutions of international crimes remain as acceptable options. On this view, partial or full amnesties or any other attempt short of a criminal trial at the national level would entitle the international prosecutor to initiate an ICC indictment on the rationale that such attempts demonstrate an 'unwillingness or inability' to carry out the required investigation or prosecution (art 17, Rome

Statute). This interpretation certainly suits those who believe that there is a 'duty to prosecute' some or all of the international crimes subject to the Court's jurisdiction.<sup>4</sup>

More thoughtful observers, especially those who support, for example, South Africa's Truth and Reconciliation Commission, believe that the ICC will need to be more nuanced. They argue that since the ICC prosecutor has the discretion to initiate an investigation only when it is in the 'interests of justice' (art 53, Rome Statute), the ICC will be capable of distinguishing among different types of amnesties or other efforts short of individualised trials. It has been suggested that the determination of whether or not to proceed with an international prosecution where a national amnesty has been proclaimed should turn on, for example, (1) the types of crimes being amnestied, (2) the remedies provided for victims despite the amnesty, (3) the support for the amnesty among the general population, (4) the role of the amnesty in providing for a transition to democratic rule, and (5) the general state of human rights both before and after the amnesty.<sup>5</sup> Others have suggested drawing distinctions between different types of truth commissions based on a number of factors, including whether the Commission was established by the legislature or executive of a democratically elected regime.<sup>6</sup>

I believe that the ICC will necessarily have to make some or all of these distinctions and that it will apply its scarce resources accordingly. But criteria for choosing between legitimate and illegitimate amnesties or truth commissions are not spelled out in the Court's statute or its rules and it is not clear that prosecutors and judges will agree on these, much less that they will apply them consistently.

I am also sceptical of the claim that the elaborate detail in the Court's statute and rules concerning the elements of crimes will lead to uniform international humanitarian law. Most of us here, as lawyers of the common law, are by nature sceptical of claims that any code will eliminate interpretative gaps and imaginative judicial attempts to fill them. This is especially likely to be true of a criminal code that was elaborated over a relatively short period of time, attempts an unwieldy melange of common law and civil law substantive criminal concepts, and builds on the creative but still skeletal relevant caselaw, including those judgments of the ICTY and ICTR. Note too that under complementarity, the ICC must defer to good faith national court judgments and that these decisions will not be subject to review — even to correct an erroneous interpretation of the law.

Nor is it clear that we ought to aspire to 'uniform' humanitarian law at the expense of other goals. While it is interesting that the existing ad hoc tribunals seem to be even now, before the ICC statute comes into force, turning to the more elaborate definition of crimes contained in the Rome statute for guidance, such attempts at securing uniformity of interpretation may in the long run not rebound to the credibility of international criminal law. Whatever one thinks of the crimes defined in the Rome statute or whether the definition of these crimes will *ultimately* become accepted as CIL, even ICC enthusiasts concede that the statute contains many examples of progressive development of existing law. Applying these novel aspects of substantive criminal law retroactively to crimes committed before the Rome statute comes into force, to instances where the local criminal law where the crime occurs differs substantively from the Rome statute, or in cases where the ICC's jurisdiction is not formally triggered may come back to haunt human rights advocates.

The ICC is ill-suited to uniform application of international norms in any case. We cannot assume that different chambers within the ICC will reach coherent and consistent results — even if many such trials were to take place. As compared to the ad hoc tribunals, the ICC's rules exacerbate the potential for inconsistency. Rule 6.18, a concession to French concerns that the ad hoc tribunals borrowed too heavily from common law procedures, gives ICC judges wide discretion to decide, on a case-by-case basis, just how a trial is to be conducted. This unprecedented discretion as to applicable procedures — a decided innovation compared to how criminal proceedings are conducted in national courts — could easily lead to sharp differences between, for example, how ICC investigations and trials presided over by chambers dominated by civil law versus common law judges

<sup>4</sup> See, eg, D Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

<sup>5</sup> See, eg, M Arsanjani, 'The International Criminal Court and National Amnesty Laws' in American Society of International Law, *Proceedings of the 93<sup>rd</sup> Annual Meeting* (1999) 65, 66-67.

<sup>6</sup> J Dugard, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001, 1012.

will be conducted. And, as all lawyers know, even subtle differences in procedure can lead to differences in result as well as to sharp differences in perceptions of fairness. Overcoming the impossible or inappropriate demands of many ICC enthusiasts will be the ICC's second challenge.

### Challenge three: politics

Supporters of the ICC tend to portray the Court as a triumph of legalism over power politics, especially the type engaged in by hegemonic powers. The Court's likely establishment is certainly a triumph for international lawyers but we should not fool ourselves into thinking that either we or the Court can ignore the realities of relative power. Putting to one side the possibility that the United States will seek to undermine the Court, other political challenges loom large.

Consider the necessary political compromise that the ICC will apply only prospectively, for crimes committed after the entry into force of the Court's statute (art 11). As the current cases of Indonesia and Cambodia suggest, the resolution of present human rights cases are inevitably linked to prior grievances — for political, as well as possibly moral, reasons. For these reasons, a state's willingness to cooperate with an ICC investigation may turn on whether such proceedings will include crimes committed by other regimes in the past. At present Indonesian authorities, for example, appear willing to consider prosecutions for events in East Timor only if atrocities committed as far back as the early 1960s by Suharto and others are also considered. Political realities may, therefore, disable the ICC from playing a role in many future cases — as well as undermine the Court's attempts to render a credible collective memory in cases that it does attempt but where the relevant history of barbarism did not begin with the entry into force of the Court's statute. The political acceptability of the Court's judgments may be undermined by its inability to deal comprehensively with a nation's history, including with respect to long-standing ethnic divides that lead to present-day crimes.

As this suggests, there will be considerable political pressures brought to bear to construct alternatives to the ICC to handle certain cases for temporal or other reasons — even when the relevant states are parties to the ICC and the Court would otherwise have jurisdiction. We should not expect that the ICC's establishment will end attempts at hybrid international/national efforts (as now seems likely in Cambodia), civil suits in national courts (such as the Karadzic litigation in the United States), novel proceedings (such as the Scottish trial in the Netherlands of the Lockerbie bombers), or interstate disputes involving crimes covered by the Court's statute (such as Bosnia's case in the International Court of Justice). Further, when we consider the possible benefits of these alternatives — including the possibility that, for example, a hybrid Cambodian tribunal may have a far greater impact on Cambodian society than any distant international trial ever could — we should not expect that the one-size-fits-all concept of international adjudication some see in the ICC will result in a one-size-fits-all approach to accountability.

Despite the heroic efforts to enable the ICC to fill all of our diverse accountability agenda, there will remain instances in which national authorities — for both legitimate and illegitimate reasons — will prefer a domestic venue but will need international assistance to make it happen credibly and other cases where particular victims or other survivors will turn to a remedy elsewhere than at the Court. Weaknesses in the ICC's ability to force states to submit evidence, witnesses, or those indicted may also force its prosecutor or its judges to devise inventive ways (not foreseen in the statute or the rules) to cooperate with or at least not interfere with such efforts. And of course, despite our hopes for effective criminal deterrence, there will be cases where the international community may need to take preventive action — and not rely on the distant possibility of possible prosecution — in order to effectively deter.

The political challenges resulting from competing national jurisdictions and from the inescapable need to bridge the often competing goals of national and international communities (and sub-groups within each) will remain long after the ICC is established and the Court will need to weather these to survive. For all these reasons and many more besides, the Court and the credibility of international humanitarian law will continue to depend on the political will of states, including major powers. Maintaining a reputation for judicious neutrality in the face of political pressure will be the ICC's third challenge.

## Conclusion

We simply do not know whether we have created an effective viable institution capable of carrying out numerous criminal trials that respect the rights of defendants or a human rights forum more suited to the 'venting' of victims' groups in the exceptional case where formal jurisdictional requirements and political realities coincide. Criminal trials cannot be everything to all people. We cannot use the criminal process to pursue all the goals that are now enunciated for the ICC — from reconciliation to establishing truth to the pursuit of individualised justice. I suspect that the ICC is a cumbersome combination of technique for mobilisation of shame/class action suit/truth commission/reparations process and criminal trial. I fear that it may collapse under the weight of competing goals and lack of financial or other resources to do all that its statute, rules, and enthusiasts demand. Perhaps we might have been better off establishing, alongside a more streamlined ICC, other mechanisms, including procedures for enabling localised truth or compensation commissions more suited to undertaking the myriad tasks needed for victim mollification and national reconciliation. All of which is to say that the much vaunted 'revolution' in international law-making or accountability — the 'Grotian Moment' — has not yet arrived.

But maybe the glass is half full, not half empty. Perhaps the number of successful ICC trials will not matter. Indeed, some would suggest that many of the NGOs active in the ICC effort — most of which lack experienced criminal law expertise — have other, essentially symbolic, goals in mind. If the intent at Rome was to 'send a message,' there is little doubt that the time-pressured negotiations and the ultimate vote at its end did that. The ICC's statute and rules unquestionably affirm, rhetorically at least, that international humanitarian law matters. And the threat that states may actually take seriously what the Rome statute says may yet inspire governments, even those now resisting the Court, to prosecute their own felons or those that come within their territorial jurisdiction or find other ways to come to terms with their past. For these reasons, I agree with those who say that the greatest impact of the ICC and the best indicator of its success will not be found in The Hague but within states. In the end the efficacy of the ICC may be determined not so much by the few (?) trials that are likely to be successfully pursued through its arduous, time-consuming and expensive processes but by the forms of accountability that it might inspire elsewhere, including within more credible and effective national courts around the world. If so, international lawyers should spend as much time perfecting these processes — including examining closely whether local laws facilitate domestic prosecutions of international crimes<sup>7</sup> — as we have trying to 'perfect' the ICC. The effort to till our own gardens closer to home may be the greatest challenge of all.

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<sup>7</sup> See, eg, D Cassel, 'The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity' (1999) 23 *Fordham International Law Journal* 378.



# A Functioning System of International Criminal Justice

Jon Cina \*

My comments today will, I hope, provide an overview of international criminal justice through the prism of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and, to a lesser extent, the other Security Council authorised *ad hoc* court, the International Criminal Tribunal for Rwanda (ICTR). I believe that together they have produced a functioning system of international law enforcement. It is one of limited scope, partial success and largely untested potential. Its existence is of tremendous significance, however, regardless of its achievements to date.

In January 1993 the Deputy Prime Minister of Bosnia and Herzegovina was returning from aid negotiations at Sarajevo airport under United Nations protection. He sat amidst French UN soldiers inside an armoured personnel carrier in a convoy of clearly marked UN vehicles. Bosnian Serb militia stopped the convoy at a roadblock, one of several used to control their three-year long siege of the city. After protracted discussions, the French commander opened the door of the vehicle whereupon the Bosnian Serbs reached in and shot the Deputy Prime Minister eight times, killing him instantly. This set the pattern for the UN Protection Force's failure to live up to its name and was, sadly, matched by the impotence of the rest of the Organisation. The Security Council expressed profound shock at and strong condemnation of the murder — a violation of international humanitarian law — and ordered an enquiry, after which no further action was taken.<sup>1</sup>

In April 2000, French special forces serving with the North Atlantic Treaty Organisation (NATO) peacekeeping force in Bosnia broke down the door of a house in Pale, the Bosnian Serb war-time capital, and forcibly detained Momcilo Krajisnik. Mr Krajisnik was, with Radovan Karadzic, formerly a member of the political and military elites that are alleged to have planned and directed the policy of savage crimes committed in the name of a 'Greater Serbia'. NATO acted pursuant to an arrest warrant issued by the ICTY in The Hague, following Mr Krajisnik's indictment for genocide, crimes against humanity, violations of the laws and customs of war and grave breaches of the Geneva Conventions.<sup>2</sup>

So over a distance of seven years and a few kilometres the character of the international community's response to massive atrocities has undergone what appears to be a paradigm shift in terms of enforcement. Between 1992 and 1995, United Nations Protection Force (UNPROFOR's) Chapter Six status under the Charter made its position in Bosnia untenable, relying as it did completely on the goodwill of the parties to the conflict. It had neither the bargaining nor the coercive power to enforce the dictates of humanitarian law. It faced the terrible moral calculus of whether to continue to attempt to supply the population with basic aid and to record crimes where possible, or to have consent for its presence withdrawn, thus forcing it to evacuate and remove even the small benefit to the inhabitants that its presence facilitated. On the ground, there was neither the will nor the capacity to attempt prevention of or justice for massive and systematic violations of international law.

The signing of the Dayton peace agreement<sup>3</sup> in 1995 officially ended the conflict and inserted NATO's Implementation Force (IFOR) in a peace-enforcement and peace-keeping role. A number of theories have been

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<sup>1</sup> Statement by the President of the Security Council, 8 January 1993, reproduced in 'The United Nations and the Situation in the Former Yugoslavia', UN Department of Public Information, DPI/1312/Rev.4–July 1995-10M p 142. This incident has been the subject of considerable comment: see D Rieff, *Slaughterhouse: Bosnia and the Failure of the West* (1995) 5, 150–1. However, the present author intends no criticism of the UNPROFOR personnel involved.

<sup>2</sup> *Prosecutor v Momcilo Krajisnik*, Case No. IT-00-39-I Amended Indictment, 21 March 2000 <<http://www.un.org/icty/indictment/english/kra-1ai000321e.htm>>.

<sup>3</sup> The General Framework Agreement for Peace in Bosnian and Herzegovina initialled at Wright-Patterson Air Force Base in Dayton, Ohio on November 21, 1995 and signed in Paris on December 14, 1995 (GFAP).

advanced to suggest that IFOR was legally required to detain persons indicted by the ICTY.<sup>4</sup> Whatever the case, it did not feel that it was obliged to do so or that it should be. IFOR assisted the ICTY only intermittently and explicitly refused to carry out arrests unless it came into contact with target individuals 'in the course of its normal duties'.<sup>5</sup> A Dutch unit did have such an encounter but after verifying the identity of the suspect concerned was ordered not to return to the scene to detain him. Meanwhile, Radovan Karadzic, under double indictment by the ICTY, routinely passed through UN and IFOR checkpoints. IFOR had the capacity and the right under the peace agreement to assist other organisations working in Bosnia. The settlement further expressly required the parties, Bosnia, Croatia and the Federal Republic of Yugoslavia, to cooperate with the ICTY and stated that the commander of IFOR and the international civilian administration co-ordinating the peace process retained final authority regarding the agreement's interpretation. Yet, as is well known, post-Somalia anxieties, fear of mission creep and the perceived requirements for a stable peace deprioritised the imperative of accountability, before both national and international courts.

Then priorities were re-evaluated. Over the course of 1997 the UN force in eastern Croatia, and then NATO in Bosnia assisted the ICTY in detaining those it had accused. NATO's policy evolved: if indictees were encountered, they would be arrested when the 'occasion made it propitious to do' so.<sup>6</sup> Presently, arrests occur on average every two to eight weeks and the United Kingdom maintains a force specifically to gather intelligence on and apprehend indicted persons, the last arrest occurring just three days ago.<sup>7</sup>

It has been suggested that this is the result of NATO and the ICTY being more familiar with each other's mandates and modes of operation.<sup>8</sup> There are a number of more comprehensive, and somewhat more convincing, justifications that might be posited, including the influence in 1997 of the newly appointed US Secretary of State, the new United Kingdom Labour Government and the policy emphasis on war crimes accountability in the face of a lack of progress in removing the immediate causes of the conflict in the former Yugoslavia, the chief one being the continued presence and influence of the planners and instigators thereof. Yet, the reason, or reasons, for this shift are, from the perspective of the development of international criminal law, somewhat extraneous. Rather, NATO accepted the nexus between conflict resolution and the seeking out and detaining persons charged with *jus cogens* crimes. The fact that it could do so, both as an international organisation and as its constituent member states acting in concert, reveals the rapid pace at which this branch of international criminal law is maturing. As such, it is merely the most accessible aspect of a new criminal justice structure capable of operating, required to operate, supra-nationally. It has been crafted principally by the ICTY and ICTR since their creation in 1993 and 1994. They have together and separately elaborated the mechanics of investigation, indictment, arrest, remand, trial, conviction, appeal, acquittal and imprisonment, as well as witness protection and jurisprudential development, each deserving more discussion than time presently permits.

Such efforts are premised of course on the mandates of the two International Tribunals, and by implication those of the International Criminal Court (ICC) and the international courts that have been variously mooted for a number of other conflict zones, including Cambodia, the Democratic Republic of Congo, East Timor and Sierra Leone, being realistic: that through prosecution and conviction they can engender a sense of justice in the victims of those convicted, as well as play a positive contributory role in the post-conflict situations in the former Yugoslavia and Rwanda. The question properly concerns the relationship between national and international methods of addressing the crimes and, by extension, the contexts in which they occurred. The

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<sup>4</sup> Arguments have relied on *inter alia*: the provisions of the Geneva Conventions pertaining to the repression of grave breaches; the GFAP itself; the Chapter Seven status of ICTY orders; and NATO's own internal procedures and decisions. See Is NATO Authorised or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia? P Gaeta, 'Law' (1998) 9 *European Journal of International Law* 174; 1996 *ICTY Yearbook*, Chapter V, D <<http://www.un.org/icty/publication/yearbook/1996/chapter5.htm#>>.

<sup>5</sup> The oft repeated answer to questions asking why IFOR and SFOR did not detain indicted persons.

<sup>6</sup> NATO Secretary-General Javier Solana, Transcript of Joint Press Conference, Sarajevo, SFOR LANDCENT Transcript 19 Dec. 1997, <http://www.nato.int>.

<sup>7</sup> Dusko Sikirica was detained by SFOR on June 25 2000.

<sup>8</sup> J A Burger, 'International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned' (31 March 2000) No 837 *International Review of the Red Cross* 129.



strains therein are complex and unsuited to the application of a generalised model: the needs of each victim group depend on their circumstances, requiring a specific and nuanced policy approach.

In this regard, the Statutes of the Tribunals are notable for their homogeneity. Nevertheless, to many working in the courts, doubts surrounding their efficacy often seem to be a form of putting the cart before the horse. Certainly, their progress has been sporadic, remains incomplete, as it would in any analogous legal system, and has suffered from poor structural and strategic choices. Both are too far removed from the populations they were created to serve, physically and culturally; both must confront the inflexibility and idiosyncrasies of UN management, together with the absence of any institutional context or historical credibility as regards supra-national criminal justice; both are constrained by the dynamics of staffs necessarily drawn from municipal legal systems; and both are operating in highly politicised contexts. Their total reliance on state co-operation, while not an obstacle *per se* to court processes, leaves them powerless to address non-compliance and has tended to undermine the courts rather more than the state-based framework in which they operate. More fundamentally, the lack of coherent, inter-agency approaches by the UN and by its member states to the underlying conflicts and the concomitant policy choices which cast the Tribunals as distinct from, rather than integral to, peace undoubtedly prejudiced their records.

As has been noted by other members of the panel,<sup>9</sup> the Security Council's failure to differentiate between Rwanda and the former Yugoslavia stands out in particular. In establishing the ICTR, it ignored the objections and wishes of the Rwandan Government and imposed the template used to create the ICTY. Thus handicapped, the court's own mismanagement of its affairs during its early years did not help matters. The situation has improved but it remains to be seen if its relationship with the Government will develop into one that benefits Rwanda and its attempts to construct a new community. Similarly, a lack of political support for the ICTY together with misplaced claims as to its potential raised false expectations about its actual purpose and disappointed many in the region, particularly in Bosnia. And during last year's bombing of Serbia, NATO repeatedly warned Serbian forces of the threat of punishment. Given that appalling crimes were being committed until the termination of the air campaign, such exhortations often seemed to be a substitute for the need to direct greater efforts towards prevention.

Given their extrinsic nature, any international criminal tribunal is likely to suffer comparable, if not necessarily as severe, difficulties. However, the political priorities that lurk in the shadows of international law do not negate the important potential of what has been accomplished thus far. That indictments with the force of law can be issued under the authority of the UN, their subjects arrested anywhere in the world, including by a multinational military force, and transferred to a third country for trial, and if convicted serve their sentences in one of a number of other states is in itself a profound and remarkable achievement.

Moreover, the ICTY does have an exemplary role within the specific environment for which it was established. Many of the states and entities of the former Yugoslavia lack a viable united polity, effective executive and credible judiciary. The trial by the ICTY of those chiefly responsible for the conflicts, together with the continued international monitoring of domestic prosecutions of other perpetrators, offers a temporary and partial solution to the political, legal and security concerns that for the foreseeable future will attend such processes occurring in local courts. ICTY trials should take place in the region, as acknowledged by the Tribunal in response to recent political developments in Croatia.<sup>10</sup> Ultimately, this could evolve into a more substantive relationship with domestic criminal justice. In Kosovo, for example, it is intended that international prosecutors and judges will work in local courts<sup>11</sup> and a Kosovo War and Ethnic Crimes Court will be established in the province to handle many cases that fall within the jurisdiction of the ICTY. In due course, judicial proceedings

<sup>9</sup> J Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365. See also Howland and Calathes, 'The UN's International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation' (1998) 39 *Virginia Journal of International Law* 135.

<sup>10</sup> See Letter dated 17 May 2000 from ICTY President Claude Jorda to President Stipe Mesic, Republic of Croatia, JL/P.I.S./501-e, <<http://www.un.org/icty/pressreal/p501-e.htm>>.

<sup>11</sup> UNMIK/Reg/2000/6 Regulation No. 2000/6 On The Appointment And Removal From Office Of International Judges And International Prosecutors; and Regulation 2000/34 27 May 2000 Amending UNMIK Regulation No. 2000/6 On The Appointment And Removal From Office Of International Judges And International Prosecutors.

should be complemented by broader initiatives such as the proposed mixed local/international truth commission for Bosnia.

More generally, the ICTY and ICTR have established that international criminal law is institutionally and mechanically feasible. The resulting normative expansion has become an important component in framing policy options in response to humanitarian crises. The ICTY Prosecutor entered Kosovo with the Kosovo Force (KFOR). The likely political imperative justifying this support from NATO was the ostensible vindication of its use of force against Serbia. Yet, it does not negate the legal and other benefits of immediate access to witnesses and physical evidence. Further afield, the UN Group of Experts for Cambodia proposed adding international prosecutions of the Khmer Rouge to the remit of the ICTY and ICTR Prosecutor. While perhaps a questionable distribution of resources, the intention was to create a dedicated Cambodia prosecutorial team based in Asia that could complement local expertise with the practical knowledge of the ICTY and ICTR. In another manifestation, the notion of intervening military forces acting in an interim law enforcement capacity against alleged perpetrators of qualitative or quantitative serious human rights abuses has gained currency in Kosovo, East Timor, and perhaps Sierra Leone. And the greatest single resource available to the ICC is the experience of the ICTY and ICTR.

In many respects, therefore, the Tribunals have been engaged in preparatory work to develop their capacity to function as criminal courts. In a recent review, the ICTY estimated that it would finish trying cases between 2007 and 2016, with the appellate phase requiring time beyond that.<sup>12</sup> It is a court that will last a generation, at least as long as the effects of the events it is called to adjudicate. As such, the refinement of its procedures is progressive. Both Tribunals recently established Outreach Programs, long-term public access projects that seek finally to consider and mediate the problem of the courts' distance from the former Yugoslavia and Rwanda. The ICTY has just submitted a request for a second increase in judicial capacity to the Security Council with the aim of reducing pre-trial detention, which currently may run to over two and a half years per accused. The tensions inherent in the 'experimental' work of both courts, the inevitable involvement of real victims, real witnesses and real accused in what are effectively test cases, are impossible to resolve, particularly with hindsight.

International criminal justice as theory has been well served by the students of the discipline. But the reality of its operation is best expressed by those it seeks to assist. The weather in Europe is now mild enough for the ICTY to begin, once again, its annual exhumations programs throughout the Balkans. To many of those attending as the investigators open some of the 440 mass graves so far identified in Kosovo, the fact that an international court is investigating and pursuing the fate of their relatives and friends is of value. In their words: 'The world must know what was done to us.'

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<sup>12</sup> Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, May 2000, <<http://www.un.org/icty/pressreal/RAP000620e.htm>>.

# **Maritime Boundary Settlements through Joint Development Zones**



# **The Legal Status of the Timor Gap Treaty Post-UN East Timor Referendum: Is State Succession to Joint Development Mandated by International Law?**

David M Ong\*

## **Introduction**

The legal status of the 1989 Timor Gap treaty<sup>1</sup> between Australia and Indonesia is now cast in shadow in light of the overwhelming vote for independence by the people of East Timor in the United Nations organised referendum last August 1999.<sup>2</sup> This essay will begin with a description of the background, negotiation and main features of the Timor Gap treaty. It will then examine the international law relating to maritime boundaries of new states, with a view to ascertaining whether a future newly independent East Timor state<sup>3</sup> is under an obligation to respect the terms of the Timor Gap treaty. Finally, arguments advocating a joint development arrangement between a new East Timor state and Australia for the disputed continental shelf area and the petroleum resources therein will be discussed. Regardless of whether joint development is mandated by

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<sup>1</sup> Full title: Treaty between the Australia and the Republic of Indonesia on the Zone of Co-operation in an area between the Indonesian Province of East Timor and Northern Australia, signed (in the airspace) over the Timor Gap on 11 December, 1989; entered into force on 9 February, 1991. (hereinafter: the Timor Gap treaty) Sources: (1990) 29 ILM 469; and V Prescott, 'Australia-Indonesia (Timor Gap)' Report No 6-2(5) in J I Charney and L M Alexander (eds), *International Maritime Boundaries*, Vol II (1993) 1245. Also in H Fox (ed): *Joint Development of Offshore Oil and Gas*, Vol. II (1990) part III, 235. For an early analysis of the background and main features of the Treaty, see: V L Forbes and F M Auburn, 'The Timor Gap Zone of Co-operation' *Boundary Briefing* No 9 (1991).

<sup>2</sup> The UN-sponsored referendum on East Timor's future took place on 30 August, 1999. The vote was organised by UNAMET the predecessor organisation to the present UNTAET. Following a strong voter turn-out (98.6%), UN Secretary General Kofi Annan announced on 4 September 1999, that the result was an overwhelming vote in favour of independence for East Timor. Almost 80 per cent (78.5%) of those registered to vote rejected a proposal for autonomy within Indonesia, thereby supporting East Timor's separation from Indonesia. In November 1999, the Indonesian People's Consultative Assembly met and accepted the result of the East Timor vote. On 25 October 1999, by unanimously adopting UNSC Resolution 1272 (1999), the UN Security Council established UNTAET for an initial period until 31 January 2001. It is responsible for the administration of East Timor and empowered to exercise all legislative and executive authority, including the administration of justice. The Security Council also mandated UNTAET to provide security and maintain law and order throughout East Timor; ensure the co-ordination and delivery of humanitarian, rehabilitation and development assistance; support capacity-building for self-government; and assist in the establishment of conditions for sustainable development. See: Press Release SC/6745, 4057<sup>th</sup> mtg (am), 25 October 1999. This followed two days of extensive negotiations in New York between the UN Secretary-General, Kofi Annan and the Indonesian and Portuguese foreign ministers during March 1999, culminating in an agreement that allowed both local East Timorese (pop. 600,000) and the East Timorese diaspora living all over the world (30,000), the majority being in Portugal, Australia and Macau, to participate in a direct ballot to decide whether the territory remained part of Indonesia, or became independent. See J Aglionby, 'UN Pressure gives East Timor Vote on Independence' *The Guardian* newspaper (UK), Saturday, 13 March 1999, 18.

<sup>3</sup> Here, it is submitted that East Timor falls within the category of states *in statu nascendi*, as described by Crawford, where he notes that '(t)he capacity of entities *in statu nascendi* to acquire rights under other forms of international arrangement is also a matter of some difficulty.' See J Crawford, *The Creation of States in International Law* (1979) 394.

international law, it is argued here that it represents the most effective solution to the immediate problem of exploitation of the petroleum resources found in the disputed area. The recent Memorandum of Understanding (MOU) between the Australian government and the UN Transitional Administration in East Timor (UNTAET)<sup>4</sup> continuing the application of the legal regime established by the Timor Gap Treaty appears to vindicate this view.

### The background, negotiation and main features of the Timor Gap treaty

The Australia/Indonesia Timor Gap Zone of Co-operation Treaty was agreed in 1989 to fill in the gap between the continental shelf boundaries of the respective countries that were delimited by agreements in 1971 and 1972.<sup>5</sup> The existence of this gap was due to the fact that at the time of the earlier maritime delimitation agreements between Australia and Indonesia, the land territory to which this gap appertained, that is, East Timor, was controlled by Portugal. However, in late 1975 Indonesia invaded East Timor and formally annexed it on 17 July 1976.<sup>6</sup> This illegal action stalled negotiations for the resolution of the Timor Gap because of Australia's initial reluctance to recognise the Indonesian army's enforced incorporation of East Timor into the Indonesian state.

However, a growing perception of international community indifference,<sup>7</sup> despite UN Security Council Resolutions against Indonesia, and the lack of concerted efforts on the part of the Portuguese to resolve the East

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<sup>4</sup> Full title: Memorandum of Understanding between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET), acting on behalf of East Timor, on Arrangements Relating to the Timor Gap Treaty, 10 February 2000. Adopted in an Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued operation of the treaty between Australia and the Republic of Indonesia on the Zone of Co-operation between the Indonesian Province of East Timor and Northern Australia of 11 December 1989. Performed at Dili, 10 February 2000. Entry into force: 10 February 2000, but with effect from 25 October 1999. See ATS 2000, No 9, accessed at the following website: <<http://www.auslii.edu.au/au/other/dfat/treaties/2000/9.html>>.

In April, 2000 Australia approved legislation giving effect to the above treaty with UNTAET. See *Timor Gap Treaty (Transitional Arrangements) Act 2000*.

<sup>5</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, signed at Canberra on 18 May 1971 and the Agreement between the Government of the Republic of Indonesia and the Government of the Commonwealth of Australia Establishing Certain Seabed Boundaries in the area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971 signed at Jakarta on 9 October, 1972. See V Prescott, 'Australia-Indonesia (Seabed Boundaries)' Report No 6-2(1) and 'Australia-Indonesia (Timor and Arafura Seas)' Report No 6-2(2) in Charney and Alexander (eds), Vol II (1993) above n 1, 1195–1205 and 1207–18, respectively.

<sup>6</sup> The legality of this annexation and consequently the rights of both Indonesia and Australia to enter into any agreement over the exploitation of hydrocarbons in the continental shelf area pertaining to East Timor was the subject of a case brought by Portugal against Australia, before the ICJ, on 22 February 1991. See I Scobbie, 'The East Timor Case: The Implications of Procedure for Litigation Strategy' (1991) 9 *Oil and Gas, Law and Taxation Review* 273.

On 30 June 1995, the Court delivered its decision, holding by 14 votes to two that it lacked jurisdiction to deal with the dispute brought by Portugal against Australia in the absence of Indonesia's participation in the proceedings, which the Court held to be indispensable since the legality of Indonesia's conduct in annexing East Timor was fundamental to the determination of the dispute (para.24). See: *Case concerning the East Timor (Portugal v Australia)* Judgement, [1995] ICJ Rep 90 and 34 ILM 1581. See also: S B Kaye, *Australia's Maritime Boundaries*, Wollongong Papers on Maritime Policy No 4, (1995) 75.

<sup>7</sup> Calvo-coressi, eg, notes that both Portugal and Australia implicitly acquiesced in the Indonesian invasion of East Timor, while '(T)he rest of the world hardly noticed.' See P Calvo-coressi, *World Politics Since 1945* (6<sup>th</sup> ed), (1991) 472. Cassese postulates that the general apathy displayed by the international community, which amounted to the effective tolerance of the Indonesian occupation of East Timor, can be accounted for by political considerations, in particular the strategic importance of Indonesia for the West. See A Cassese, *Self-Determination of Peoples: A Legal Re-Appraisal* (1995) 227.

Timor issue,<sup>8</sup> led the Australian government to conclude that its national interests were better served by granting *de facto* recognition of Indonesian sovereignty over East Timor. Declining production from Australia's major oilfields in the Bass Strait, coupled with the promisingly large potential for exploitable hydrocarbons in the Kelp structure to the north of the Timor Gap area, further reduced Australian reticence to renewing negotiations with Indonesia over the Timor Gap. Thus, in 1979, Australia resumed the sea-bed boundary negotiations with Indonesia that had initially begun with Portugal. These negotiations culminated in a Joint Statement by the two Foreign Ministers released on 25 October 1988 which, *inter alia*, established a Zone of Co-operation in the Timor Gap in respect of petroleum exploration and exploitation. This Joint Statement was followed by the definitive treaty slightly more than a year later.

The Timor Gap treaty, along with its four annexes,<sup>9</sup> was signed on 11 December 1989 by Mr Gareth Evans, Minister for Foreign Affairs and Trade on behalf of Australia and by Dr Ali Alatas, Minister for Foreign Affairs on behalf of Indonesia. This agreement is probably the most sophisticated joint development regime agreed to date.<sup>10</sup> Both the geographical division and institutional design are complex. Consideration of the respective states' legal claims and how these were resolved in the delineation of the Zone of Co-operation will be followed by an examination of the joint development regime that this treaty established for the shared exploitation of the petroleum resources in the overlapping continental shelf claims area.

According to Burmester,<sup>11</sup> the boundaries of the zone are based on the following criteria: In the east and west, the lines are based on the equidistance principle for adjacent coastlines. The northern and southern limits of the Zone of Co-operation represent the maximum continental shelf limits claimed by the two states and thereby delineate the area of overlapping claims. The line representing the southern limits of area A is the median line of this overlapping continental shelf claims area. In other words, if Australia and Indonesia had agreed to delimit their continental shelf boundary according to the median line principle, which is equidistant from the opposing coastlines of Australia and East Timor, then the agreed maritime boundary would have been drawn along this line. The northern limits of area A were drawn along a designated isobath<sup>12</sup> corresponding to the deepest point of the so-called Timor Trough, a sea-bed depression located due south of the East Timor coastline.

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<sup>8</sup> See K Suter, 'Timor Gap Treaty: The continuing controversy' (1993) 17 *Marine Policy* 294, 302.

<sup>9</sup> Under art 1(o), Annexes A, B, C, and D are included within the meaning of the 'Treaty'. Annex A contains the designation and description including maps and coordinates of the areas A, B and C comprising the Zone of Co-operation and is incorporated into the Treaty by art 1. Annex B contains the Petroleum Mining Code for area A of the Zone of Co-operation. This code governs operational activities relating to exploration and exploitation of the petroleum resources in area A subject to the power of the Ministerial Council under art 6.1(b) of the Treaty to amend it (art 1.1(i)). Annex C to the treaty contains the model production sharing contract between the Joint Authority and contractors on the basis of which production sharing contracts for area A are to be concluded subject to modification by the Ministerial Council under art 6.1(c) of the treaty (arts 1.1(g)).

<sup>10</sup> For an early analysis of its provisions see A Bergin, 'The Australian-Indonesian Timor Gap Maritime Boundary Agreement' (1990) 5 *International Journal of Estuarine (now Marine) and Coastal Law* 383. It should be noted however that unique as the Timor Gap treaty is, it is but one of three such joint development arrangements in Southeast Asian waters alone. The other two are: The 1979 Memorandum of Understanding between Thailand and Malaysia establishing a Joint Authority for the exploitation of the resources of the sea-bed in a defined area of the continental shelf of the two countries in the Gulf of Thailand, followed by the 1990 Agreement between the same two countries on the Constitution and other matters relating to the establishment of the Malaysia-Thailand Joint Authority, both texts in D Ong, 'Thailand/Malaysia: The Joint Development Agreement 1990', *Current Legal Developments* (1991) 6 *International Journal of Estuarine (now Marine) and Coastal Law* 57-72. Also, the 1992 Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the exploration and exploitation of petroleum in a defined area of the continental shelf involving the two countries, in T L McDorman, 'Malaysia-Vietnam', Report No 5-19, in Charney and Alexander (eds) above n 1, 2335, 2341.

<sup>11</sup> H Burmester, 'The Zone of Co-operation between Australia and Indonesia: A Preliminary Outline with Particular Reference to Applicable Law', in H Fox (ed), *Joint Development of Offshore Oil and Gas Vol II* (1990) 128, 129-30.

<sup>12</sup> This is a line drawn on maritime charts that traces every point of a specified ocean water depth.

The use of different criteria based on distance and geomorphology represent the different legal bases of the respective states during the stalemated delimitation negotiations. Australia based its claim on the principle of natural prolongation that formed the early underpinnings of the continental shelf regime.<sup>13</sup> Australia thus argued that the Timor Trough represented the natural limits of Australia's wide continental shelf and margin and hence the dividing line between the Australian legal continental shelf and the much narrower East Timor shelf.<sup>14</sup> Indonesia, on the other hand, argued that the 'default' limit for a coastal state's legal continental shelf is the 200-nautical mile distance criterion established by the 1982 UN Convention on the Law of the Sea (LOS)<sup>15</sup> and affirmed by more recent international maritime boundary delimitation cases.<sup>16</sup> The northern and southern limits of area A in the Zone of Co-operation therefore reflect the different legal criterion relied on for each of the two states' overlapping continental shelf claims.

Petroleum resource exploration and exploitation in area A is subject to joint control and revenue sharing (art 2(2)(a)). It is administered by a Ministerial Council (Part III: arts 5 and 6) and Joint Development Authority (Part IV: arts 7–11) on the basis of production-sharing contracts (Annex C). The Zone of Co-operation is divided into three areas: A, B, and C, that are subject to three different jurisdictional frameworks (art 2). Areas B and C are situated nearest to the Australian and Indonesian coastlines, respectively. These two areas are subject to the jurisdiction of the party most proximate to them. Thus, in area B, Australian jurisdiction and laws prevail, subject to the provision of 10 per cent of gross tax revenues from petroleum resource exploitation in this area to Indonesia (art 4(1)). A similar arrangement occurred in respect of tax revenues from the exploitation of area C, by the Indonesians to the Australians (art 4(2)). Finally, area A which lies in between the other two areas is subject to a truly joint development arrangement whereby the rights and responsibilities of the two parties in relation to exploration and exploitation of the petroleum resources therein shall be exercised by the Ministerial Council and Joint Authority on the basis of equal shares (arts. 2(2)(a) & 3).

The sophisticated nature of the treaty is evident from the complex institutional framework laid down for the joint development of petroleum resources in area A. It creates a hierarchical, two-level arrangement composed of a Ministerial Council and a Joint Authority.<sup>17</sup> The Ministerial Council has the overall responsibility for petroleum-related activities in area A of the Zone of Co-operation (art 6). It is therefore the principal policy-making body. The Joint Authority is subordinate to the Ministerial Council, and is responsible to the

<sup>13</sup> See *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, [19] and [43], where the principle of natural prolongation as the legal basis for both the continental shelf regime itself, and the extent of its outer limits, was elaborated. For a recent examination of the relationship between natural prolongation and the delimitation of maritime boundaries, see: M Zahraa, 'Natural Prolongation and Delimitation of Maritime Boundaries' (1996) VII *The Finnish Yearbook of International Law* 378.

<sup>14</sup> The use of the Timor Trough or Trench as a relevant circumstance to be taken into account in any continental shelf delimitation between East Timor and Australia based on the natural prolongation principle had been noted by Brown. See E D Brown, 'The Anglo-French Continental Shelf Case' (1979) 16 *San Diego Law Review* 461, 477, as cited in Zahraa, above n 13, 381-2, fn.24.

<sup>15</sup> Art 76(1) of this Convention provides that 'The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

<sup>16</sup> See *Continental Shelf Case (Libya v Tunisia)* [1982] ICJ Rep 18, where the Court held that natural prolongation was not the only important criteria to be considered when establishing the appropriate continental shelf boundary; and *Continental Shelf Case (Libya v Malta)* [1985] ICJ Rep 13, 35, where the Court further marginalised natural prolongation as a relevant criterion in all cases within the 200 nautical mile limit.

<sup>17</sup> Unlike the Malaysia-Thailand Joint Authority, eg, which ostensibly at least retains control over all aspects of policy and decision-making for the exploration and exploitation of the non-living natural resources in the Joint Development Area. See art 3(2) of the 1979 Memorandum of Understanding and art 7(1) of the 1990 Agreement on the Constitution of the Joint Authority. For analysis of this issue, see: D M Ong, 'The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?' (1999) 14 *International Journal of Marine and Coastal Law* 207, 233.



Council for the day-to-day management of the petroleum activities in area A (arts 7(3) and 8). Part III established a Ministerial Council for the Zone of Co-operation (art 5(1)), consisting of an equal number of Ministers designated by each party (art 5(2)), meeting annually or as often as required (art 5(3)), alternately in Indonesia or Australia and chaired alternately by a Minister nominated by each Party (art 5(4)). Decisions of the Council shall be taken by consensus and it may establish procedures for taking decisions out of session (art 5(5)).

The Ministerial Council has overall responsibility for all matters relating to the development of the petroleum resources in area A of the Zone of Co-operation (art 6(1)). Its functions include, *inter alia*, giving directions to the Joint Authority (art 6(1)(a)); amending the Petroleum Mining Code to facilitate petroleum development in area A (art 6(1)(b)); modifying the Model Production Sharing Contract (art 6(1)(c)); approving the agreement, termination, and variation of production sharing contracts between the Joint Authority (JA) and firms (art 6(1)(d), (e) & (f)); approving JA petroleum sales (h); approving the distribution of revenues from production sharing contracts in area A between Australia and Indonesia (j); settling disputes in the JA through consultation (k); approving rules, regulations and procedures for the effective functioning of the Joint Authority, including staff regulations (m); reviewing the treaty operation and making recommendations to the parties that the Council considers necessary for treaty amendment (n); appointing the Executive Directors of the JA (o); inspecting and auditing the JA's accounts (p); considering and adopting the annual report of the JA (r); and finally, reviewing distribution among Indonesia, Australia and third countries, of expenditure on petroleum operations in area A. The Ministerial Council shall also ensure optimum commercial utilisation of area A's petroleum resources consistent with good oilfield and sound environmental practice (art.6(2)).

Part IV of the treaty established a Joint Authority (art 7(1)), that has juridical personality and such legal capacities under the two parties' laws as necessary to exercise its powers and perform its functions, in particular capacity to contract, acquire and dispose property, to institute and be party to legal proceedings (art 7(2)). The Joint Authority is responsible to the Ministerial Council (art 7(3)). The Joint Authority shall consist of equal numbers of Executive Directors appointed by the Ministerial Council, nominated by each Party (s 9(1)(a)); three Directorates responsible to the executive Directors: a Technical Directorate (s 9(1)(b)(i)); a Financial Directorate (s 9(1)(b)(ii)); and a Legal Directorate (art 9(1)(b)(iii)); and a Corporate Services Directorate (art 9(1)(c)). Of the four Directors heading the Directorates, the Executive Directors shall appoint two from each Party (art 9(2)). The Executive Directors and the four Directors shall constitute the Executive Board (art 9(4)). The Executive Directors and personnel of the Joint Authority shall have no financial interest in any activity relating to exploration for and exploitation of petroleum resources in area A (art 9(5)). Decisions of the Executive Directors shall be reached by consensus, failing this by reference to the Ministerial Council (art 7(4)). The Joint Authority has its head office in Jakarta and an office in Australia, each of which shall be headed by an Executive Director (art 7(5)).

The Joint Authority, subject to directions from the Ministerial Council, is responsible for the management of petroleum exploration and exploitation activities in area A, in accordance with the treaty, the Petroleum Mining Code and production sharing contracts (art.8). These management functions include, *inter alia*, dividing area A into contract areas, commissioning environmental investigations prior to contract areas being advertised and making recommendations to the Ministerial Council on production-sharing contract applications (art 8(a)); entering into production sharing contracts with companies, subject to Ministerial Council approval, and supervising the contractors pursuant to the requirements of the Petroleum Mining Code (art 8(b)); terminating and transferring contractors (art 8(c), (d) & (e)); collecting and with the approval of the Ministerial Council distributing the proceeds of the Joint Authority's share of the petroleum production from contracts awarded in area A between the two parties (art 8(f)); preparing annual accounts of the Joint Authority for submission to the Ministerial Council (art 8(g)); controlling movements into, within and out of area A vessels, aircraft, structures and other petroleum exploration and extraction equipment and, subject to article 23, authorising the entry of workers (art 8(h)); establishing safety zones (art 8(i)); issuing regulations under the Petroleum Mining Code on all matters related to the supervision and control of health and safety, environmental protection and work practices (art 8(j)); making recommendations to Ministerial Council to amend the production sharing contracts (art 8(k)); requesting action by the parties for search and rescue and anti-terrorist operations in area A (art 8(l)(i) & (ii)); requesting assistance with pollution prevention measures from the parties (art 8(m)); preparing annual reports to the Ministerial Council (art 8(n)); with the approval of the Ministerial Council, varying the terms of the production sharing contracts (art 8(o) & (q)); with the approval of the Ministerial Council, marketing of

petroleum production (art 8(r)); inspecting and auditing the contractors' accounts (art 8(s)); such other functions as may be conferred on it by the Ministerial Council (art 8(u)).

The Australia-Indonesia Joint Authority is only responsible for the development of the *petroleum* resources in area A under article 8 of the Timor Gap treaty.<sup>18</sup> This limitation of the Timor Gap treaty to the regulation of activities pertaining only to petroleum resources has certain implications for the obligations of each party to the treaty should other non-hydrocarbon minerals be found within the zone. It is arguable that the exploitation of such minerals will be outside the jurisdictional and operational ambit of this treaty. Therefore, should a similar kind of dispute occur with regard to a non-hydrocarbon type mineral deposit situated within the Zone of Co-operation, particularly if it is located within area A of this zone, the respective governments might find themselves needing to negotiate another co-operative agreement to jointly exploit this non-hydrocarbon deposit.

The Joint Authority has juridical personality and more particularly, a contractual capacity for the performance of its functions.<sup>19</sup> The most important contractual function the Joint Authority has performed relates to entering production sharing contracts with corporations for the extraction of petroleum. In this, however, the Joint Authority is subject to at least two constraints: First, it can only enter such contracts subject to the Ministerial Council's approval.<sup>20</sup> Second, the production sharing contracts for area A have been formalised and annexed to the treaty; any variation of their provisions can again only be made subject to the approval of the Ministerial Council, under article 8(o).<sup>21</sup>

In area A, the parties shall also co-operate to prevent and minimise pollution of the marine environment arising from the exploration and exploitation of petroleum, in particular by providing assistance to the Joint Authority as may be requested pursuant to article 8(m) and where pollution in area A spreads beyond it (art 18(1)(a) & (b)). Pursuant to article 8(j), the Joint Authority shall issue regulations for marine environmental protection in area A and establish an oil spill contingency plan (art 18(2)). Contractors shall be liable for damage or expenses incurred as a result of marine environmental pollution arising out of petroleum operations in area A in accordance with contractual arrangements with the Joint Authority and the law of the State in which a claim in respect of such damage or expenses is brought (art 19).

In the exercise of criminal jurisdiction, a national or permanent resident of a state party shall be subject to the criminal law of that state for acts or omissions in area A connected with or arising out of the exploration and exploitation of petroleum resources, provided that a permanent resident of one state party who is a national of the other party shall be subject to the criminal law of the latter state (art 27(1)). A national of a third state, not being permanent resident of either party, shall be subject to the criminal law of both state parties in respect of acts or omissions in area A, subject to a double-jeopardy clause (art 27(2)(a)). In such a case the two parties shall consult each other as to which criminal law is to be applied, taking into account the nationality of the victim and the interests of the state party most affected by the alleged offence (art 27(2)(b)). All the foregoing provisions are subject to the rule that the criminal law of the flag state shall apply in relation to acts or omissions on board vessels including seismic or drill vessels in, or aircraft in flight over, area A (art 27(3)).

The parties shall assist and co-operate, through agreements if appropriate, for the purposes of criminal law enforcement, including the obtaining of evidence and information (art 27(4)(a)). They also recognise the interest of the other party where the alleged victim is a national of the other party and shall keep this party informed to the extent permitted by the law. The parties may arrange for officials of one party to assist in enforcing the criminal law of the other party. Where such assistance involves detention of a person who under article 27(1) is

<sup>18</sup> Again in contrast with the Malaysia-Thailand Joint Authority which also has control over the other non-living resources aside from merely petroleum. See art 3(2) and 3(4) of the Memorandum of Understanding; and art 7 of the 1990 Agreement on the Constitution of the Joint Authority, above n 17.

<sup>19</sup> Under art 7(2) of the treaty, above n 17.

<sup>20</sup> Art 8(b) *ibid*.

<sup>21</sup> Annex C to the treaty contains the model production sharing contract between the Joint Authority and contractors on the basis of which production sharing contracts for area A are to be included concluded. Under art 1(o), Annexes A, B, C, and D are included within the meaning of the 'treaty'.

subject to the jurisdiction of the other party, then such detention can only continue until it is practicable to hand the person over to the relevant officials of that other party (art 27(5)).

Claims for damages or restitution of expenses as a result of activities in area A may be brought in the state party that has or whose nationals or permanent residents have suffered the damage or incurred the expense. The court in which the action is brought shall apply the law and regulations of that state (art 28). The law applicable to production sharing contracts shall be specified in that contract (art 22). Other legal areas covered by provisions on the applicable laws include: customs, migration and quarantine laws (art 23); employment (art 24); health and safety for workers (art 25); petroleum industry vessels (art 26) and taxation law (art 29).

Any dispute arising between the parties concerning the interpretation or application of this treaty shall be resolved by consultation or negotiation between the parties (art 30(1)). Each production sharing contract entered into by the Joint Authority shall contain provisions to the effect that any dispute concerning the interpretation or application of such contract shall be submitted to a specified form of binding commercial arbitration. The parties shall facilitate the enforcement in their respective courts of arbitral awards made pursuant to such arbitration (art 30(2)).

In the event that the treaty ceases to be in force due to the conclusion of a permanent continental shelf boundary and there are in existence immediately prior to this date production sharing contracts with the Joint Authority, these contracts shall continue to apply to each state party or some other person nominated by the state party, in place of the Joint Authority, in so far as the contract is to be performed in the territorial jurisdiction of each state party, having regard to the agreed boundary delimitation. In such cases, each party shall apply to contractors within its territorial jurisdiction a regime no more onerous than that set out in this treaty and the relevant production sharing contract (art 34(1)(a) & (b)). The two parties shall at the time of concluding the permanent boundary delimitation make arrangements to give effect to article 34(1). The two states have promulgated the necessary enabling domestic legislation and given the written notifications under article 32 of the treaty, 30 days after which the treaty entered into force.

On signature of the Timor Gap treaty, Portugal delivered a written protest to the Australian government complaining of a flagrant violation of international law and the UN Charter on the basis that the annexation of East Timor by Indonesia was illegal. This protest was followed by legal action against Australia at the International Court of Justice (ICJ),<sup>22</sup> claiming that the Timor Gap treaty was illegal and should be declared null and void. The ICJ declined jurisdiction to entertain the Portuguese claim on the basis that the relevant legal issues arising from this dispute necessarily involved the actions of a third state, namely Indonesia, which did not accept the compulsory jurisdiction of the Court.<sup>23</sup>

However, recent developments have cast further doubt upon the legal status of the Timor Gap treaty and its continued applicability. The UN-sponsored referendum in East Timor saw a resounding vote for independence.<sup>24</sup> While the resulting violence and unrest initially delayed the implementation of this vote, crucially the acceptance of this result by the Indonesian government should pave the way for the eventual election of an independent East Timor government. This new government will then be in a position to begin negotiations with the Australian government as to the continued implementation (or otherwise) of the Timor Gap treaty. In the hiatus before a democratically elected East Timorese government takes over the reins, the UN

<sup>22</sup> See: *Case Concerning East Timor (Portugal v Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep 90.

<sup>23</sup> Ibid 105 [35]. For an analysis of several of the legal issues raised by this case, namely, the Court's jurisdiction, the legal effect of the right of self-determination, and the legality of the Indonesian occupation of East Timor, see C Antonopoulos, 'Effectiveness v. the Rule of Law Following the East Timor Case' (1996) XXVII *Netherlands Yearbook of International Law* 75.

<sup>24</sup> Above n 2. The Indonesian government accepted the UN-run ballot following two days of extensive negotiations in New York between the UN Secretary-General, Kofi Annan and the Indonesian and Portuguese foreign ministers during March, 1999. These talks culminated in an agreement that allowed both local East Timorese voters (600,000) and the East Timorese diaspora living all over the world (30,000), the majority being in Portugal, Australia and Macau, to participate in a direct ballot to decide whether the territory remained part of Indonesia, or became independent. See J Aglionby, 'UN pressure gives East Timor vote on independence', *The Guardian* newspaper (UK), Saturday, 13 March 1999, 18.

Security Council has established an interim administration, namely UNTAET.<sup>25</sup> In the exercise of its mandate, UNTAET has recently entered into a Memorandum of Understanding with Australia establishing a provisional arrangement for the continued application of the Timor Gap treaty.<sup>26</sup> This development raises the question as to whether some variation of the joint development arrangements established by the Timor Gap treaty will eventually be formally re-adopted between a new East Timor state and Australia.

### The legal status of the Timor Gap treaty

This section will consider the different legal bases that would allow a new East Timor state to discharge of any legal obligations it may have in respect of the treaty.<sup>27</sup> The following discussion will consider at least three alternative modes of analysis that can be utilised to determine whether the Timor Gap treaty has continuing legal effect.<sup>28</sup> First, it may be argued that the Indonesian invasion and consequent annexation of East Timor constituted an illegal act under international law that invalidates any diplomatic acts between Indonesia and third states (apart from Portugal) regarding the East Timorese population and its resources. The consequent invalidity of the Timor Gap treaty would then continue in respect of a new East Timor state and Australia. Second, the international law of state succession may allow a new East Timor state to renounce the treaty, should it so wish. This argument raises complex issues that need to be tackled before a definitive answer can be arrived at. Finally, should it be the case that a new East Timor state is deemed to succeed to the treaty, is it nevertheless possible for this new entity to argue that the *rebus sic stantibus* rule applies? According to this rule, a fundamental change of circumstances relating to the application of the treaty would result in its termination.<sup>29</sup>

### Can the Timor Gap treaty be declared invalid?

Article 69 of the Vienna Convention on the Law of Treaties, 1969 provides that where the invalidity of the treaty is established, the treaty is void and its provisions have no legal effect. We therefore begin this analysis of the legal status of the Timor Gap treaty by asking whether a future East Timor state can claim that the adoption of the treaty was an illegal act, thereby rendering the present joint development arrangement invalid. Such a claim would rely on the principle that illegal acts cannot result in legally binding instruments. Should this claim be upheld, the consequences for the continued operation of the treaty would be dire. As Nahlik notes, the claim of invalidity undermines the very roots of a treaty: 'It compels attention to the moment of the conclusion of the treaty, for at that very moment, something already must have existed which stood in the way of the validity of the treaty.'<sup>30</sup> Sforza argues that the Timor Gap treaty represents but one example of repeated violations by Indonesia of the territorial sovereignty of East Timor and should be considered illegal under international law.<sup>31</sup> This echoes arguments put forward by Portugal in its claim before the ICJ in the *East Timor Case*.<sup>32</sup>

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<sup>25</sup> By UNSC Resolution 1272 of 25 October 1999, above n 2. The Security Council established the UNTAET for an initial period until 31 January 2001.

<sup>26</sup> This arrangement was brought into force by an exchange of Diplomatic Notes on 10 February 2000 that retrospectively applied the provisional agreement as from 25 October 1999, ie, the date when UNTAET took over government functions on behalf East Timor.

<sup>27</sup> For a discussion of the traditional methods by which a treaty may be discharged, see J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6<sup>th</sup> ed, Sir Humphrey Waldock ed, 1963) 327.

<sup>28</sup> This is apparently notwithstanding Australia's own admission in its submissions before the ICJ in the *East Timor Case*, above, n 22 that the Timor Gap treaty would not bind an independent East Timor. Indeed the Australian government has reportedly given its official approval to the 'clean slate' approach for a succeeding East Timor state in the Attorney-General's submission to the East Timor Senate Enquiry on 19 April 1999.

<sup>29</sup> See: A Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude*, (1985) 201.

<sup>30</sup> S E Nahlik, 'The Grounds for Invalidity and Termination of Treaties' (1971) 65 *American Journal of International Law* 736, 738.

<sup>31</sup> J M Sforza, 'The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization',

General support for this view can be derived from the doctrinal literature. McNair, for example, includes the incompatibility or conflict with rules of international law within a list of possible factors that may render a treaty invalid.<sup>33</sup> However, it may be noted that there appears to have been some slippage on this issue more recently, especially since the widespread acceptance of the *jus cogens* doctrine as a legitimate reason for rendering a treaty invalid. It is arguable that the focus on *jus cogens* has narrowed perspectives to the extent that many publicists now contemplate only breaches of *jus cogens* norms as automatically invalidating treaties, thereby implicitly denying the traditional conception of a possibly wider category of international violations rendering treaties invalid.

On the other hand, present doctrine can be viewed as merely representing a refinement, rather than a limitation, of the possible factors invalidating a treaty. According to McNair, certain customary rules of international law and conventional rules such as the UN Charter stand in a higher category because they are necessary to protect the public interests of international society and are therefore universally applicable.<sup>34</sup> In fact, this is merely an argument for the peremptory nature of such rules, and thereby easily subsumed within the relatively new *jus cogens* category that the 1969 Vienna Convention enshrined as invalidating conflicting treaties (art 64). Aust notes that 'there is no agreement on the criteria for identifying which norms of general international law have a peremptory character. Whether a norm of general international law has it depends on the particular nature of the subject matter.'<sup>35</sup> Therefore, should *jus cogens* norms be defined restrictively, then a treaty that conflicts with certain international obligations regarded in the past as invalidating the treaty will not now do so.

In the *East Timor Case*, the Court itself was less convinced by these arguments as it refused to rule on the validity of the Timor Gap treaty in the case before it.<sup>36</sup> In its Judgment, the Court neither accepted that Indonesia had officially annexed East Timor, nor that Portugal remained the administering power over the territory.<sup>37</sup> Instead the Court suggested that a novel situation had emerged: East Timor remained a non-self-governing territory with a continuing right of self-determination under Chapter XI of the UN Charter,<sup>38</sup> but it was controlled by a non-traditional administering power, namely Indonesia. The legal implications of this finding are difficult to entangle but they do suggest that the invalidity of the treaty should not be presumed simply because of the illegality of the Indonesian annexation of East Timor. Moreover, the lack of formal protests against the Timor Gap treaty by third states (apart from Portugal) arguably reveals at least a measure of acquiescence on the part of the international community in this exercise.

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Note, (1999) 22 *Suffolk Transnational Law Review* 481, 525–6.

<sup>32</sup> Portugal maintained that 'Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389.' See *Case Concerning East Timor (Portugal v Australia)* above n 22, 98, [19].

<sup>33</sup> See A McNair, *The Law of Treaties* (1961) 206, 214–24. He notes that a treaty can be invalidated due to its incompatibility with (a) a rule of customary international law; (b) a rule of general conventional international law; (c) the UN Charter; and (d) specific obligations created by other treaties (p 214). This approach has been cited with approval by Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> ed, 1984) 162.

<sup>34</sup> McNair, above n 33 214–7.

<sup>35</sup> A Aust, *Modern Treaty Law and Practice* (2000) 257.

<sup>36</sup> The Court noted that 'the argument of Portugal under consideration rests on the premise the United Nations resolutions and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.' See *East Timor Case*, Judgment, above n 22, 103 [31].

<sup>37</sup> As Antonopoulos notes, 'the Court declined to accept as facts certain United Nations General Assembly and Security Council resolutions which affirmed Portugal's status as the administering power of East Timor.' above n 23, 76.

<sup>38</sup> See: *East Timor Case*, Judgment, above n 22, 103 [31].

Balanced against the Court's equivocal view, however, are the persuasive arguments contained in Judge Weeramantry's dissenting opinion. Judge Weeramantry considered the legal force of the relevant UN Security Council and General Assembly resolutions in line with each of Australia's objections to Portugal's contentions above. First, in respect of Australia's contention that the progressively lessening vote in favour of the General Assembly resolutions showed that those resolutions were of a diminishing level of authority, he argues that once a General Assembly resolution has been duly passed, it commands recognition and respect, irrespective of its political history or the voting strength it reflects.<sup>39</sup> Second, as to whether Security Council and General Assembly resolutions can lapse through desuetude, he observes that once these resolutions are duly passed they do not have to be repeated to retain their validity. It is to be presumed that they would retain their validity until duly revoked or superseded by some later resolution.<sup>40</sup> Third, the notion that these resolutions were nullified by supervening events was also denied by Judge Weeramantry, who suggested that it would be up to the relevant UN bodies, namely the Security Council and General Assembly, to decide whether the situation was altered and act accordingly. Finally, it is interesting to note that the Court found Portugal's assertion that the right of peoples to self-determination was *erga omnes*, irreproachable.<sup>41</sup> However, the arguably more important question of whether the treaty is invalidated on the ground that it violates an *jus cogens* obligation,<sup>42</sup> by violating the East Timorese people's right to self-determination and abusing their permanent sovereignty over their natural resources,<sup>43</sup> was not deliberated upon by the Court.

#### Will an independent East Timor state succeed to the treaty?

Assuming a newly independent East Timor state eventually takes its rightful place on the international stage, the next pertinent question is the extent to which this new state is bound to respect certain obligations under international law. In the context of this essay, the obligations in question relate especially to any treaties entered into by Indonesia,<sup>44</sup> ostensibly on behalf of the East Timor territory she was occupying (albeit illegally) between 1975 and September 1999.<sup>45</sup> Chief among these will certainly be the 1989 Timor Gap treaty. Consideration of these issues necessarily requires an appraisal of the international law of state succession in relation to treaties delimiting territorial boundaries and in particular, maritime boundaries. The extent of any obligations arising from previously agreed bilateral maritime boundary delimitation treaties between the predecessor state and third states should be examined. However, the international law on this issue is far from certain.<sup>46</sup> This renders its analysis necessarily speculative.

There are three main schools of thought in respect of state succession, which has been defined as a situation '(w)hen one state takes the place of another and undertakes a permanent exercise of its sovereign territorial rights or powers'.<sup>47</sup> These are the doctrines of universal and partial state succession, and the more recent 'clean

<sup>39</sup> See: Dissenting Opinion of Judge Weeramantry, 139–223, 189–90, *ibid*.

<sup>40</sup> *Ibid* 190.

<sup>41</sup> *East Timor Case*, Judgment above n 22, 102 [29].

<sup>42</sup> See art 53 of the Vienna Convention on the Law of Treaties, 1969.

<sup>43</sup> Brownlie suggests that both these principles are *jus cogens*, citing the Separate Opinion of Judge Amoun in the *Barcelona Traction Case* (Second Phase), [1970] ICJ Rep 304, as authority for the right of self-determination. See I Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed, 1998) 515.

<sup>44</sup> Consideration of any maritime boundary treaties entered into by Portugal would also have been pertinent but in this instance is rendered superfluous by their absence.

<sup>45</sup> When Indonesia signalled its acceptance of the result of the UN-sponsored referendum in East Timor, thereby allowing UNTAET to fulfil its mandate to administer the territory during its transition period to full independence and sovereignty.

<sup>46</sup> O'Connell's view on this subject while dated is still pertinent today: 'The law relating to state succession to treaties has never been completely settled.' See D P O'Connell, 'Independence and Succession to Treaties' (1964) *The British Year Book of International Law* 1962, 84, 84. Brownlie echoes this conclusion more recently when he notes that '(S)tate succession is an area of great uncertainty and controversy.' See Brownlie, above n 43, 650.

<sup>47</sup> See A S Hershey, 'The Succession of States' (1911) 5 *American Journal of International Law* 285, 285. The 1978

slate' approach. The universal state succession theory provides that the complete catalogue of rights and duties involving the predecessor state continues to be applicable to any successor state.<sup>48</sup> Partial succession on the other hand relies upon a prior determination as to whether the predecessor state's personality has survived the transition to the new state.<sup>49</sup> If the state's personality survived, then the successor state is said to have succeeded to the predecessor state's rights and duties.<sup>50</sup> The universal and partial succession arguments that certain rights and duties of the predecessor pass *ipso jure* to a successor sovereign predate the more recent 'clean slate' notion of state succession. However, they are arguably inapplicable in respect of newly independent states such as a future East Timor state. As Hershey notes, '(t)here is even a greater modification of these principles (of universal or partial succession) in the case of a colony or province which has achieved its independence.'<sup>51</sup>

The general rule applicable to newly independent states<sup>52</sup> on questions of state succession to treaty obligations adheres to the 'clean slate' approach.<sup>53</sup> This presumes the inapplicability of treaty obligations entered into by the predecessor state upon the succeeding state. Hence the right of a newly independent state to re-negotiate many of the treaty obligations entered into by the predecessor state.<sup>54</sup> However, even this general rule now

Vienna Convention on the other hand highlights the international responsibilities undertaken by the new state over its territory in its definition of the 'succession of states.' See art 2(1)(b) of the Vienna Convention on the Succession of States in respect of Treaties, 1978. Opened for signature: 23 August 1978; in force: 1996. See (1978) ILM 1488. By the end of 1998, only 15 states had ratified this Convention. Thus, the legal authority of the Convention itself as a definitive statement of the legal position of succeeding states under customary international law is uncertain. Mullerson, eg, notes that '(t)he two (1978 and 1983) Conventions on state succession have many clauses which pertain more to the progressive development of existing customary international law than to its codification.' See R Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (1994) 137. More recently though, its entry into force has prompted Aust to note that, 'although the Convention is largely an example of the progressive development of international law, rather than a codification of customary law, and is not therefore a reliable guide to the rules of customary law on treaty succession, its eventual entry into force, recent practice following the end of the Cold War, and decisions of the International Court of Justice, may have now breathed new life into some of its provisions.' See Aust, above n 35, 306.

<sup>48</sup> See S T Korman, 'The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession', Note (1992) 16 *Suffolk Transnational Law Review* 174, 178–9, citing Hershey, above n 47, 285. Korman and other writers have noted the failing appeal of the universal theory of state succession. Marek, eg, points out that the existence of universal succession would defeat the sharply defined notion of individual state sovereignty and identity that forms the cornerstone of modern international law. See K Marek, *Identity and Continuity of State in Public International Law* (2<sup>nd</sup> ed, 1968) 10.

<sup>49</sup> Korman, above n 48, 182–3, citing Hershey, above n 47, 288–96. Marek too postulates that general international law admits partial succession only, although it is unclear whether she conceives of partial succession in the same way as Hershey, *ibid* 11.

<sup>50</sup> Korman above n 48, 182–3, citing A R Cowger, Jr, Note, 'Rights and Obligations of Successor States: An Alternative Theory', (1985) 17 *Case Western Reserve Journal of International Law* 285, 289.

<sup>51</sup> Hershey, above n 47, 289.

<sup>52</sup> For the purposes of state succession, a 'newly independent state' is defined as a formerly dependent territory for the international relations of which the predecessor state was responsible. See art 2(1)(f) of the Vienna Convention on State Succession, 1978.

<sup>53</sup> The classic exposition of this rule is by McNair: '(N)ewly established states which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations.' See McNair, above n 33, 601. Balanced against this approach is the doctrine of universal succession which can be traced all the way back to the writings of Grotius. This doctrine stipulates that a new state succeeds to the *universum jus* of their predecessor states. Their rights and obligations devolving *ipso jure* from the previous state to the new one, without exception or modification. See H Grotius, *De Jure et Pacis Lib* (F Kelsey transl. 1913) 315–319.

<sup>54</sup> The right to re-negotiate treaties based on the 'clean slate' approach in itself raises further issues. Chief among these is the question whether certain treaties will continue in force during the interim period between independence and the new

enshrined in Article 16 of the 1978 Vienna Convention on State Succession<sup>55</sup> is open to question.<sup>56</sup> As Jenks points out, 'it is not clear why, now that the rules established by multipartite legislative instruments constitute so large a part of the operative law of nations, a new state should be regarded as starting with a clean slate in respect of rules which have a conventional rather than a customary origin.'<sup>57</sup> Beemelmans has noted more recently that 'in spite of a failure to codify State succession matters, a lack of consensus among learned authors, and clear tendencies in older precedents, there seems to be an emerging consensus in recent practice suggesting that State succession should not normally lead to a disruption of legal relationships at all levels.'<sup>58</sup> Brownlie observes presciently that, '(l)eaving questions of state succession on one side, the principle of effectiveness dictates acceptance, for some legal purposes at least, of continuity before and after statehood is firmly established.'<sup>59</sup> In reality, as Craven notes, neither the universal succession thesis, nor the 'clean slate' approach to state succession is generally applicable, nor do they resolve the majority of problems thrown up by state succession.<sup>60</sup> Finally, as O'Connell points out succinctly, '(W)hat is striking about the state practice in respect of succession to treaties in recent years (prior to 1979) is that it is the territorially-connected treaties alone which have given rise to controversy.'<sup>61</sup>

Moreover, the 'clean slate' rule itself is acknowledged to contain a number of exceptions.<sup>62</sup> It is therefore the extent to which any of the acknowledged exceptions to this rule may be applicable in the present situation that concerns us here. Legal doctrine has evolved a distinction between 'personal' and 'real' or dispositive treaties.<sup>63</sup> The latter category is regarded as providing legal obligations that succeed from the predecessor state to the new state. In this respect, territorial boundary treaties are regarded as examples *par excellence* of dispositive treaties whose obligations succeed to the new state. State practice on this issue is heavily in favour of the principle that boundary treaties remain unaffected by the succession of states. *Opinio juris* too generally accepts that boundary treaties devolve upon successor states despite the change of sovereignty. This exception to the 'clean slate' rule was therefore accepted as part of customary international law even before the 1978 Convention on State Succession was negotiated. As Shaw notes, 'The basic reason for the rule is accepted as that of necessity to maintain the stability and continuity of boundaries as an essential condition of international life as emphasised in the recognised principle of respect for the territorial integrity of states.'<sup>64</sup>

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state declaring which treaties it will succeed to. See J Mallamud, 'Optional Succession to Treaties by Newly Independent States', Note, (1999) 63 *American Journal of International Law* 782.

<sup>55</sup> Art 16 provides that: 'A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.'

<sup>56</sup> No less an authority on the subject than Professor O'Connell himself has argued that state practice belies the application of the 'clean slate' rule and therefore undermines the notion that the Vienna Convention codifies customary international law on this issue, see D P O'Connell, 'Reflections on the State Succession Convention' (1979) 39 *ZaÖRV* 725.

<sup>57</sup> See C W Jenks, 'State Succession in respect of Law-Making Treaties' (1953) 29 *British Year Book of International Law* 1952 105, 107.

<sup>58</sup> See: H Beemelmans, 'State Succession in International Law: Remarks on Recent Theory and State Praxis', (1997) 15 *Boston University International Law Journal* 71, 75.

<sup>59</sup> Brownlie Brownlie, above n 43, 78, footnotes in text deleted.

<sup>60</sup> M C R Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *European Journal of International Law* 142, 147–9.

<sup>61</sup> O'Connell, above n 56, 736.

<sup>62</sup> As Jenks notes, 'The only clear and widely accepted exception (to the clean slate rule) being treaties creating local obligations which can be regarded as having the character of executed conveyances.' See Jenks, above n 57.

<sup>63</sup> O'Connell attributes the initial distinction drawn between these two categories of treaties to Vattel. See D P O'Connell, *The Law of State Succession* (1956) 49, citing Vattel, *Le Droit des gens*, bk. II, c.xiii [203] (English trans.) Vol. III (1916).

<sup>64</sup> M Shaw, *Title to Territory in Africa: International Legal Issues*, (1986) 233–4.



However, even this generally well-accepted exception to the 'clean slate' rule is denied by some writers. Makonen, for example, provides useful counter arguments against the usual reasons why boundaries are held to succeed changes in the statehood of a defined territory.<sup>65</sup> O'Connell too cautioned against any presumption of succession based on treaty categorisation alone, preferring to examine the nature of each treaty on a case-by-case basis. He adhered to the notion that 'the question of state succession to treaties is more a question of treaty interpretation than of the existence or otherwise of general rules of law concerning the fate of treaties upon change of sovereignty.'<sup>66</sup> He would therefore assess the compatibility of the treaty with the changed situation caused by a new state succeeding a previous state.<sup>67</sup> He points out that ultimately, 'the difference between the ways in which treaties are disposed of following change in sovereignty and other changes of circumstances (under the *rebus sic stantibus* principle) is a matter of degree.'<sup>68</sup>

Several further questions therefore arise regarding boundary treaties: First, do succeeding territorial boundary treaties include maritime, as well as land boundaries? The answer to this question is not as axiomatic as one might suppose. It is noteworthy that most, if not all, adduced examples of succeeding territorial treaties relate to land, rather than maritime, boundaries. Land boundaries are therefore examples *par excellence* of the permanent demarcation of territorial sovereignty. This does not necessarily imply that state succession to maritime boundary treaties has been treated differently from land boundary treaties. However, it should be realised that the delimitation of maritime jurisdictions, especially regarding maritime zones beyond territorial waters, is arguably less connected *per se* with notions of territorial sovereignty than land boundaries. While maritime jurisdictions of course derive from territorial sovereignty, they are by their very nature less all-encompassing than their land-based counterparts. Maritime boundaries do not delimit the complete bundle of jurisdictions normally available to a sovereign state within its land territory. As Marston notes, 'the maritime area is not jurisdictionally homogeneous and contains areas under coastal state sovereignty (internal waters and territorial sea) and areas under a less intensive regime (contiguous zone, exclusive economic or fisheries zone, continental shelf).'<sup>69</sup> For example, Exclusive Economic Zone (EEZ) or continental shelf delimitation agreements between states only represent a spatial divide of the sovereign rights and specified maritime jurisdictions available to the delimiting states within these maritime territories under international law,<sup>70</sup> no more and no less. As Marston points out, '(t)he question is whether these and other distinctions give to maritime delimitations a quality of stability different from that of land delimitations.'<sup>71</sup> Since these maritime jurisdictions do not encompass the full sovereignty of a state, unlike that of territorial jurisdiction on land, maritime delimitation treaties may not be automatically subject to the same rule upon state succession as their land-bound brethren.

Thus, the underlying reasons why boundary treaties *per se* succeed to new states, and others do not, must first be examined. Here, one may conclude that the 'real' nature of boundary treaties, in that they show an intrinsic connection with the territory, provides the legal basis for their permanency, notwithstanding state succession. After all, as Udokang notes, a new state succeeds not to the treaty itself but in fact to the territorial boundaries established by this treaty.<sup>72</sup> Mullerson confirms this view, observing that '(w)ith respect succession and boundaries, it is not exactly a treaty which is succeeded to, but rather the boundary itself as an objective reality

<sup>65</sup> See Y Makonen, *International Law and the New States of Africa: A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa*, 441–53.

<sup>66</sup> D P O'Connell, 'State Succession and Problems of Treaty Interpretation' (1964) 58 *American Journal of International Law* 41, 41.

<sup>67</sup> O'Connell, above n 56, 735.

<sup>68</sup> Ibid 738.

<sup>69</sup> G Marston, 'The Stability of Land and Sea Boundary Delimitations in International Law', in G H Blake (ed), *World Boundaries, Vol.5: Maritime Boundaries* (1994) 144, 152.

<sup>70</sup> As provided in art 56(1) (EEZ) and 77 (continental shelf), respectively, of the 1982 UN Convention on the Law of the Sea (UNCLOS, 1982).

<sup>71</sup> Marston, above n 69, 152–3.

<sup>72</sup> O Udokang, *Succession of New States to International Treaties* (1972) 380 fn 124 citing Jenks, Jenks, above n 57, 107; O'Connell, above n 63, 49; and Lester, 'State Succession to Treaties in the Commonwealth' (1963) 12 *International Comparative Law Quarterly* 492.

having its own *de facto* and *de jure* existence regardless of whether the treaty itself is in force.<sup>73</sup> Brownlie affirms that international law doctrine has long accepted that a change of sovereignty does not as such affect international boundaries.<sup>74</sup> He notes that the ICJ has applied this principle in the *Frontier Dispute*<sup>75</sup> and *Temple*<sup>76</sup> Cases.

Moreover, Article 11(a) of the Vienna Convention on State Succession to Treaties, 1978 provides that any boundaries established by treaties, without exception, are not as such affected by state succession. Quite apart from the 1978 Convention, the relevant principle is well-established in custom. Numerous examples of state practice confirming the general permanency of territorial boundaries can be adduced in support of this principle. Therefore, in the absence of any state practice distinguishing between land and maritime boundary treaties, both types of boundary treaties being dispositive by nature succeed sovereignty changes. As Marston concludes in his study, there does not appear to be any difference in legal principle between the internal and external stability of maritime boundary delimitations and their land counterparts.<sup>77</sup>

The parallel development of the legal principle of *uti possidetis juris* provides further support for the notion that territorial boundaries transcend state succession.<sup>78</sup> As Udokang notes, 'The legal significance of stability and definitiveness in boundary delimitation has been recognised in international arbitral and judicial decisions relating to boundary disputes.'<sup>79</sup> The *uti possidetis* principle is now accepted as a rule of general customary international law and provides that 'after the achievement of independence, existing delimitations acquire the protection of international law, and any subsequent changes must be achieved without the use or threat of force and through peaceful means.'<sup>80</sup>

However, the question arises, as in the foregoing discussion on state succession, whether the *uti possidetis* rule is applicable to maritime as well as land boundaries. The 1989 *Guinea-Bissau/Senegal Arbitration*,<sup>81</sup> adjudicated upon just this issue. A majority of the Tribunal held that previous ICJ cases and Asian state practice in the decolonisation period following the Second World War supported the notion that state succession and the *uti possidetis* rule applied to maritime boundaries.<sup>82</sup> The Tribunal also dismissed an argument put forward by Guinea-Bissau that maritime boundaries which delimited only certain activities, like the exploitation of natural resources, cannot succeed to a new state.<sup>83</sup>

On the other hand, the Dissenting Opinion of Bedjaoui should be noted here. He considered that the *uti possidetis* principle was inapplicable in this case because it pertains only to land boundaries delimiting

<sup>73</sup> R Müllerson, 'Law and Politics in Succession of States: International Law on Succession of States', in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (1998) 5, 19.

<sup>74</sup> I Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998) 55. See also I Brownlie, *Boundary Problems and New States*, Josephine Onoh Memorial Lecture, 27 February 1996, (1996) 5.

<sup>75</sup> *Case concerning the Frontier Dispute* (Burkina Faso/ Republic of Mali) [1986] ICJ Rep 554, 566 [24].

<sup>76</sup> *Case concerning the Temple of Preah Vihear* (Cambodia v Thailand), Merits [1962] ICJ Rep 6.

<sup>77</sup> Marston, above n 69, 159.

<sup>78</sup> As Mullerson notes in the context of treaty succession issues following the break-up of the USSR and Yugoslavia, the rule of state succession in the context of boundaries merely confirms the continuing viability of the *uti possidetis* rule. See R Mullerson, 'New Developments in the Former USSR and Yugoslavia' (1993) 33 *Virginia Journal of International Law* 299.

<sup>79</sup> Udokang, above n 72, 378.

<sup>80</sup> Müllerson, above n 73, 20.

<sup>81</sup> *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* in E Lauterpacht and C J Greenwood (eds) (1990) 83 ILR 1–120.

<sup>82</sup> (1990) 83 ILR 36–37 [63–64].

<sup>83</sup> *Ibid* 37 [65].

sovereign territories, and not to maritime boundaries delimiting areas of less exclusive jurisdictions.<sup>84</sup> According to Bedjaoui, the *uti possidetis* principle constitutes an exception to the otherwise sacrosanct norm of state sovereignty and must be applied and interpreted restrictively. Maritime boundaries therefore cannot be automatically included within the application of this principle because unlike land boundaries they do not, strictly speaking, delimit sovereign territory.<sup>85</sup> After examining the case precedents and state practice relied upon by the Tribunal to arrive at its decision, Bedjaoui refines his objection to the application of the *uti possidetis* rule to boundaries delimiting maritime zones beyond the territorial sea.<sup>86</sup> In other words, according to him, this rule only applies to land and territorial sea boundaries and not continental shelf or EEZ boundaries. Even more interesting is the Declaration appended to the Award by the President of the Tribunal, Julio Barberis, whereby he notes that, in his view, the disputed boundary agreement applied to the territorial sea, the contiguous zone, and the continental shelf between Senegal and Guinea-Bissau, but not the EEZ waters.<sup>87</sup>

Furthermore, the fact that *uti possidetis* is an obligatory norm of international law does not legitimatise territorial changes imposed during the illegal occupation and annexation of a state. As Mullerson notes in the context of the Baltic states, '(o)n the one hand, *uti possidetis* requires leaving the borders as they were at the moment of restoration of independence; on the other hand, the necessity to remedy the results of illegal occupation and annexation means that frontiers existing before the loss of independence should be restored.'<sup>88</sup> The ensuing dilemma between these two conflicting principles will resonate with decision-makers on the East Timor issue, whether they be the states involved, empowered third parties, international institutions or an adjudicatory body. As Mullerson concludes, the decision will be an outcome of two different legal maxims originating from Roman law: *ex injuria non jus oritur* (illegal acts do not create law) and *ex factis jus oritur* (facts have a tendency to become law).<sup>89</sup>

A second question that may be raised in respect of the Timor Gap treaty relates to its temporary nature. Article 2(3) assumes as much when it provides, *inter alia*, that nothing contained in the treaty shall be interpreted as prejudicing the position of either contracting state on a *permanent* continental shelf delimitation in the Zone of Co-operation (emphasis added). Article 33 envisages the treaty being applicable for an initial period of 40 years,<sup>90</sup> before continuing for successive terms of 20 years, unless by the end of each term, including the initial term, the two states have concluded an agreement on a permanent continental shelf delimitation in the Zone of Co-operation area.<sup>91</sup> Article 34 provides that the conclusion of a permanent continental shelf boundary will have the consequent legal effect of voiding the present treaty,<sup>92</sup> with certain exceptions in relation to contractors' rights under previously awarded concessions.<sup>93</sup> This raises the question whether the Timor Gap treaty is only a temporary maritime boundary treaty and therefore cannot be regarded as succeeding to a new East Timor state under the terms of Article 11(a) of the Vienna Convention on State Succession. Kaye, for example, is of the view that the joint development arrangements established by Malaysia and Thailand in the Gulf of Thailand, as well as between Australia and Indonesia in the Timor Gap, are temporary.<sup>94</sup> Prescott on the other hand, suggests that what is provisional today may in time acquire permanency.<sup>95</sup> Any argument on this

<sup>84</sup> Ibid 64 [34].

<sup>85</sup> Ibid 67 [40].

<sup>86</sup> Ibid 71–3 [48–52].

<sup>87</sup> Ibid 48.

<sup>88</sup> Mullerson above n 73, 21.

<sup>89</sup> Ibid 21.

<sup>90</sup> Art 33(1) of the Timor Gap treaty.

<sup>91</sup> Art 33(2) *ibid*.

<sup>92</sup> Art 34(1)(a) *ibid*.

<sup>93</sup> Art 33(1)(b) *ibid*.

<sup>94</sup> S B Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice' (1999) 19 *Australian Year Book of International Law* 49, 63.

<sup>95</sup> J R V Prescott, 'The Gulf of Thailand: Maritime Limits to Conflicts and Co-operation', *Maritime Briefings* (1998) 32–3.

issue depends on the definition of a 'boundary' in the context of state succession being limited to permanent rather than merely temporary boundaries. This assumption of the permanency of boundaries could well be read into the meaning of 'boundary' given the need to retain its connection with the 'real' nature of the territory concerned in order to succeed to a new state claiming sovereignty over this territory. On the other hand, it can be maintained, using O'Connell's analytical insight, that whether a boundary is permanent or temporary does not detract from its intrinsically 'real' nature.

Finally in this context it must also be questioned whether offshore joint development agreements such as the Timor Gap treaty are to be regarded as maritime boundary treaties for the purpose of state succession? This view suggests that the joint development regime established by this treaty does not fall within the traditional conception of a 'boundary'. Should this view be substantiated, it will be a strong argument for the discontinuance of the treaty by a new East Timor state. After all, the treaty provides for an area (area A of the Zone of Co-operation) that is subject to the joint control and jurisdiction of the two contracting states. This arguably represents the very antithesis of territorial delimitation providing for the permanent separation of sovereignty and jurisdiction that we have come to expect from boundaries.

On the other hand, the Timor Gap treaty can be put forward as an example of a new breed of maritime boundary treaty that establishes a legal regime for the management of various sea-use activities within a designated area. Such management-type boundary regimes represent a progressive attempt to move away from the strictures imposed by conventional boundary-making practice, in favour of a functional approach designed to resolve the real issues arising from such boundary disputes.<sup>96</sup> These usually involve disputed ownership of natural resources and/or conflicting sea-use activities. Again it is possible to refer to the Vienna Convention for support for the proposition that such boundary treaty regimes, as opposed to mere boundary delimitation treaties are covered by the general rule providing for their continued effect notwithstanding state succession. Article 11(b) provides that the obligations and rights established by a treaty and relating to the *regime* of a boundary are also not affected by state succession (emphasis added). Moreover, Article 12(1) extends this continuity to cover treaty rights and obligations relating to the use or benefit of any territory, or to restrictions upon its use, for the benefit of any territory of a foreign state and considered as attaching to the territories in question.

The issue therefore turns on the question whether the joint development framework and institutions established by the present Timor Gap treaty relate to the boundary regime. And what if certain provisions are deemed to be boundary-related but others are not? As Sharma notes, '(e)very now and then boundary treaties will contain additional provisions in the text or annexure for the exercise of reciprocal rights and duties that are only notionally connected with the territory. ...The question then arises whether the treaty devolves *in toto* or does not devolve, or whether it is possible to sever provisions which are transmissible to the successor from those not so transmissible.'<sup>97</sup> This type of dilemma was highlighted by O'Connell to substantiate his argument against the pre-emptive categorisation of individual treaties into either 'personal' or 'real' treaties.<sup>98</sup> According to Sharma, several approaches have been utilised to determine which parts of a boundary treaty are severable from the rest of the treaty and thus transmissible to the succeeding state.<sup>99</sup> State practice suggests that rights relating to, *inter alia*, commercial navigation, fisheries and cattle grazing have in the past been regarded as severable from the straightforward boundary line stipulations in a succeeding treaty.<sup>100</sup>

While there is little doubt about the 'real' or dispositive character of certain provisions of the Timor Gap treaty,<sup>101</sup> not all of these provisions can readily be described as such, especially when they regulate the commercial transactions involving the sale and supply of the extracted petroleum resource. On the other hand,

<sup>96</sup> See D M Johnston, *The Theory and History of Ocean Boundary-Making* (1988) 227–9, citing O R Young, *Resource Regimes: Natural Resources and Social Institutions* (1982).

<sup>97</sup> S P Sharma, *International Boundary Disputes and International Law: A Policy-Oriented Study* (1976) 239.

<sup>98</sup> O'Connell, above n 56, 735–6.

<sup>99</sup> Sharma above n 97, 239–40.

<sup>100</sup> Ibid 241–2.

<sup>101</sup> Namely, Annex A containing the designation and description, including maps and co-ordinates of areas A, B, and C of the Zone of Co-operation incorporated into the treaty by art 1(1)(p).

these provisions are intimately linked to the joint development regime established by the treaty. It would be difficult in these circumstances to distinguish between the so-called 'personal' aspects of the treaty from its 'real' or dispositive aspects for the purpose of succession.

Yet another argument denying a new East Timor state's succession to the Timor Gap treaty can be made on the basis that it is an unequal treaty.<sup>102</sup> This view suggests that the so-called automatic succession formula for new states in the case of boundary treaties should be suspended where it can be shown that these treaties are not consistent with the interests of the people of that new state.<sup>103</sup> This is especially pertinent in respect of territorial treaties that are the products of colonialism and thereby contrary to self-determination. In the present context, it would be interesting to speculate whether Indonesia's annexation of East Timor after the Portuguese withdrawal amounted to the re- or neo-colonisation of this territory. Thus, any boundary treaty entered into between the effective colonial power and third states should not succeed to the new state as it would not have represented the consent of the colonised population. Chen recommends that 'the successor or other concerned states suffering from unequal boundary treaties should have the right to demand negotiation for a new boundary treaty based on the principles of equality, independence, reciprocity and freedom of consent, provided that pending the conclusion of a new boundary treaty the territorial *status quo* be respected as *fait accompli*'.<sup>104</sup> However, it is doubtful whether general international law accords with this view. Merely to argue that disputes concerning the succession of boundary treaties arise primarily due to their unequal nature does not in itself provide an adequate legal pretext for changing the present legal position supporting their continuation. To presume otherwise would surely result in calls for the re-negotiation of many international boundary treaties across the globe, thereby undermining their fundamental purpose of providing stability and continuity in international relations between states.

#### Has there been a fundamental change of circumstances allowing termination of the Treaty?

According to Shaw, '(t)his rule states that a party to a treaty may unilaterally invoke as a ground for terminating or suspending the operation of the treaty the fact that there has been a fundamental change of circumstances from those which existed at the time of the conclusion of the treaty.'<sup>105</sup> Lissitzyn observes that 'a treaty should not be applied in circumstances which are so different from those for which the parties sought to provide that its application would be contrary to the parties' shared expectations and would defeat their apparent objectives.'<sup>106</sup> The *rebus sic stantibus* rule, as it is also known, is now provided included in Article 62 of the 1969 Vienna Convention on the Law of Treaties. However, as Fitzmaurice notes, its formulation is particularly cautious.<sup>107</sup> In particular, the threshold whereby the change of alleged circumstances is so fundamental as to allow for the unilateral termination of a treaty is undefined.<sup>108</sup> As David observes, the doctrine of fundamental change of circumstances as a reason for terminating treaties pits the two main tenets of international relations, namely stability and flexibility, against each other: 'Concern with stability militates against the frequent termination of former arrangements, while flexibility, as the term was understood in the nineteenth century, favours frequent termination of former agreements in pursuance of short-term interests.'<sup>109</sup>

<sup>102</sup> See Lung-Fong Chen, *State Succession Relating to Unequal Treaties* (1974) esp. 175.

<sup>103</sup> Chen, *ibid* 177.

<sup>104</sup> *Ibid* 214.

<sup>105</sup> Shaw, *above n* 64, 230.

<sup>106</sup> O J Lissitzyn, 'Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances', *Proceedings of the American Society of International Law*, 61<sup>st</sup> Meeting, 25–29 April 1967, 186, 187.

<sup>107</sup> M Fitzmaurice, 'The Gabčíkovo-Nagymaros Case: The Law of Treaties' (1998) 11 *Leiden Journal of International Law* 321, 332.

<sup>108</sup> As Vamvoukos notes, 'the lack of any precise definition of the notion of changed circumstances may be due to the fact that the provisions do not, as a rule, accord the parties a right of unilateral action in the first instance. The party invoking the provision has to initiate negotiations with the other party and, only if such negotiations fail, has it a right to unilateral denunciation of or withdrawal from the treaty.' See Vamvoukos, *above n* 29, 150.

<sup>109</sup> A E David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* (1975) 13–14.

It is possible to argue that the status of a newly-independent state of East Timor alone constitutes a fundamental change of circumstance that has the legal effect of terminating the Timor Gap treaty. However, this is not reflected in state practice. Mere change in the legal status of a state does not of itself constitute a fundamental change of circumstance resulting in termination of the treaties agreed by the previous state.<sup>110</sup> If this were the case then the rules relating to state succession of treaties would be rendered almost superfluous. In the *Gabcikovo-Nagymaros Case*, for example, Hungary requested the Court to adjudge, *inter alia*, that the Treaty of 16 November 1977 agreeing to invest in and build a series of dams and tidal barrages along the course of the Danube river had never been in force between Hungary and Slovakia, thereby implying that Slovakia did not succeed to the rights and obligations that were formerly provided to Czechoslovakia under this 1977 treaty.<sup>111</sup> The ICJ, however, disregarded this alleged distinction between the former Czechoslovakia and the present Slovakia for the purpose of state succession to treaty obligations. It apparently assumed that state succession naturally followed the consensual division of one state into two (or more) new states. As Klabbers notes, the Court 'simply re-iterated that it did not need to express itself on the legal nature of the alleged automatic succession rule.'<sup>112</sup> The Court also accepted that the political and economic situation, as well as the state of environmental knowledge, had changed considerably in the intervening years since the treaty was first signed in 1977. Nonetheless it held that these changes had not transformed the 1977 treaty obligations in such a radical manner so as to provide a justification for the termination of the treaty by either party.

This presumption against finding that a fundamental change of circumstances has occurred appears to extend to changes in substantive legal concepts and rules too. This is especially true in the case of boundary treaties,<sup>113</sup> as with the case of state succession considered above. In other words, it is not open for a new East Timor state to argue that the change in the legal basis for continental shelf boundary delimitation from geomorphological criteria to the more explicit 200 nautical mile distance criterion in itself constitutes a fundamental change of circumstances meriting the termination of the treaty.

An analogous situation to this occurred in the *Fisheries Jurisdiction Case*,<sup>114</sup> where Iceland invoked both legal and factual changes in the waters around Iceland as reasons to terminate an agreement with the United Kingdom providing for the right to refer any dispute concerning Iceland's extended fisheries jurisdiction to the ICJ. In respect of the former, legal changes, Iceland contended that the evolving legal opinion on fisheries jurisdiction, as embodied in the Icelandic declaration of a 50 nautical mile exclusive fishing zone, constituted grounds for invoking the *rebus sic stantibus* rule.<sup>115</sup> The Court held that 'while changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of the treaty,

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<sup>110</sup> See: art 62 of the Vienna Convention on the Law of Treaties, 1969. As the ICJ re-affirmed in the *Gabcikovo-Nagymaros Case*, 'The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.' See: *Case concerning the Gabcikovo-Nagymaros Project* (Hungary v Slovakia) Judgment of 25 September 1997 [1997] ICJ Rep 7, 65 [104].

<sup>111</sup> Ibid 15 [11].

<sup>112</sup> J Klabbers, 'Cat on a Hot Tin Roof: The World Court, State Succession and the *Gabcikovo-Nagymaros Case*' (1998) 11 *Leiden Journal of International Law* 345, 349.

<sup>113</sup> Art 62(2)(a) of the 1969 Vienna Convention provides: 'A fundamental change of circumstances may not be invoked: (a) as a ground for terminating or withdrawing from a treaty establishing a boundary...' While the overall purpose of Article 62 represents a leaning towards closely circumscribing the operation of the *rebus sic stantibus* doctrine, according to Lissitzyn, this provision (art 62(2)(a)) is especially forthright, not because provisions in such boundary treaties should be regarded as already 'executed', but because such treaties were intended to create a stable situation between the relevant states and thus needed to be excluded from the operation of the doctrine. See O J Lissitzyn, 'Treaties and Changed Circumstances (*Rebus Sic Stantibus*)' (1967) 61 *American Journal of International Law* 89, 915, 917, citing Sir Humphrey Waldock, Special Rapporteur to the ILC on the Law of Treaties, in the (1963) II *International Law Commission Yearbook*.

<sup>114</sup> *Fisheries Jurisdiction case (Jurisdiction) (United Kingdom v Iceland)* [1974] ICJ Rep 3.

<sup>115</sup> See Vamvoukos, above n 29, 169.

the Icelandic contention is not relevant to the present case.<sup>116</sup> However, as Vamvoukos notes, this was mainly because the present case only concerned the validity of the compromissory clause providing for referral to the ICJ and jurisdictional issues arising therefrom.<sup>117</sup> On the other hand, in rejecting Iceland's arguments, the Court held that any change of circumstance must be fundamental,<sup>118</sup> and result in a radical transformation of the obligations still to be performed.<sup>119</sup> The cautious attitude of the Court in its interpretation of the *rebus sic stantibus* rule in this case, and its general reluctance to allow this rule to overturn the more fundamental principle of the stability of treaties has been noted by Fitzmaurice.<sup>120</sup>

The effect of substantive new legal developments was also adjudicated on in the *Gabcikovo-Nagymaros Case*. In this case, Hungary argued that the advent of international law for environmental protection in the intervening years between the adoption of a bilateral treaty between itself and Czechoslovakia (now Slovakia) constituted a fundamental change of circumstances<sup>121</sup> and precluded performance of the treaty,<sup>122</sup> thus entitling it to terminate the treaty. While agreeing that recently evolved norms of environmental law are relevant to the implementation of the treaty and should be inserted into the relevant treaty provisions concerning the project,<sup>123</sup> the ICJ refused to accept that the need to consider the inclusion of these principles constituted a fundamental change of circumstances such that the *rebus sic stantibus* rule should be applied.<sup>124</sup>

### Is joint development of the Timor Gap mandated by general international law?

The foregoing section has considered some of the difficult issues relating to the possible invalidity, lack of succession and fundamental change of circumstances that may combine, jointly or severally, to deny the application of the present Timor Gap treaty between Australia and a new East Timor state in the near future. The final section of this essay will be devoted to an exploration of legal and practical arguments that can be utilised to propose a similar type of joint development arrangement on the basis of general international law, as opposed to the international law of treaties and state succession to treaties. The conceptual bases for these arguments are developed elsewhere<sup>125</sup> and will not be re-trodden here. Rather the problem will be considered anew.

This problem consists of two states, namely Australia and a newly independent East Timor, with opposing coastlines. Both states are legally entitled to claim at least 200 nautical mile of continental shelf,<sup>126</sup> thereby creating an overlapping claims area, where oil and gas deposits are known to exist. Assuming the Timor Gap treaty is disapplied due to the legal difficulties considered above, the usual question facing the parties at this juncture would be the negotiation of a permanent continental shelf boundary delimitation. The international legal framework governing such situations has at its heart the application of equitable principles,<sup>127</sup> with a view

<sup>116</sup> *Fisheries Jurisdiction Case* (Jurisdiction) above n 114, 17.

<sup>117</sup> Vamvoukos, above n 29, 169.

<sup>118</sup> *Fisheries Jurisdiction Case* (Jurisdiction) above n 114, 18 [37], [38].

<sup>119</sup> *Ibid* [43].

<sup>120</sup> Fitzmaurice, above n 107, 333, 343.

<sup>121</sup> *Gabcikovo-Nagymaros Case*, above n 110, 64 [104].

<sup>122</sup> *Ibid* 67 [111].

<sup>123</sup> *Ibid* 67 [112].

<sup>124</sup> *Ibid* 64–5 [104].

<sup>125</sup> See D M Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?' (1999) 93 *American Journal of International Law* 771. The relative merits of the Malaysia-Thailand joint development agreements in comparison with the Timor Gap treaty and the Malaysia-Vietnam agreement are considered in Ong, above n 17.

<sup>126</sup> See art 76 of the 1982 LOSC.

<sup>127</sup> As developed by the ICJ in successive maritime boundary dispute cases beginning with the *North Sea Continental Shelf Cases* above n 13.

to achieving an equitable solution by agreement.<sup>128</sup> The precise nature of these equitable principles has been the subject of some legal obfuscation by the Court that has consequently provoked much doctrinal debate.<sup>129</sup> While the use of the median line to delimit the maritime boundary may be agreed between the two states, it is by no means legally required,<sup>130</sup> unless it can be shown to be the only possible delimitation technique for achieving the often elusive equitable solution. Thus, advocates of a median line solution delimiting a continental shelf and/or EEZ boundary,<sup>131</sup> in line with the recently agreed 1997 Australia-Indonesia EEZ 'water column' maritime boundary in the same area,<sup>132</sup> need to provide more legal authorities to substantiate their arguments to this effect. Neither is it necessarily the case that the continental shelf boundary delimiting the sea-bed between the two countries must be the same line as the EEZ boundary delimiting the superjacent water column.<sup>133</sup> There is no provision in the 1982 LOSC, nor rule of customary international law prescribing such a course of action.<sup>134</sup> State practice expressing a preference for a common continental shelf and EEZ boundary based on the median line,<sup>135</sup> does not amount to persuasive legal argument in favour of this proposal. Nor does state practice alone,<sup>136</sup> without a perceived legal imperative to this effect, fulfil the requirement for the formation of a

<sup>128</sup> As required by art 74(1) of the 1982 LOSC for EEZ delimitation and art 83(1) for continental shelf delimitation.

<sup>129</sup> The literature on this issue is extensive and cannot be fully referred to here. Examples include: M D Blecher, 'Equitable Delimitation of Continental Shelf' (1979) 73 *American Journal of International Law* 60; B Kwiatkowska, 'Equitable Maritime Boundary Delimitation — A Legal Perspective' (1988) 3 *International Journal of Estuarine (now Marine) and Coastal Law* 287; P Weil, *The Law of Maritime Delimitation — Reflections* (1989); and S P Sharma, *Delimitation of Land and Sea Boundaries Between Neighbouring Countries* (1989).

<sup>130</sup> Art 6(1) of the 1958 Continental Shelf Convention requiring the application of the median line in such situations in the absence of an agreement has been superseded in this respect by arts 74(1) and 83(1) of the 1982 LOSC, both in international conventional law and arguably also in customary international law.

<sup>131</sup> See G A McKee, 'The New Timor Gap: Will Australia now break with the past?' (2000) 62 *Inside Indonesia*, citing J J Smith who argues that a new East Timor state will benefit from recent international law developments which 'strongly suggest that a median line will ultimately form the EEZ boundary between East Timor and Australia.' See also: R Tanter, M Selden, and S R Shalom, 'East Timor Faces the Future' (2000) 32 *Bulletin of Concerned Asian Scholars* 113–24, esp 118–120.

<sup>132</sup> Full title: Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, signed in Perth, Western Australia on 14 March 1997. Not yet in force. See <<http://www.austlii.edu.au/au/other/dfat/treaties/2000/index.html> for text>. The legal status of this agreement is presumably also being re-appraised following the UN-sponsored referendum result and consequent relinquishment of Indonesian sovereignty over East Timor.

<sup>133</sup> For an analysis of the possible legal problems raised by the overlapping nature of the Indonesian EEZ jurisdiction in the water column superjacent to the Australian continental shelf jurisdiction in some areas delimited by the 1997 Treaty, see M Heriman and M Tsamenyi, 'The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?' (1998) 4 *Ocean Development & International Law* 361–96.

<sup>134</sup> As Churchill and Lowe note, 'Although the provisions of the Convention governing continental shelf and EEZ boundaries are the same, their wording is sufficiently imprecise for the continental shelf and EEZ boundaries to differ — a situation fraught with potential conflict ...' See R R Churchill and A V Lowe, *The Law of the Sea* (3<sup>rd</sup> ed) (1999) 196.

<sup>135</sup> Eg, para 7 of Malaysia's Declaration following her ratification of the 1982 LOSC on 14 October 1996, in accordance with art 310 of this Convention, states that: 'The Malaysian Government interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of Malaysia and of such other States is measured. Malaysia is also of the view that in accordance with the provisions of the Convention, namely article 56 and article 76, if the maritime area is less [than] or to a distance of 200 nautical miles from the baselines, the boundary for the continental shelf and the exclusive economic zone shall be on the same line (identical).' It should be noted that art 310 of the LOSC provides that the declarations or statements made by states when signing, ratifying or acceding to this Convention 'do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State.'

<sup>136</sup> Churchill and Lowe note that 'Since the late 1970s the trend, particularly outside Europe, has been to conclude



customary rule.<sup>137</sup> As Churchill and Lowe correctly observe, 'Although state practice exhibits an overwhelming trend towards EEZ and continental shelf boundaries coinciding, the practice is not such as to *require* a single boundary.'<sup>138</sup> Thus, despite the problems that might face the two countries should any new continental shelf boundary settlement differ from the present median line EEZ 'water column' boundary,<sup>139</sup> there is no legal compulsion upon them to arrive at a common boundary solution.

There is a further legal issue that militates against the use of the median line to delimit a common boundary. This relates to the use of a proportionality test by the ICJ to ascertain the equity of maritime boundary solutions presented in their judgements.<sup>140</sup> The most relevant case for our purposes here is the *Libya/Malta Continental Shelf Case*, where the Court shifted the recommended boundary from the initial median line drawn between Libya and Malta in the Mediterranean Sea closer to Malta in recognition of Libya's longer coastline and consequently greater land mass facing Malta.<sup>141</sup> In the *Libya/Malta Case*, the Court noted that the principle of proportionality between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast was first enunciated in the *North Sea Continental Shelf Cases*.<sup>142</sup> The proportionality test is employed to verify the equity of a delimitation between opposite coasts, as well as between adjacent coasts. The Court elaborated the criteria that needs to be taken into account for the application of the proportionality test to determine whether an equitable delimitation would ensue. This involved first, the identification of 'relevant coasts' and 'relevant areas' of continental shelf, second, the calculation of the mathematical ratios and lengths of the coasts and the areas of shelf attributed, and finally the comparison of such ratios.<sup>143</sup> However, the Court was very much aware of the possible practical difficulties involved in the identification the 'relevant coasts' and 'relevant areas' for the application of the proportionality test. Thus, the Court limited the application of this test to the continental shelf areas immediately adjacent to the modified median delimitation line already established.

The Court found it necessary to adjust the initial median delimitation line northwards by exactly 18 degrees so that it lay closer to the Maltese coastline to achieve an equitable solution between the continental shelf areas appertaining to the two parties, namely Libya and Malta.<sup>144</sup> Brown cautions against the conclusion that this adjustment of the initial median line was an application of the proportionality test. He argues that the Court simply took into consideration the marked disparity in the comparative coastal lengths as a relevant circumstance.<sup>145</sup> Brown admits however that it would have been very surprising to later find the Court had held the net effect of this modification did not satisfy the proportionality test as a criteria for an equitable result.<sup>146</sup> This leads to the conclusion that although the proportionality principle is conceived by the Court as an *ex post*

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agreements establishing a single maritime boundary for all zones ...Of the single maritime boundaries that have so far been agreed, many, particularly in the case of opposite coasts, are based on the equidistance (or median) principle ...' above n 134, 197.

<sup>137</sup> Using the threshold of proof applied by the Court in the *North Sea Continental Shelf Cases*. See [1969] ICJ Rep 43–4, [75–77].

<sup>138</sup> Churchill and Lowe, above n 134, 196 (emphasis added).

<sup>139</sup> See S B Kaye, 'Multiple Boundaries in Maritime Boundary Delimitation: The Problems of Common Jurisdiction', in Australia and New Zealand Societies of International Law (ANZSIL) Proceedings of the 6<sup>th</sup> Annual Conference, 1998 Canberra (1999) 185–93.

<sup>140</sup> Churchill and Lowe note at least three cases where the proportionality principle was utilised, namely the *Greenland/Jan Mayen Case*, and the *Libya/Malta and Libya/Tunisia Cases*. See Churchill and Lowe, above n 134, 189.

<sup>141</sup> See *Case Concerning the Continental Shelf (Libya/Malta)*, Judgment [1985] ICJ Rep 13, 43–6, 49–50.

<sup>142</sup> Ibid 44 [74] citing [1969] ICJ Rep 54 [101].

<sup>143</sup> Ibid 44 [74].

<sup>144</sup> Ibid 42–3 [71–73].

<sup>145</sup> See E D Brown, 'The Libya-Malta Continental Shelf Case (1985)' in Bin Cheng and E D Brown (eds), *Contemporary Problems of International Law: Essays in honour of Georg Schwarzenberger on his Eightieth Birthday* (1988) 3–18, 14–5, citing the Libya/Malta Judgment, 49 [66].

<sup>146</sup> Brown, *ibid* 17.

*facto* test to determine the equity of a proposed delimitation line; in reality it is applied by the Court throughout its deliberations to ascertain that the eventual result it arrives at will necessarily be an equitable one.

Given the large disparity in coastal lengths and land masses facing each other across the Timor Gap between Australia and a newly independent East Timor state, a similar readjustment to the proposed median line continental shelf boundary is eminently possible by any tribunal tasked with adjudicating the matter. A putative median line boundary between a new East Timor state and Australia would thereby also be moved northwards like in the *Libya/Malta Case* to compensate for the disparity between the opposing coastal lengths of East Timor and Australia. The Australian negotiating position *vis-à-vis* a new East Timor state on this issue should also be based upon this premise. Thus, the expectation that a median line continental shelf boundary would follow the 1997 Australia-Indonesia EEZ boundary line along the southern limits of area A of the current Zone of Co-operation and thereby surrender most, if not all, of the current joint development area to a new East Timor state may be premature.<sup>147</sup> Instead, we may find that a suitably modified median line continental shelf boundary will in fact cut across the oil and gas fields currently being primed for exploitation, especially the Bayu-Undan gas project in area A.<sup>148</sup>

It is precisely at this juncture that a further co-operative arrangement to deal with any straddling deposits is needed. Indeed, the present 1997 Australia-Indonesia EEZ boundary treaty provides a legal basis for the unitisation of such deposits.<sup>149</sup> Significantly, it echoes Article 20 of the Timor Gap treaty itself, which also provides for the unitisation of any hydrocarbon deposit found to extend across any boundary lines of area A of the Zone of Co-operation. International transboundary unitisation agreements based on similar straddle deposit clauses are especially prevalent in the North Sea.<sup>150</sup> These agreements are arguably merely applying an

<sup>147</sup> See G A McKee, 'The New Timor Gap: Will Australia now break with the past?' (2000) 62 *Inside Indonesia*. McKee is of the opinion that 'a median line settlement under UNCLOS [sic] will enable East Timor to receive almost twice the benefit offered by a (Timor Gap) treaty Indonesia and Australia concluded in darker times.' See also Tanter, Selden and Shalom who quote McKee as arguing that 'the median line principle, which was given weight by Australia in the 1997 treaty with Indonesia, is significant for the new nation of East Timor since all the significant petroleum discoveries have been in the area north of the line. Thus East Timor may be entitled to the entire tax revenues.' Above n 131, 119, citing a letter to the authors by McKee, dated 5 November 1999.

<sup>148</sup> The Bayu-Undan project involves two phased developments of the field's natural gas and gas liquids resources. The first phase of development in October 1999, comprising an initial expenditure of approximately US\$1.4 billion on the liquids stripping/lean gas recycle phase makes it the largest investment proposed to date in the Timor Sea.

The Bayu-Undan field is located in the central Timor Sea about 500 kilometres north west of Darwin Australia and about 250 kilometres south of Suai in East Timor. The field straddles two production sharing contract (PSC) areas (91-12 and 91-13) in area A of the Timor Gap Zone of Co-operation just north of the EEZ boundary and median line between Australia and East Timor. The Bayu-Undan field is a single gas/condensate resource with recoverable reserves of approximately 400 million barrels of liquids (condensate and LPG) and 3.4 tcf of gas. The field life is estimated to be 25 years, with first liquids production planned to commence in late 2003.

A second phase downstream development to commercialise the field's valuable gas reserves is also planned and concepts for this are the subject of separate studies and approvals by the co-venture companies and government authorities.

<sup>149</sup> Art 9 provides that '(i)f any single accumulation of liquid hydrocarbons or natural gas, or if any other mineral deposit beneath the seabed, extends across the lines described in arts 1 and 3 of this Treaty, and the part of such accumulation or deposit that is situated on one side of the line is recoverable in fluid form wholly or in part from the other side of the line, the two parties will seek to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation.

<sup>150</sup> See UK-Norway Agreement Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom, 10 May 1976, 1977 *Gr. Brit. TS* No 113 (Cmnd 7043), 1098 *UNTS* 3. See J C Woodliffe, 'International Unitization of an Offshore Gas Field' (1977) 26 *International and Comparative Law Quarterly* 338. Similar agreements relating to the Murchison and Statfjord Fields were also concluded between the United Kingdom and Norway on 16 October 1979, 1981 *Gr. Brit. TS* No 39 (Cmnd 8270) and No 44 (Cmnd 8282). The Anglo-Dutch Agreement Relating to the Exploitation of the Markham Field Reservoirs and the Offtake of Petroleum

alternative version of the joint development principle currently provided for in the 1989 Timor Gap treaty.<sup>151</sup> They too require an element of co-operation and further negotiation regarding the different legal issues arising from the implementation of the joint regime, even if this regime is nowhere near as complex as the current Timor Gap treaty regime. Thus they will not necessarily result in the financial windfall and consequent autonomy for the newly independent East Timor state as envisaged by the proponents of a new median line continental shelf boundary replacing the Timor Gap treaty.

Indeed, worse may follow. Unlike the joint development model implemented by the Timor Gap treaty that envisages a straightforward 50:50 split of all government revenues between the two parties from petroleum development anywhere within area A of the Zone of Co-operation,<sup>152</sup> many transboundary unitisation agreements dealing with situations where a boundary is already drawn tend to arrive at very specific breakdowns of the revenue split between the two governments. These revenue splits are usually directly proportionate to how much (or little) of the deposit lying across the boundary is estimated to be located within the continental shelf of each state. Therefore, should a permanent continental shelf boundary applying a modified median line cut across the Bayu-Undan field, or indeed any other field in such a way that most of the deposit lies on the Australian side of the line, then in fact the percentage split of the government revenues derived from the exploitation of the resulting transboundary deposit may reflect very badly upon the new East Timor state, whereas presently it is entitled to 50 per cent of these revenues from a petroleum deposit found anywhere in area A of the Zone of Co-operation.

An appreciation of the foregoing legal and practical difficulties arising from the proposed replacement of the Timor Gap joint development regime with a median line continental shelf boundary appears to underlie the pragmatic stance adopted by the UNTAET in its negotiating relationship with Australia on the subject of the continuing implementation of the Timor Gap treaty. This is regardless of the possible adoption by a succeeding new East Timor state of the 'clean slate' rule in its approach to the treaty and Australian acquiescence with the legality of this approach. Thus, it is perhaps unsurprising that the Memorandum of Understanding agreed between UNTAET and Australia provides for the continued applicability of the terms of the Timor Gap treaty including, *inter alia*, all actions taken by either the Ministerial Council for the Zone of Co-operation or the Joint Authority for area A of the zone, as well as all existing production sharing contracts (paragraphs 2(b) and (c), respectively). The joint development principle embodied in the Timor Gap treaty therefore continues to apply under the terms of the MOU. It is submitted here that regardless of the political stance taken up by a new East Timor state with regard to the Timor Gap treaty itself, joint development will continue to be a cornerstone of the diplomatic relations between this new state and Australia over the Timor Gap area, albeit with some fine tuning as to the exact boundaries of the Zone of Co-operation and the proportions of the petroleum revenues shared between the contracting parties.

In this respect, the present continuation of a joint development approach to the hydrocarbon resources of the Timor Gap, accords with Koskenniemi's observation that '(t)he absence of clear-cut rules (in the international law of state succession) on continuation and disruption of treaty relations or detailed lists of fundamental rights of states, for instance, makes it possible to combine continuation at the level of abstract status with important changes at the level of specific rights and duties.'<sup>153</sup>

## Conclusions

In the not too distant future, East Timor will take up its rightful place as a new sovereign state. Traub suggests that the UNTAET and the National Council for East Timorese Resistance (CNRT) have agreed on the road to

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Therefrom, 26 May 1992, is a similar type of international transboundary unitisation agreement. See 1993 *Gr. Brit. TS* No 38 (Cmnd 2254).

<sup>151</sup> See Ong, above n 125, 788–92, where a typology of three different categories of joint development models is described.

<sup>152</sup> Art 2(2)(a).

<sup>153</sup> M Koskenniemi, 'The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research', in Centre for Studies and Research in International Law and International Relations, Hague Academy of International Law, *State Succession: Codification Tested Against the Facts* (1997) 89, 93.

independence.<sup>154</sup> The process will begin with a mass convocation of Timorese in late 2000 or early 2001 to debate constitutional principles, followed by the drafting of a constitution and the election of a constituent assembly. Then, in what is expected to be late 2001 or early 2002, the elected assembly will sign the constitution and the country will declare its independence.<sup>155</sup> This new legal status raises several questions in respect of the continuing application of Timor Gap treaty. These questions have been enumerated in this essay as follows: Are new states bound to accept maritime boundary treaties agreed by predecessor states? Is the Timor Gap treaty to be regarded as a maritime boundary treaty for this purpose? Will a new East Timor state succeed to the Timor Gap treaty agreed between Indonesia and Australia? Finally, even if the Timor Gap treaty is found to be inapplicable in this context, is there nevertheless a legal mandate to jointly develop the hydrocarbon deposits found in an overlapping continental shelf claims area that may result from the treaty being rendered invalid?

While inconclusive in and of themselves, when taken together in their entirety, the legal arguments developed in the course of this essay conspire to suggest that the present Timor Gap arrangement embodying the joint development principle is sufficiently robust to stand the test of time. The precise application of the joint development principle, whether in its present form, or through a system of compulsory transboundary unitisations of straddling hydrocarbon deposits across a modified median line continental shelf boundary, is reliant upon the political will of the future parties to this arrangement. International law does not currently prescribe a specific solution for this problem of hydrocarbon deposits situated in a disputed area of overlapping continental shelf claims. It merely provides for several different models of co-operation in the joint development of these deposits, any model of which can be utilised by agreement between the parties concerned.<sup>156</sup>

Therefore, it is clear that the intense co-operative effort by both Australia and Indonesia, engendered and maintained by the negotiation, agreement and implementation of the 1989 Timor Gap treaty, will need to continue at a high diplomatic level in the new bilateral relationship between Australia and an independent East Timor state. Continued high-level co-operation is imperative to prevent possible disruption of the oil and especially gas supplies that are due to come on stream from area A of the current Zone of Co-operation in the very near future. Modifying the present joint development arrangements in the Timor Gap, rather than beginning negotiations anew under the 'clean slate' approach therefore represents the legally correct, politically astute and economically viable solution to this dilemma.

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<sup>154</sup> J Traub, 'Inventing East Timor' (2000) 79 *Foreign Affairs* 74, 88.

<sup>155</sup> The gradual process towards laying the foundations for democratically elected government in East Timor is continuing and was recently boosted by the news that one of East Timor's biggest and best known political groups, *Fretilin*, which spearheaded the bloody 24-year struggle for independence from Indonesia has begun the process of transforming itself from a revolutionary front to a mainstream political party. See M Dodd, *The Sydney Morning Herald* newspaper (Australia) May 2000.

<sup>156</sup> See Ong above n 125, 788–92, for a basic typology of the main joint development models adopted by states in their bilateral practice on this issue.

# Creative Obfuscation: Joint Development Agreements and Management of Sovereignty Disputes

Gillian Triggs\*

Resorting to deliberately ambiguous words and phrases, variously described as creative,<sup>1</sup> contrived,<sup>2</sup> emotive,<sup>3</sup> and purposeful,<sup>4</sup> has been a time-honoured technique in the treaty-making process.<sup>5</sup> Television images of exhausted delegates at the Kyoto negotiations for the United Nations Framework Convention on Climate Change are testament to their determination to discover some formula for agreement, usually at the eleventh hour. Words and phrases can provide a foundation, albeit fragile, upon which a legal regime can be built. Where there are profound differences of view, however, ambiguous or imprecise words amount to little more than 'bridges of paper, unable to support the regulatory structure to come'.<sup>6</sup> Where fundamental differences exist, Pinto rightly reminds international lawyers of their duty to abandon or postpone the drafting of illusory agreements.

By contrast, where there is agreement on basic issues, 'studied ambiguity instead of concrete particularity' can provide a creative way forward. This essay explores the role of contrived obscurity in facilitating agreement by allowing states to place an interpretation on words and phrases that is most favourable, or not prejudicial to, their respective juridical views on sovereignty. It is argued that provisions drafted to ensure sovereign neutrality have provided a particularly fruitful means of enabling states with conflicting claims to territory and appurtenant maritime zones to put aside their legal claims in favour of joint exploitation of resources and management of the environment. Creative drafting that protects the juridical positions of all claimants might, indeed, provide a solution to tensions over conflicting claims to the Spratlys.<sup>7</sup>

Challenges to territory or offshore rights strike at the heart of sovereignty, for territory is the basis for the exercise of state powers. It is not therefore surprising that disputes between states over conflicting claims to sovereignty have proved to be among the most intractable problems for international law. In particular, some states with opposite or adjacent coasts have been unable to agree upon delimiting their sovereign rights over

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<sup>1</sup> Senator Gareth Evans, (1991) 62 *Monthly Record* 73; S Kaye, 'The Timor Gap Treaty: Creative Solutions and International Conflict' (1994) 16 *Sydney Law Review* 72.

<sup>2</sup> M C W Pinto, 'Common Heritage of Mankind: From Metaphor to Myth', in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 249, 250.

<sup>3</sup> Ibid, Pinto considers the risks of 'rule-making on the basis of metaphor' such as the common heritage of mankind and argues that use of an emotive or charismatic phrase may foster expensive and time-consuming negotiations where there is no agreement on fundamentals. See discussion by R Rothman, 'Stability and Change in a Legal Order: the Impact of Ambiguity' (1972) 83 *Ethics* 37, 38 where he argues there is an inherent ambiguity in the language of law.

<sup>4</sup> A D'Amato, *Purposeful Ambiguity as International Legal Strategy: the Two China Problem* in Makarczyk (ed), above n 2, 109.

<sup>5</sup> Examples include the *Helsinki Final Act* and its parts described as 'baskets', UN Security Council Resolution 242, the concept of a 'common heritage of mankind', the United Nations approach to the China seat of the PRC and Taiwan and, more recently, the role of the United States in response to China's threats in the Straits of Taiwan; 'bi-focalism' and Article IV of the Antarctic Treaty.

<sup>6</sup> Ibid 249.

<sup>7</sup> Claimants are China, Vietnam, the Philippines, Malaysia, Taiwan and Brunei. Indonesia's Track-Two workshops, funded by the Canadian International Development Agency, have been instituted to seek a solution to the tensions in the region regarding conflicting sovereignty claims, thus far without success. See discussion by Valencia et al, below n 17, Chapter V.

non-renewable resources of the continental shelf. While most states are ultimately able to agree upon a final delimitation of disputed maritime zones,<sup>8</sup> many remain unresolved, especially it seems in the Asian region.

Examples of regional disputes include overlapping continental shelf claims in the Gulf of Thailand and in the areas north, west and east of the Natuna Islands, in the East Asian seas, the Timor Gap and offshore Brunei. Sovereignty disputes over islands, with related maritime claims, include the Spratleys, Kuriles, Sipadan and Ligitan (off the eastern coast of Kalimantan and currently subject to determination by the World Court<sup>9</sup>), Senkoku or Diayutai and more recently Pulam Batu Puteh. These disputed claims variously involve all major nations in the Asian Pacific region: Russia, China, the Philippines, Brunei, Japan, Thailand, Vietnam, Indonesia, Cambodia, Republic of Korea, Taiwan, Australia, Singapore and Malaysia.

At customary international law, delimitation of maritime boundaries is to be achieved through an equitable solution.<sup>10</sup> Equitable standards and perceptions will, however, vary depending upon the political, economic and geographical circumstances of each state concerned. Where vital interests are at risk, especially those concerning petroleum resources, nations find it difficult to agree upon a workable compromise. Failure to agree upon an equitable solution in maritime boundary disputes, negotiations often taking place over many years of diplomatic effort, has prompted the creation of joint development regimes under which the sovereignty position of each state is safeguarded. By ensuring joint development regimes are strictly 'sovereignty neutral', it has been possible to provide a non-prejudicial and creative means by which disputing states can exploit and manage their offshore resources to their mutual advantage.

### Antarctic Treaty regime

An early example of the negotiation of a treaty provision to avoid, if not obfuscate, differing legal views on sovereignty is the complex, ambiguous and verbose, though effective, Article IV of the Antarctic Treaty 1959. The origins of this Article lie in a proposal on behalf of Chile, by Professor Escudero in 1948, that United States' efforts to establish an international organisation for Antarctica should 'freeze' all claims so that no activities south of the 60 degree South Latitude could prejudice sovereign rights. Such tentative moves towards legal regulation of activities in Antarctica were overshadowed by preparations for the International Geophysical Year (IGY) Conference in Paris in 1955. Argentina and Chile declared that resolutions adopted in the interests of the IGY and scientific research generally 'do not modify the existing status in the Antarctic regarding the relations of the participating countries'.<sup>11</sup> The declaration formed the basis of a 'gentleman's agreement' under which participating governments undertook not to engage in legal or political argumentation over Antarctic sovereignty during the IGY itself.<sup>12</sup> While tacit recognition of the benefits of avoiding sovereignty disputes, albeit temporarily, may have doubtful legal effect, the gentlemen's agreement had the practical merit of enabling states to achieve the limited scientific objectives of the IGY. More importantly, this fragile agreement provided a precedent for sovereign neutrality under the Antarctic Treaty which was successfully negotiated some months after the end of the IGY, in 1959. Article IV provides that

1. Nothing contained in the present Treaty shall be interpreted as:
  - (a) a renunciation by any Contracting Party of previously asserted rights or claims to territorial sovereignty in Antarctica;
  - (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in

<sup>8</sup> J Charney and L M Alexander, *International Maritime Boundaries* Vols 1 and 2 (1993).

<sup>9</sup> A new extension has been given to Indonesia and Malaysia to file their Counter-Memorials, 12 May 2000 <[www.icj-cij.org/icjwww/ipresscom/IPress2000/ipresscom2000-14\\_inma\\_200005...](http://www.icj-cij.org/icjwww/ipresscom/IPress2000/ipresscom2000-14_inma_200005...) 25/09/2000>.

<sup>10</sup> Article 83 of the 1982 UN Convention on the Law of the Sea articles the customary law position adopted by the International Court of Justice, see discussion J Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88 *American Journal of International Law* 227, 245.

<sup>11</sup> H M M Whiteman, *Digest of International Law* Vol 2 (1963–73) 1238, 1242–3.

<sup>12</sup> G Triggs, *International law and Australian sovereignty in Antarctica* (1986).

Antarctica, or otherwise;

- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
- 2. No act or activities taking place while the present treaties are in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

The purpose of Article IV was to preserve the apparently irreconcilable interests of the claimants, potential claimants and non-claimants. As a matter of interpretation, the Article states what it does not mean and does not state what it does mean. It is deliberately obscure, leaving each state free to interpret Article IV consistently with its juridical interests. While Article IV creates what Marcoux describes as a 'purgatory of ambiguity',<sup>13</sup> more positively, it enabled the parties to move forward, not only to agree upon the Antarctic Treaty itself, but to provide a remarkably effective foundation for the creation of the entire interlinked Antarctic Treaty regime.<sup>14</sup>

Article 4(1) was drafted to allow the following interpretations:

- The words 'any basis of claim' in Clause 1(b) may protect the prior interests of non-claimant states, such as the United States and the Soviet Union, which have not previously sought to assert a claim but which might seek to do so in the future. The words 'or those of its nationals' will cover claims made on behalf of, but not yet ratified by, the state concerned. In this way, potential claimants can protect their 'rights' to make a claim in the future.
- Non-claimants are protected by Article 4(1)(c) which provides that 'a Contracting Party does not prejudice its position' as regards its 'recognition or non-recognition' of other states' rights or claims. This provision also protects claimants who have already recognised the Antarctic sovereignty claims of other states.
- Claimants are further protected by Article 4(1)(a) which provides that the Treaty is not a renunciation of 'previously asserted rights or claims to territorial sovereignty'.
- Similarly, Article 1(b) provides that a basis of claim which a state may have is not to be reduced or diminished by the Treaty.
- Article 4(2) deals with activities during the life of the Treaty. Such activities ought not to constitute a basis for asserting or supporting or denying a claim to create a right. Further, no new claim or enlargement of an existing claim may be made. It seems that ratification was achieved in part on the grounds that when the Treaty terminates, the legal position will return to the *status quo*; a result which is by no means certain.

Article 4 raises many legal issues concerning its continuing role if the Treaty were to terminate and also its opposability as against third states. The behaviour of state parties during the life of the Treaty thus far indicates that they intend to rely upon the existence of their permanent bases in Antarctica and scientific research there to support future claims, or to consolidate existing ones, if the need to do so arises.

Despite the legal questions that have and will continue to be raised by the beguilingly simple terms of the Antarctic Treaty, Article 4 has provided a remarkably stable foundation. An interlinked regime has evolved through the years of the Cold War and beyond, to regulate tourism, sealing, marine living resources.<sup>15</sup> Through

<sup>13</sup> J M Marcoux, 'Natural Resource Jurisdiction in the Antarctic Continental Margin' (1971) 11 *Virginia Journal of International Law* 374, 379.

<sup>14</sup> For a discussion of the regime established through Article IV see, D R Rothwell, *The Polar Regimes and the Development of International Law* (1996) and G Triggs (ed), *The Antarctic Treaty Regime: Law, Environment and Resources* (1987).

<sup>15</sup> *Ibid.*

the Antarctic Treaty system, it has proved possible to ban Antarctic mining and to impose rigorous environmental assessment requirements for activities in Antarctica.<sup>16</sup>

Convoluting and obscure though its language may be, Article IV has provided a mechanism for effective joint management of activities in Antarctica. It has also become a powerful precedent for conflict avoidance in the Asian region. Where disputing states have employed sovereignty neutral provisions, such as Article IV, jointly to exploit and manage offshore resources.

### 1982 United Nations Convention On The Law Of The Sea And Joint Development Of Petroleum Resources

The idea of cooperative arrangements to exploit resources, whether fisheries stocks or straddling petroleum deposits, is not new.<sup>17</sup> Joint management regimes in marine areas have long existed in the North Sea between the United Kingdom and Norway in the Frigg Field Reservoir<sup>18</sup> and the Murchison and Stratford Fields,<sup>19</sup> in the Bay of Biscay,<sup>20</sup> in the area between Jan Mayen and Iceland between Iceland and Norway<sup>21</sup> and throughout the Middle East.<sup>22</sup> More recent examples are the joint development agreements between Vietnam and Malaysia<sup>23</sup> Columbia and Jamaica,<sup>24</sup> Guinea-Bissau and Senegal<sup>25</sup> and Argentina and the United Kingdom around the Falkland (Malvinas) Islands.<sup>26</sup>

What is new is that, in the Asian region, the underlying problem has been one of either disputed sovereignty over islands or disputed maritime boundaries, rather than access to the resource itself. For this reason, many

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<sup>16</sup> Protocol on Environmental Protection to the Antarctic Treaty. For a review of the Protocol see C Redwell, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 42 *International Comparative Law Quarterly* 599.

<sup>17</sup> See discussion by M J Valencia, J M Van Dyke and N A Ludwig, *Sharing the Resources of the South China Sea* (1997) ch VIII.

<sup>18</sup> Agreement Relating to the Exploitation of the Frigg Field reservoir and the Transmission of Gas Therefrom to the United Kingdom, 10 May 1976, 1098 UNTS 3.

<sup>19</sup> Murchison and Stratford Fields Agreement between United Kingdom and Norway, 16 October 1979, 1981 Gt. Brit. TS No 39 (Cmd. 8270).

<sup>20</sup> Convention on the Delimitation of the Continental Shelf in the Bay of Biscay between France and Spain, 29 January 1974.

<sup>21</sup> Agreement Concerning Fishery and Continental Shelf Questions between Iceland and Norway, 28 May 1980 discussed by W Ostreng, in M J Valencia (ed), *Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development* (1985) 555.

<sup>22</sup> Agreement Relating to the Partition of the Neutral Zone between Kuwait and Saudi Arabia, 7 July 1965, 4 ILM 1134. See generally T El-Hakim, *The Middle Eastern States and the Law of the Sea* (1979) 180–88; M J Valencia, 'Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas' (1986) 23 *San Diego Law Review* 661; G Blake et al (eds), *The Peaceful Management of Trans-boundary Resources* (1995); H Fox, et al *Joint Development of Offshore Oil and Gas Vol 1* (1989–90) 3–5 *Table of Joint Development Agreements*; G Triggs, 'Joint Development Agreements in the Asian Region: A Creative Response to Maritime Boundary Disputes' (1997) 33 *International Law News* 9.

<sup>23</sup> Memorandum of Understanding Between Malaysia and Vietnam, 5 May 1992.

<sup>24</sup> Maritime Delimitation Treaty Between Jamaica and the Republic of Colombia, 12 November 1993, (1994) 9 *International Journal of Maritime and Coastal Law* 394.

<sup>25</sup> Guinea-Bissau-Senegal: Management and Co-operation Agreement, 14 October 1993, *ASIL Newsletter*, Jan–Feb. 1996, 1–2.

<sup>26</sup> Argentina-United Kingdom: Joint Declaration on Cooperation Over Offshore activities in the South West Atlantic, 25 September 1995, 35 ILM 301 (1996). Under this arrangement, the UK will receive two-thirds of the earnings from hydrocarbons east of the Falklands with Argentina receiving one-third only, along with a 50/50 split of hydrocarbons west of the islands; Valencia et al, above n 17, 185.



Asian offshore resource conflicts attract the added dimension of territorial sovereignty implications that have proved fatal to final settlement. Since the eighties, however, the concept of joint development has been developed by states in Asia as a peaceful means of unlocking access to oil and gas resources to their mutual benefit while, at the same time, preserving their juridical positions on sovereignty.

That an equitable solution to overlapping continental shelf claims might prove difficult in practice is envisaged by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Article 83 recognises that:

Pending agreement between the States concerned, in a spirit of understanding and cooperation, may give every effort to entering into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation.

Article 83(3) does not define what a provisional arrangement might be, though it does clarify five elements. A provisional arrangement:

- may be between two or more states, recognising that the opposing states may not be the only ones concerned where third states have fisheries or research interests in the region.
- can bind only those states that have agreed to it and will not affect third state rights.
- is of a practical nature so that they may not touch on the delimitation issue itself, nor on the territorial sovereignty questions which underline that issue.
- is interim in the sense that they may be preliminary or even preparatory to a final agreed status of the disputed area and use of its resources.
- provides that any activities undertaken pursuant to such an arrangement will not prejudice any final delimitation.

Each of these elements will be present in a joint development agreement, which has been defined as 'The cooperation between States with regard to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims.'<sup>27</sup>

While there are several examples of interim agreements jointly to develop non-renewable resources in areas of overlapping continental shelf claims, they reflect the unique circumstances of each geo-political boundary dispute. The drafting of each article responds to issues that are special to the negotiating states and to their particular historical, economic and strategic concerns and objectives. Most critically, an agreement for joint development depends upon the political will of both states to complete negotiations. Thus, where the political will exists, provisions that enable each state to maintain its juridical position while proceeding with exploitation and management of the area can be an effective tool for dispute resolution, at least in the short term. Provisions similar to Article IV of the Antarctic Treaty will typically be included in a provisional joint development agreement permitting a 'bifocal and multifocal' view of sovereign rights.

Joint development agreements vary. Some models are the following:

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<sup>27</sup> This definition was suggested by Lagoni as Rapporteur to the EEZ Committee of the ILA Report on Joint Development (unpublished) and adopted by H Fox (ed) *Joint Development of Offshore Oil and Gas*, Vols 1 and 2 (British Institute for International and Comparative Law, 1990) 44.

- Each state maintains its claim to sovereignty so that full legal ownership is not threatened but agrees to cooperate with the other to manage and share the resource. Examples are the Japan-South Korea Agreement of 1974 and the Kuwait-Saudi Arabia Agreement of 1965.<sup>28</sup>
- One state manages and regulates exploitation of the oil and gas resources on behalf of the other state and shares all revenue with that other state. Examples are the Qatar-Abu Dhabi Agreement 1969 and the 1991 Australia-Indonesia Timor Gap Treaty in relation to Areas B and C, but not in Area A where the resource is managed jointly.
- An administrative structure is created through a joint authority. In the Australia-Indonesia Timor Gap Treaty, a ministerial council is established which holds the sovereign rights of both states and regulates and manages activities on behalf of both Australia and Indonesia in relation to Area A. Another example is the Thailand and Malaysia Joint Development Agreement of 1984.
- Co-ownership of the resource is agreed under which, for example, each state has a one-half undivided share, as in the 1992 Uqair Treaty between Saudi Arabia and Kuwait. This is not thought to be a desirable model because there is no established model for co-ownership or resource-sharing with recognised legal attributes. The Saudi Arabia-Kuwait Treaty was not a success and led to litigation.

Whatever model or new variation of joint development is adopted, critical to the arrangements will be a provision to ensure it does not prejudice respective sovereignty positions. Indeed, the *raison d'être* of joint development is that the parties have irreconcilable views on sovereignty. The success of joint development regimes lies in the ability to draft provisions that are sovereignty neutral. The following are some significant examples of such regimes.

#### Joint Development between Japan and Republic of Korea, 1974

The first attempt in the Asian region to create a joint development regime was in 1974 by Japan and the Republic of Korea.<sup>29</sup> The Treaty provides for the authorisation of concessionaires by each state party in respect of designated sub-zones of the disputed continental shelf and establishes a Joint Commission for consultation on implementation. The Joint Commission has, by comparison with later joint development arrangements, a limited power merely to recommend action to the state parties. Article 28 ensures sovereign neutrality of the arrangement by providing that nothing in the Treaty:

shall be regarded as determining the question of sovereign rights over all or any portion of the joint development zone, or as prejudicing the positions of the respective parties with respect to the delimitation of the continental shelf.

Article 28 of the Japan-Republic of Korea Treaty is a much simpler version of Article IV of the Antarctic Treaty. However, it adopts the same formula; joint development of resources in the disputed continental shelf are not to prejudice the juridical positions of either party regarding permanent delimitation of the shelf.

#### Malaysia-Thailand Agreement on joint development in the Gulf of Thailand

Curiously, and in contrast with other joint development agreements, the Malaysia-Thailand Memorandum of Understanding (MOU) for exploitation of non-renewable resources in the Gulf of Thailand of 1979, and the subsequent agreement in 1990 establishing a Joint Authority, do not provide explicitly for differing juridical views on sovereignty. Earlier, in 1972, Malaysian and Thai negotiators were able to agree on a continental shelf

<sup>28</sup> This model has also been adopted by the Memorandum of Understanding Between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries, June 5 1992, in force June 4 1993.

<sup>29</sup> Agreement Between Japan and South Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Continental Shelf Adjacent to the two Countries, 30 January 1974, 1225 UNTS 113.

boundary up to 29 nautical miles offshore in the Gulf of Thailand. There was fundamental disagreement, however, over their respective sovereignty claims to Ko Losin, a rock situated 39 nautical miles offshore on the Thai side of what would otherwise have been an agreed equidistant line.<sup>30</sup> Creation of a joint development regime in 1979 was intended as an interim measure covering the disputed area of approximately 2100 square nautical miles.

The MOU of 1979, and the subsequent agreement, recognise the existence of overlapping claims in the Gulf of Thailand, providing only that the parties will continue to attempt to resolve the problem of delimitation of the continental shelf boundary by negotiations<sup>31</sup> or:

such other peaceful means as are agreed to by both parties, in accordance with the principles of international law and practice, especially those agreed to in the agreed minutes of the Malaysia-Thailand Officials' Meeting on Delimitation of the Continental Shelf Boundary between Malaysia and Thailand in the Gulf of Thailand and in the South China Sea 27 February–1 March 1978, and in the spirit of friendship and in the interest of mutual security.<sup>32</sup>

The Joint Authority is granted all rights and responsibilities of Malaysia and Thailand for exploitation of the non-living natural resources of the seabed and subsoil of the overlapping area. Importantly, the prior rights under existing concessions and licences granted in the area are not to be affected by the Joint Authority. As might be expected in such a treaty, any disputes are to be settled peacefully by consultation or negotiation between the state parties.<sup>33</sup> The regime for joint development is thus relatively simple. While no specific provisions were devised to ensure sovereign neutrality, both Malaysia and Thailand have reiterated their original claims to jurisdiction in the overlapping area.<sup>34</sup> It seems, in this instance, that diplomats saw no need to provide that joint development poses no threat to sovereignty claims, relying instead on the neutrality implied by shared powers of the Joint Authority and provision that all costs and benefits are to be shared equally by Malaysia and Thailand.

### The Timor Gap Treaty<sup>35</sup>

Unlike the Thai-Malaysia joint development, it was fundamental to agreement on creation of the Zone of Cooperation between Australia and Indonesia under the Timor Gap Treaty that several provisions were drafted to ensure joint exploitation would not prejudice their differing juridical positions on continental shelf delimitation. Australia claims sovereign rights to the continental shelf in the Timor Gap as the 'natural prolongation' of its land territory. In geomorphological terms, Australia's shelf extends to the Timor Trough, significantly to the East Timor side of any equidistance line. By contrast, Indonesia has argued that international law requires delimitation to be based on equitable principles, a median line being the most obviously equitable result for opposite states. These apparently irreconcilable positions on exclusive sovereign rights to the continental shelf had the practical effect of denying access by either nation to petroleum resources, particularly

<sup>30</sup> Summary of the Malaysia-Thailand *Two Countries*, 30 January 1974, 1225 UNTS/113. MOU, Report numbers 5–13 by Choon-ho Park; Charney and Alexander, above n 8, 1099–1123.

<sup>31</sup> Article III, MOU between Malaysia and the Kingdom of Thailand on the delimitation of the Continental Shelf Boundary between the Two countries in the Gulf of Thailand, 24 October 1979, entered into force, 15 July 1982. The MOU was followed on 13 May 1990 by an agreement on the establishment of a Joint Authority. Both texts are in D Ong 'Thailand/Malaysia: The Joint Development Agreement 1990', *Current Legal Developments* (1991) 6 *International Journal of Estuarine (now Marine) and Coastal Law* 57–72..

<sup>32</sup> Article 2.

<sup>33</sup> Article VII, Annex I of the MOU, 21 February 1979.

<sup>34</sup> See Thailand's 1988 Proclamation establishing an EEZ extending towards Malaysia in the Gulf of Thailand and the Claim by Malaysia in December 1979; Charney and Alexander, above n 8.

<sup>35</sup> 1989 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia [1991] ATS No 9.

to the prospectively rich natural gas fields. A solution lay in joint development, mutual sharing of costs and benefits and guaranteed sovereign neutrality. Under Article 2(3) the parties agree that:

Nothing contained in this Treaty and no acts or activities taking place while this Treaty is in force shall be interpreted as prejudicing the position of either Contracting State on a permanent continental shelf delimitation in the Zone of Cooperation, nor shall anything contained in it be considered as affecting the respective sovereign rights claimed by each Contracting State in the Zone of Cooperation.

The parties also agree under Article 2(4) that 'Notwithstanding the conclusion of this Treaty, the Contracting States shall continue their efforts to reach agreement on a permanent continental shelf-delimitation in the Zone of Cooperation.'<sup>2</sup>

The Timor Gap Treaty was thus an interim arrangement of the kind envisaged by UNCLOS. By adopting an Article IV-like provision, the Treaty also purported to protect the juridical positions of both parties. The Treaty came into effect in 1991 and over the following years succeeded in providing a sufficient level of legal and political security to attract investment in petroleum activities in the Zone of Cooperation. The first product was taken from the Area in 1998, unitisation of a straddle deposit was negotiated in 1999 and joint venture agreements were planned to develop the Bayu-Undan field for a liquids-stripping and gas-recycling project.<sup>36</sup>

These fruitful outcomes of the Timor Gap Treaty are now under threat. Political events in Indonesia, the UN supervised vote in East Timor against integration with Indonesia, the creation by the UN of a Transitional Administration in East Timor (UNTAET) and the resulting political instability have significantly increased the commercial risks of financial investment in petroleum activities in the Zone of Cooperation.

In an effort to restore 'the political confidence necessary for significant investments presently under consideration in the Zone of Cooperation'<sup>37</sup> UNTAET and Australia have resorted to a novel form of creative obfuscation. UNTAET has been granted by the UN a treaty-making power 'as may be necessary for carrying out the functions of UNTAET in East Timor'.<sup>38</sup> On the basis of this power, Australia and UNTAET have agreed by an Exchange of Notes of 10 February 2000 on 'practical arrangements for the continuity of the terms of the Treaty'. By a MOU of the same date, UNTAET and Australia have also agreed that, following the separation of East Timor from Indonesia, the area covered by the Treaty is now outside the jurisdiction of Indonesia.<sup>39</sup> As Australia's Foreign Minister Mr Downer has observed, UNTAET has now become, 'Australia's partner in the Treaty, the terms of which will continue to apply throughout the transitional period until East Timor gains independence.'<sup>40</sup>

The phrase 'continuity of the terms of the Treaty' may seem verbose where the words 'continuity of the Treaty' might have sufficed. The language may, however, be explained by the need to avoid any implication that East Timor, on achieving statehood, has succeeded to the treaty rights and liabilities of its predecessor, Indonesia. To continue the terms of the Treaty, rather than the Treaty itself, provides a means of avoiding the objection of many representatives of East Timor, and possibly also of UNTAET, that the Treaty is illegal<sup>41</sup> and one to which East Timor will not succeed on independence. By adopting the notion of incorporation of a treaty by reference to it, the Exchange of Notes also avoids the highly imprecise principles of state succession at international law.

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<sup>36</sup> The Gas Recycle Development Plan was expected to achieve full commercial production in November 2003, with a field life of about 25 years.

<sup>37</sup> Joint media release, 10 February 2000 <[www.dfat.gov.au/media/releases/document/fa010\\_2000.html](http://www.dfat.gov.au/media/releases/document/fa010_2000.html)>.

<sup>38</sup> UNSC Res 1272 (25 October 1999), which incorporates the UN Sec Gen's Report of 4 October 1999, S/1999/1024 granting the power.

<sup>39</sup> Joint media press release *Timor Gap Agreement Reached with UNTAET* (10 February 2000).

<sup>40</sup> Ibid.

<sup>41</sup> Mari Alkatiri, a spokesman for the Council for National Resistance of East Timor, eg, declared 'we are not going to be a successor to an illegal treaty'; K Polglaze, *Timor Gap Treaty in Doubt*, *The Canberra Times*, 30 November 1999, 2.

Not only does the Exchange of Notes contrive to break any assumed link for succession purposes of the Treaty between Australia and Indonesia on one hand and UNTAET and Australia on the other, it provides that the terms of the Treaty continue from the transitional period 'without prejudice to the position of the future government of East Timor with regard to the Treaty'.<sup>42</sup>

On independence, East Timor may decide to 'succeed' to the treaties to which Indonesia was a party in respect of territory of East Timor, including the continental shelf. Any right of a successor state to resume multilateral treaty rights does not, however, extend to bilateral treaties such as the Timor Gap Treaty because the bilateral nature of the relationship necessarily requires the consent of the other state to any change in parties. At the end of the transitional period, it will thus be a matter of *de novo* negotiations between Australia and East Timor whether a new treaty for joint development for the resources of the Zone of Cooperation is agreed.

The Exchange of Notes has been an attempt to preserve the status quo so that the terms of the Treaty will regulate the relations between UNTAET and Australia and the powers of the Joint Authority in its relations with contractors under Production Sharing Contracts. The efforts of representatives of the UN, of the peoples of East Timor and of Australia to draft words to protect the rights of contractors and to preserve differing juridical positions on sovereignty have been imaginative and simple. Whether, however, the drafting techniques will succeed in achieving the objectives of providing legal stability to attract investments in the Zone of Cooperation has yet to be demonstrated.

### **1997 Treaty between Australia and Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries**

Another recent example of creative drafting to preserve differing juridical positions of states while enabling them to exploit resources and manage the environment is the Treaty of 1997 between Australia and Indonesia. The 1997 Treaty establishes three EEZ and seabed boundaries, with the objective of making offshore resources accessible in a secure legal context.<sup>43</sup> As is argued in the Australian National Interest Analysis, settlement of the boundaries 'greatly reduces the potential for future disputes and serves as model of bilateral cooperation'.<sup>44</sup>

While settling certain boundaries, a consequence of the 1997 Treaty has been the creation of areas of overlap between Australian seabed or continental shelf jurisdiction, and Indonesian EEZ or water column jurisdiction. These overlapping areas reflect the application of different legal principles for delimitation of seabed and water column boundaries. In particular, Australia maintains its view that, although international law has developed to encompass a distance-based criterion for water column boundaries, the natural prolongation principle remains the guiding legal criterion for seabed boundaries. Indonesia argues that the distance-based principle now applies to the continental shelf. As the outer limit of Australia's continental shelf claim extends further than an equidistance line between Australia and Indonesia, the EEZ boundary will, on these differing legal views, necessarily be different from the seabed boundary.

It is in relation to these areas of overlapping jurisdiction that the 1997 Treaty is particularly creative. The Treaty recognises the different legal status of the seabed and of the water column and the corresponding different sovereign rights of Indonesia in the water column and of Australia in the seabed north of the EEZ line. Article 7 provides that, in the overlapping areas, Indonesia may exercise EEZ rights and jurisdiction as provided for by UNCLOS and that Australia may exercise continental shelf rights to explore for and exploit the natural resources of the seabed and subsoil. Similarly, Indonesia has sovereign rights to explore for and exploit the natural resources of the water column in the overlapping area. Article 7 also provides that Australia and Indonesia must cooperate with each other in relation to the exercise of their respective rights and jurisdictions and, when doing so, no party may unduly inhibit the exercise of the rights of the other. In recognition of

<sup>42</sup> Exchange of Notes <[www.austlii.edu.au/dfat/treaties/2000/9.html](http://www.austlii.edu.au/dfat/treaties/2000/9.html) 25/05/00>.

<sup>43</sup> Treaty Between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, ILM, Vol. 5, September 1997, 1055; National Interest Analysis <[www.austlii.edu.au/au/other/dfat/nia/1997/1997018n.html](http://www.austlii.edu.au/au/other/dfat/nia/1997/1997018n.html), 21/09/2000>.

<sup>44</sup> Ibid 1.

Australia's sovereign rights to explore and exploit the continental shelf in the overlapping area, Australia is bound to give to Indonesia three months notice of any proposed grant by it of exploration or exploitation rights.

To facilitate agreement on the respective rights of Indonesia and Australia in the overlapping areas, it was necessary to protect their juridical positions in relation to the continental shelf of the Timor Gap. The 1997 Treaty does not cover the seabed of the Zone of Cooperation, but does establish a water column boundary there. The parties agree that:

Nothing contained in this Treaty and no acts or activities taking place pursuant to this Treaty shall be interpreted as prejudicing the position of either Party on a permanent seabed delimitation in the Zone of Cooperation established in the Zone of Cooperation Treaty nor shall anything contained in this Treaty be considered as affecting the respective seabed rights claimed by each Party in the Zone of Cooperation.<sup>45</sup>

This Article IV-like provision is intended to ensure sovereign neutrality and enables the parties to agree on their maritime boundaries and to facilitate resource exploitation within these boundaries.

## Conclusion

Treaty provisions that enable states with disputed territorial and maritime claims to move beyond sterile negotiations on permanent boundaries to develop resources jointly are a significant tool for dispute management, and possibly avoidance. The relative success of joint development regimes in Asia has prompted proposals that violent conflict, such as that in the Falklands, can be avoided in the South China Sea.<sup>46</sup> If claimants to the Spratly Islands could agree upon a form of joint development, it might be possible to defuse the current and historic tensions in the area. In particular, claimants could develop mutual confidence to focus on fisheries, the environment and maritime navigation and on access to the benefits of petroleum exploitation. China and Taiwan are reported to have supported the concept of joint development in the South China Sea. Clagett quotes a Chinese Foreign Ministry spokesman as saying that 'China is willing to shelve its dispute with Vietnam over the Spratlys in favour of joint development, but still claims undisputed sovereignty over the entire area.'<sup>47</sup>

Commentators prudently observe that any apparent support is likely to be little more than strategic posturing.<sup>48</sup> Nonetheless, and more positively, joint development has proved possible in the past between wary neighbours once it became clear that petroleum resources would otherwise remain 'locked up' by continuing conflict.<sup>49</sup> A multilateral agreement on joint development of the Spratly Islands and their appurtenant maritime areas will, doubtless, be significantly more difficult to achieve than the bilateral treaties that have been discussed. However, the political will to achieve joint development may evolve if economically viable petroleum deposits are confirmed in and around the Spratlys.

Negotiation of a joint development regime in the region will require creative drafting and above all, the drafting of provisions that preserve the respective juridical positions of each claimant. Existing treaties provide useful models for joint development and cautious optimism that it is possible to negotiate a regime for management and exploitation of the Spratlys to the benefit of all and the detriment of none.

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<sup>45</sup> Article 8.

<sup>46</sup> Valencia et al, argue that 'The creation of an institutionalised dialogue would add structure and stability to the discussions ... Putting the sovereignty issue aside and creating a regional resource management body has the greatest potential to reduce the tension currently rife in the region,' above n 17, 1, see also 183–7.

<sup>47</sup> *Indochina Digest*, 8 July 1994, 4; B M Clagett, 'Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea' (1995) *Oil & Gas Law and Taxation Review* 375, 380, fn 46, cited by Valencia et al above n 17, 197.

<sup>48</sup> Valencia et al above n 17, 186.

<sup>49</sup> See generally, T McDorman, 'The South China Sea Islands Dispute in the 1990s: A New Multilateral Process and Continuing Friction' (1993) 8 *International Journal of Marine and Coastal Law* 263, 268.

## **Teaching International Law**





# Improving International Law Teaching: Just Do It

John King Gamble\*

## Introduction

My initial title for these remarks was 'teach or get off the podium.' I chose not to use this colourful title only because it might be construed as supporting only a lecture method for international law teaching.

I should like to take the opportunity of this conference to reflect upon some of the things that have been written about international law teaching and offer some suggestions for dealing with recurring dilemmas. I cannot avoid viewing international law teaching through the lens of my own experiences of more than 25 years of teaching the subject mostly to advanced undergraduates in the United States. But I have done enough teaching at other levels and to other kinds of students and talked with dozens of fellow teachers to be fairly confident my experiences and frustrations are applicable beyond my own necessarily narrow range of experiences. Moreover, I directed the American Society of International Law's Survey of Academic International Law (SAIL) Project. SAIL was eye-opening for me. I sent a questionnaire to more than a thousand professors and administrators involved with the teaching of international law. In the process, I was able to gain quite an accurate view of how those teaching international law feel about their experiences. Three years ago, after considerable arm-twisting from Charlotte Ku, Executive Director of the American Society of International Law, Christopher Joyner<sup>1</sup> and I undertook another kind of survey. We wrote to about a hundred colleagues and asked them to send us syllabi, examinations, and teaching strategies, that is, techniques that had proven successful in conveying especially difficult concepts. The result was an ASIL publication, *Teaching International Law: Approaches and Perspectives*, designed to share the experiences of seasoned professors with those just embarking on the survey course, rather like a 'cookbook' for those who have to prepare a meal, often quickly and sometimes with little formal training. The book gave us a good vantage of how international law teachers in the United States were approaching the survey course in the late 1990s.<sup>2</sup>

In absolute terms, there might appear to be a fairly extensive literature of *about* the teaching of international law. A report Hilary Charlesworth and I completed for the International Law Association Committee on the Teaching of International Law contains a bibliography of 51 monographs and articles written in English since 1980.<sup>3</sup> But, considering its importance, serious studies of the teaching of international law have been rare. Universities around the world state with amazing consistency that the two principal roles of faculty are research and teaching. My university, in its unending drive to measure the immeasurable, goes so far as to tell us faculty we will be evaluated 40 per cent on teaching, 50 per cent on research and scholarship and 10 per cent on service. They equivocate when I ask where my published critiques on the lunacy of this system should count in my own evaluation.<sup>4</sup>

The amount of attention devoted to the teaching of international law pales in comparison to that given to research. Research is vital. There are tested and effective procedures, some of which have been operating for centuries, to assess and assure the quality of research, for example, assiduously refereed journals, peer-review

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<sup>2</sup> J Gamble and C Joyner, *Teaching International Law: Approaches and Perspectives* (1997).

<sup>3</sup> International Law Association, Committee the Teaching of International Law, (Preliminary Report, July 2000) We excluded textbooks. The fact that we limited ourselves to English and the period since 1980 means we probably have omitted as many as we included.

<sup>4</sup> J Gamble, 'The Australopithecus Afarensis (Lucy) of American Higher Education' (1999) 33 *J Ed Thought* 305-312; J Gamble, 'The Last Word on Bekkerman and Lucy' (1999) 33 *J Ed Thought* 327-332; J Gamble, 'International Legal Scholarship: A Perspective on Teaching and Publishing' (1989) 39 *J of Legal Ed* 39-46; J Gamble, 'Course Evaluation Questionnaires: The Sundial/Stopwatch Dilemma' (1990) 12 *New Education* 53-60; J Gamble, 'The Relationship between Teaching and Research: Clear Answers to the Wrong Questions' (1985) 19 *J Ed Thought* 95-103.

processes for monographs. Furthermore, most research is at least passively collaborative. Few of us write for publication without asking colleagues to critique early drafts. Major research publications often are co-authored adding further to our confidence that research does what it is supposed to do, increase our understanding of international law while meeting acceptable standards of academic rigour.

The situation with respect to the teaching of international law is very different. Considering that we spend much of our professional lives teaching, 50 articles and books in 20 years is scant attention. If we compare this level of attention to any substantive subfield of international law, for example, law of the sea or human rights, we would find perhaps a hundred times more serious scholarly attention. Teaching is too important to neglect; we cannot wish it away like service on some pesky committee.

One might argue that there has been enough navel gazing about international law teaching: why not follow the advice in my title and just get on with doing it? There are several reasons we should do more than this. First, much international law teaching is done in isolation in the sense that teachers do not work in close cooperation with colleagues and lack the benefit of synergy and advice of others. There are exceptions, for example, large law schools in the United States that may have ten faculty with major teaching responsibilities in international law.<sup>5</sup> Far more common in the United States is smaller law schools with one faculty member handling all the public international law and perhaps also the international business transactions course. In political science departments in North America — where far more people learn the basics of international law — the norm is one faculty member with teaching responsibilities for the course. International law is a fraction of the total teaching assignment — perhaps 25 per cent — and invariably they are the only person in the department teaching the subject. One might argue that most teaching is individualised with professors deciding for themselves how to handle the job. That is true, but, as I discuss in the next section, since international law tends to be marginalised, we need to work more collaboratively to try to achieve the stature international law deserves.

In the following two sections, I shall described problems with international law teaching that seem to loom large to many who have thought critically about the subject. Finally, I shall suggest several concrete steps that have a reasonable chance to move international law teaching away from the defensive, defeatist attitude too often in evidence.

### Perceived problems with international law teaching

It seems to me two problems or sets of problems loom especially large when teachers of international law vent their frustrations.

#### Problem 1: students are reluctant to take international law courses

When I make this point, I must avoid generalising too much from the situation in North America; the rest of the world has a better record of convincing — or forcing — students to take international law. The United States defines the standard that needs to be changed. As of 2000, no student in a United States law school J D program or political science Ph.D program will be required to take a course in international law. That fact should frighten us especially since there are more than 250 such programs. One might think that the United States system of higher education that prides itself on diversity and decentralisation would have produced at least a few programs that saw the wisdom of mandating the study of international law.

The SAIL study completed in 1991 and published in 1992<sup>6</sup> provided a comprehensive picture of international law teaching at that time. One study completed since then confirms these results and provides a slightly more up-to-date picture.<sup>7</sup> The good news is that one battle has been won; virtually all law schools in the United States and Canada now offer at least one course in international law.

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<sup>5</sup> J Gamble, *Teaching International Law in the 1990s* (1992) 11-37.

<sup>6</sup> Ibid.

<sup>7</sup> J Barrett, 'International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students' (1997) 31

The more important consideration is how many students enrol in international law courses. In 1912 about 25 per cent of law students in the United States took at least one course in international law; in 1991, the figure was at most 45 per cent.<sup>8</sup> If one considers the inflating influence of a small group of students at a few large law schools who take many courses in international law, has there been any improvement in 80 years? A student graduating from law school in 1912 with the LL B degree was only slightly less likely to have had an introductory course in public international law than was a student receiving the J D degree in 1991.<sup>9</sup> Some would like to think that the decade of the 1990 provided impetus for improvement in these figures. The best information we have comes from a study carried out by the American Bar Association about four years ago. In a report on that study, Professor John Barrett estimated that 'at most law schools across the United States, fewer than 20% of graduates ever take a course in international law'.<sup>10</sup>

There is ample reason to believe things are better in other countries and better in civil law than in common law systems. In the SAIL study, subject to very limited resources, I received completed surveys from 150 international law teachers from 30 countries.<sup>11</sup> International law was required in 65 per cent of those countries.<sup>12</sup> In fact the only two countries that 'seldom or never' require international law for the law degree were the United Kingdom and Australia.<sup>13</sup> A very recent appeal from Ambassador Hans Corell, Legal Counsel of the United Nations, indicates that the problem of avoiding international coursework is widespread:

In discussing with colleagues from academia how best to make these international legal norms better known around the world, it has come to my attention that many law schools do not have international law in their curricula. In schools where international law is taught, it is sometimes given marginal attention, while at other schools international law is more in focus, not to say one of the most prominent features of the institution's education.<sup>14</sup>

We do not have accurate information about subscription levels of international law courses. A reasonably safe estimate is that probably not more than 50 per cent of the students in law schools around the world will take any international law; these figures are skewed by the fact that the United States has the worst record in requiring international law and graduates many more lawyers than any other country. Introductory courses in public international law are common in departments of political science (sometimes called government or politics). Extrapolating from the SAIL survey, I estimate that, as of 2000, about 60 per cent of political science departments in the United States offer international law (often combined with international organisations) and that about 30 per cent of the majors in those departments will elect the course. The huge increase in business administration majors in the United States and concomitant internationalisation of curricula has meant some business schools offer international law on their own; many turn to political science departments for the course. Probably about three per cent of undergraduate students in the United States will take international law.

## Problem 2: too little respect

A recurring theme when international law teachers write about their craft is the perception that international law is not afforded the status and position it deserves. My personal eureka about this issue came in the 1970s when, as a new assistant professor at the University of Rhode Island, I taught a survey course in international law for the first time. As the new kid on the block, I got the worst office, one of those with incomplete walls. When students started to register for my international law course, I could hear what my colleague in the adjacent office

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*Internat'l. Lawyer* 845-58.

<sup>8</sup> Gamble, above n 5, 123.

<sup>9</sup> Ibid.

<sup>10</sup> Barrett, above n 7, 854.

<sup>11</sup> Due to small numbers, generalisation is possible only for Australia and the United Kingdom.

<sup>12</sup> Gamble, above n 5, 77.

<sup>13</sup> Ibid.

<sup>14</sup> H Corell, Information from the Legal Counsel of the United Nations, 'An Appeal to the Deans of Law Schools Worldwide' (6 June 2000) [8] <[www.un.org/law/counsel/appeal.htm](http://www.un.org/law/counsel/appeal.htm)>.

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said about the course: 'Dr Gamble is new, but I hear he is pretty good. Everybody knows international law does not exist, but it might be fun to study it all the same'. I felt as if I was teaching religion in an era when the death of God was widely accepted. The feeling persists, both in law and political science, that international law is at best a good supporting cast member, certainly not ready for a major role in the curriculum.

The causes of this situation are fairly clear in political science. International law was a mainstay of many political science programs 75 years ago. Today international law can be — but usually is not — omitted entirely with little loss in stature. Why? Many political scientists came to perceive international law as so idealistic, so normative, that it was almost unrelated to actual behaviour of states. As political science tried to behave more like a science, international law seemed farther and farther out of step with political science as the discipline developed from the 1950s through the 1980s.<sup>15</sup> There has been a resurgence of international law in political science departments since 1990 with more and more institutions offering at least a survey course.

Many scholars of international law teaching have analysed and characterised this 'we can't get enough respect' problem. Gerry Simpson in a recent article in the *European Journal of International Law* described several elements of what he calls a malaise:

International law teaching is partly fear-driven. Our phobia is a fear of the periphery. This is where we are always being exiled with our glamorous little sideshow, riding on the tails of the law school flagship — constitutional law or property or contracts. With some notable exceptions, international law has long been regarded as a boutique or fringe course, interesting but not essential. Even in the much-vaunted interdependent world, international law is regarded as optional. There is general acceptance that the world is global but doubts remain about whether the new global environment is regulated by law or by law which national or local legal professions will find relevant.<sup>16</sup>

Similar sentiments were expressed in the 1980s. Professor Michael Reisman saw a 'tendency to characterize some courses as core or indispensable and others as essentially optional or cosmetic' with international law 'frequently relegated to the second category'.<sup>17</sup> Professor David Kennedy in describing his student days at Harvard Law School said 'I also got the distinct impression that international, comparative, and for that matter, historical legal studies were not in the mainstream of my legal education'.<sup>18</sup>

This oft-cited concern that we are marginalised has been noted by too many people in too many countries over too many decades to be dismissed. But we must put our concerns into perspective. Many, if not most, subdisciplines feel they do not get the attention they deserve; international law is no different. I hope we will be different in that we can make a more convincing case that the time has come for international law to occupy a more prominent position. In the following section, I suggest some ways we might bring this about and some futile approaches we should abandon.

### **What is to be done (and avoided)?**

I shall leave to more objective eyes to judge whether a Leninist title is helpful in discovering what actions we should take.

### **Change our attitude — definitively, conspicuously and finally**

This may seem naive to suggest and impossible to implement. Old behaviours die hard, but they can be changed. We may have gotten into a rut and tend to complain rather than seizing new opportunities. We should declare victory and trumpet the fact that international law has won and must be studied by a broader spectrum of people. The global economy is real and irreversible; it can be a powerful reason to study international law. Almost

<sup>15</sup> Gamble, above n 5, ch III, 132-33.

<sup>16</sup> G Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 *Eur J I L* 73.

<sup>17</sup> W M Reisman, 'The Teaching of International Law in the Eighties' (1986) 20 *Internat'l. Lawyer* 987.

<sup>18</sup> D Kennedy, 'International Legal Education' (1985) 26 *Harvard I L J* 366.

everyone agrees that ‘the lawyer of the twenty-first century will undoubtedly have an international practice, regardless of the lawyer’s location or area of expertise’.<sup>19</sup> Michael Reisman hit the nail on the head:

Integration in a global system means that even ‘domestic law’ courses can no longer be understood adequately — whether for descriptive or practical professional purposes — without an understanding of the organization and dynamics of the international system ... The penetration of international systems into the domestic process has gone so far that international law is no longer the prerogative of a small circle of lawyers practicing in New York and Washington.<sup>20</sup>

Gerry Simpson reminds us that we have not yet moved beyond ‘that dinner-party staple: is international law really law?’<sup>21</sup> This is a case where I believe we should not, as Simpson seems to fear, worry about the incompleteness of municipal law parallels. Every legal system at every level has gaps between prescription and performance. We should say so in terms the average person can understand. Achieving the status international law deserves begins with believing it ourselves and being willing and able to explain those beliefs to others.

This anecdote made the point for me. Twelve years ago, I had a research assistant doing work on bilateral treaties between the United States and the Union of Soviet Socialist Republic (USSR) between 1933 (the date the United States recognised the Soviet Union) and 1988. The student was new to treaties, so I told her to begin by collecting all the instruments that met our criteria. She did so and in a fortnight I had photocopies of 132 treaties. At exactly the time I was looking over the stack of treaties, I was listening to United States Public Radio that featured an interview with Senator Quayle who had just been selected by then Vice-President Bush to be his running mate. Since I was not yet aware of the Senator’s abilities as an anti-matter wordsmith, I was listening only casually, but one of his first statements caught my attention. Mr Quayle said ‘You can’t trust the Russians, they break all their treaties’. I submit that situations like this one — each of us has her/his examples — provide a chance to explain how and why this popular image of international law is dead wrong.

There are instances where disciplines have markedly altered the way they are perceived. One of the best examples is economics. Sixty years ago economics was broadly seen as too theoretical and/or quantitative and of little practical use to policy makers. Economists worked hard to change that image to the point that today economics is assumed to be essential to policy-making and to have precise answers to myriad economic, political and social problems. Have supply and demand curves gotten that much better? No. But economists, to finish the analogy, have responded to the challenge that supply and demand curves do not work to predict and understand the economy with many cogent, understandable examples of successes. We can do the same for international law, but we need to be willing to make the effort even if that means addressing audiences beyond those with which we are most comfortable.

### Increase demand for international law courses

I mentioned earlier that too few students study international law. The situation is especially bleak in the United States. The survey undertaken by Professor Barrett estimated that as of the mid-1990s at most only 30 per cent of United States law students take any international law.<sup>22</sup> Two solutions suggested in the United States for almost a century, making international law mandatory and including international law questions on bar exams, have gone nowhere.<sup>23</sup> Barrett believes that, if requiring international law is unattainable ‘including international law in domestic courses seems to be a prudent alternative’.<sup>24</sup> Gerry Simpson seemed to agree when he

<sup>19</sup> Barrett, above n 7, 858.

<sup>20</sup> Reisman, above n 17, 988.

<sup>21</sup> Simpson, above n 16, 74.

<sup>22</sup> Barrett, above n 7, 853.

<sup>23</sup> Barrett, above n 7, 857; Gamble, above n 5, 136.

<sup>24</sup> Barrett, *ibid.*

commented positively about the fact that 'Melbourne Law School is currently integrating international legal materials into many of its compulsory courses'.<sup>25</sup>

A friend and colleague of mine who teaches international law at a United States law school has told me his dean paid a bonus — a couple thousand dollars, I think — to faculty who agreed to include international law materials in their domestic courses. I find such effort — with or without the financial incentives — troubling. Who assures that the international law content will continue to be included? Who monitors the quality of the content? When the law school has its next round of budget cuts, what assurance do we have that the dean will not eliminate regular international law courses on the grounds that students gained enough exposure from these 'internationalised' domestic courses?

I find Michael Reisman's argument convincing. He describes the stark contrast between domestic and international law and sees a danger that our students must avoid.<sup>26</sup>

Once a student has a basic understanding of our domestic legal system, he or she can move to other areas and learn them quickly because the decision-structure in which they transpire, the methods of making and applying law, and many of the basic policies of the law are the same or at least cognate ... None of this applies when the student moves into the international legal arena. Some of the road signs seem similar, but, on examination, they prove to be what the French call 'false friends'.<sup>27</sup>

If the only exposure our students get to international law comes from this appendix approach, I fear they will be false friends. If Professor Reisman's point was explained to law school deans, perhaps they would be more receptive to international law.

As a possible substitute for requiring an international law course, I suggest much wider use of certificates (or certification) in international law. This would be aimed principally, but not exclusively, at younger lawyers a few years out of law school. A professional association such as ASIL could certify that a certain basic background in international law has been achieved. The details would have to be worked out carefully; I envision an application form listing background, including courses taken at university, followed by an assessment by a committee of ASIL members. One could be certified through many different combinations of courses and work experience, for example, an undergraduate course in international law followed by IBT or a seminar in law school. Certification would indicate a certain level of background in international law.

Given the nature of legal education in the United States characterised by almost 200 law schools competing for a steady or declining number of applicants, one would think at least a few law schools would have broken from the pack and mandated a course in international law. Imagine the public relations value of a picture on the cover of the alumni magazine showing the dean of Central State Law School being congratulated by Arthur Rovine, Stephen Schwebel, and Charlotte Ku for being the first law school in the United States in more than 50 years to require international law of all law students. If this would not be enough, perhaps we should try grants from foundations to law schools on the condition they agree to require a course in international law. It is possible that once a couple of schools break the ice, others will follow.

### Improve courses themselves and rethink access to them

Hundreds of scholars are constantly thinking and rethinking how to conceptualise, organise, and present this subject called international law. In many ways, we are in fine shape if we would just change our attitude as recommended above. Gerry Simpson's article is an excellent example of a committed teacher wrestling with what works given the nature of the subject.<sup>28</sup> The principal worry I have about pieces like Simpson's is that, when they are read by those outside of international law, they might be interpreted as fundamental doubts even

<sup>25</sup> Simpson, above n 16, 73.

<sup>26</sup> Reisman, above n 17, 989.

<sup>27</sup> Ibid.

<sup>28</sup> Simpson, above n 16.

reaching the point where international law teachers question whether the subject should be taught at all. This is not an issue if one takes the time to understand Simpson's recommendations and realises that most academic subjects are constantly going through comparable introspections.

Significant progress in improving international law courses might require the kind of scrutiny of bedrock assumptions that can be very uncomfortable. The observation offered by von Humboldt a century ago — there is 'an organic link between the creation of knowledge and its transference'<sup>29</sup> — is accepted by most universities and drives the teaching philosophies of many. The argument is that research keeps faculty at the cutting edge and makes their teaching better. But there are dozens of cutting edges; none of us can possibly carry out research in more than a few of them. Especially when it comes to the survey course, cutting-edge research may distort as much as it enlightens. In the SAIL survey, I found strong feelings among the international law professorate that rewards for faculty follow research accomplishment, not teaching: 'How can we improve international law teaching when for the most part faculty are hired, promoted and rewarded for excellence in research?'<sup>30</sup> Given this preoccupation with research, it may be difficult to convince faculty to concentrate their efforts on teaching.

Each year those who teach the survey course in public international law feel increased frustration because they cannot do justice to all the materials that should be covered in a single-semester course. In the SAIL study, I offered the following recommendation:

International law is a vast subject, all important elements of which cannot be covered in a one-semester (or even a two-semester) course. This frustrates many teachers. We should admit the impossibility and do the best we can in one course. If more faculty would think in terms of what is the minimum knowledge every law graduate should have, we could broaden the audience for international legal education. At present, I suspect, many teachers find a one semester survey of international law oxymoronic and retreat to the more comfortable realm of specialized seminars. Instead, I wish we believed that, if all students had a common background in sources, subjects, rights and duties, territory, etc., they would be better prepared for more rigorous seminars.<sup>31</sup>

I think we should give more thought to developing a very basic course that would provide enough background in international law so that, in Michael Reisman's words, students are 'made aware of the complexity of legal change in a decentralized or ineffectively organized system'.<sup>32</sup> This course, which must be no longer than a standard one-semester course, would meet many of our most pressing needs. It would provide enough contextual background for the practitioner to work on the international issues. It would provide adequate preparation for law students to elect courses in human rights, law of the sea, or environmental law.

I would call the course survey of international law, not public international law, and make it prerequisite for other international law coursework. How do we make the course good enough that students will take it? First, we need to keep the course as compact as possible, a maximum of a one-semester, three-credit course; better would be a two-credit course, about 30 one-hour meetings, to force selectivity. We should use the Internet to encourage cooperation among hundreds of professors to make the course as effective as possible; this may be what Ambassador Corell envisions in his 'Worldwide Law School Network'.<sup>33</sup> We should capitalise on the fact that thousands of our colleagues teaching over the decades have discovered what works and what does not.<sup>34</sup>

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<sup>29</sup> See discussion in S Kwiatkowski, 'The Organizational Problems of Combining Teaching and Research' (1980) 15 *European J Ed* 355.

<sup>30</sup> Gamble above n 5, 84.

<sup>31</sup> Ibid 137.

<sup>32</sup> Reisman, above n 17, 992.

<sup>33</sup> Corell above n 14., [17].

<sup>34</sup> See Gamble and Joyner, above n 2, for a discussion of innovative techniques.

I should like to use the example of Professor Thomas Franck who gave a superb luncheon address at this conference. We need to convince Professor Franck and others like him to focus their talents in a slightly different way: How to explain aspects of international law to a broader audience clearly, engagingly, and, most importantly, in a way that retains fidelity to the subject. The irony is that teaching, regardless of how masterfully done, can contribute little to the pre-eminence of scholars like Professor Franck.

There would be resistance; there always is. This could be minimised by developing the course carefully so that professors could use it as a guide, not as something imposed on them. The ability to benefit from the experiences of others should be a major incentive. A good, compact survey course should be able to garner support from those who teach advanced courses. All of us know the frustrating inefficiency of, for example, trying to teach law of the sea to students who have had no introduction to international law. How can a student understand the 1982 UN Convention without knowing something about the basics of the law of treaties?

### Conclusions

Maybe this can be our moment, the time when the confluence of several forces makes it feasible to achieve a substantial increase in the number of people who study international law perhaps concomitant with enhanced quality of our courses. Several important developments work in our favour. The globalisation of the world economy is inserting an international element into law practices in small-town Iowa and businesses in small-town New South Wales. We used to hear the argument that international law is important and interesting but irrelevant to jobs in the real world. Not only has this argument become rare, often it has reversed itself. The Internet makes it possible for international law professors and students to communicate and collaborate with one another in ways that were impossible ten years ago.

But remember Goethe's warning: opportunity is transient. We must act decisively if this is to be our moment. If we are blinded by our mindset of the periphery, we may lose our chance to move into the mainstream. We should be more flexible, flexible in admitting that international law can be taught in venues other than law schools and in trying to fit an introduction to international law into a smaller curricular package.



# There's Method in Her Madness or Games Teachers Play

Catherine J Iorns\*

## Introduction

Earlier this year three things prompted me to look at teaching theory and try to come up with something for my international law class for the first semester of the year 2000. First, there was a long gap since I had last taught international law fully. Second, I was looking at teaching a very large group — 130 in the class, compared with the small group of 30 to 40 that I had last taught. Finally, I had a commitment to teaching where students are active participants in their learning,<sup>1</sup> but had not done this with large groups before. I thus set out to examine the literature for recent materials on active large group teaching in public international law.<sup>2</sup> What I found in the literature was of limited use in answering my specific questions. However it confirmed the direction I was taking and encouraged me to try to develop some participatory exercises for my classes, as well as encourage my students to do likewise in their presentations. This paper describes the literature that I reviewed and then some activities that I have found useful in teaching international law.

## International law pedagogy

There has not been much written recently on methods of teaching international law. There are two excellent recent articles in the area by Tim McCormack and Gerry Simpson.<sup>3</sup> However, McCormack and Simpson reinforced why I did not feel able to do a full role play with a class of 130. For example, setting aside a large block of time, like a weekend, is fraught with administrative difficulties, and would have to be voluntary. So despite being attracted to the use of role plays for their teaching purposes, especially having done so with the small class at Murdoch University, I decided I would have to try something on a much smaller scale. Simpson's 'Magic Mountain' piece is an excellent article but it focuses on substance rather than method so was not relevant to my inquiry.

## General pedagogy

There is quite a lot written about teaching generally, including teaching in large groups in particular. There appear to be six different current approaches.

## Student-centred learning

The focus of the student-centred learning approach is on learning rather than teaching: 'Teaching is no longer seen as imparting and doing things to the student, but is redefined as facilitation of self-directed learning.'<sup>4</sup> This is not a new idea but builds on ideas from authors such as Piaget and Dewey. Its application to tertiary education originates in about 1985 with Kolb's 'experiential learning' approach<sup>5</sup> and Gagne's emphasis on the process of

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<sup>1</sup> See Appendix for a categorisation of different types of classroom 'activity'.

<sup>2</sup> Something else that I did at Murdoch University when I last taught international law was to devise an innovative group project involving research essays and peer reviews. I ran a ANZSIL Teachers' Workshop on this in 1994. However, I was not prepared to try such intensive assessment methods in a large group. So I focused solely on the teaching methods.

<sup>3</sup> T McCormack and G Simpson, 'Simulating Multilateral Treaty Making in the Teaching of International Law' (2000) 10 *Legal Education Review* 61-82; G Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 *European Journal of International Law* 70.

<sup>4</sup> J O Cooper and T E Heron, *Applied Behaviour Analysis* (1987).

<sup>5</sup> D A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (1983). Kolb's aim is to transform experiences into knowledge and skill.

learning (meta-learning) developed into reflective or critical learning by Brookfield.<sup>6</sup> The pedagogical justification is that students learn best when the impetus comes from them; the lecturer becomes a facilitator or a resource to assist their learning. The practical justification is that it is market responsive and, in a user-pays environment, is better catered to students, especially where there is tight competition between providers for student dollars. A separate justification is that it meets with a vocational education aims, enabling students to learn what is necessary to meet their career aspirations, matching skills with employer requirements as well. This is often joined with problem-based learning (discussed below).

It is possible to take the 'student centred' approach too far. It has sometimes been criticised as 'dumbing down' or that it is 'MTV-style' education. That is, it is more education as entertainment, catering to students with short attention spans.<sup>7</sup>

### Student learning styles

Another category of writings is that on student learning styles. The aim or thesis of this approach is that you try and identify and then match your student's different learning styles. There are various analyses identifying learning styles. For example, the Myers-Brigg Type Indicator, Neuro-Linguistic Programming, Kolb's learning style inventory, and deep versus surface learning. There have been further analyses of the success of the different methods for different groups of students.<sup>8</sup> A general conclusion of the literature on learning styles is that it is difficult for lecturers to match all styles, but a variety in teaching methods makes it more likely that lecturers will reach more students than if they focus on just one main style.

### Large groups and active learning

The general consensus of the literature on large groups is that the best teaching styles split the large group into smaller groups (!). There do not appear to be any ideas for active learning particular to large groups en masse, but there is a perceived need to encourage active learning in large groups despite the difficulties in this. Possible solutions to the difficulties in making students in large groups actively involved in their learning include: small-scale in-class activities, such as breaking the class into small groups for such activities; email and internet discussion groups; and web-based learning. For more discussion on some of these, see below.

### Problem-based learning

Problem-based learning sounds as if it is educationally rewarding but also that it is a lot of effort to both set up and manage. This approach consists of giving students a problem before any subject matter knowledge is acquired. In small groups, the students analyse the problem, identify resources for learning how to solve it, pursue those resources, and apply the knowledge found to the problem. Students are thus learning how to learn, in the same way a problem would present itself in reality. Students take responsibility for their learning and a lecturer is a facilitator of that. There is very little emphasis on presentation of information. Neither is there an emphasis on lecturer assessment of students ability. The students also learn how to assess their own and each other's learning.

Note that this is very different from using examples and problems in class the way we usually do. We usually use them after we have presented the rules to show how to apply that knowledge to a fact situation. In problem-based learning, this happens the other way around: 'A true problem is something the student has never seen before.'<sup>9</sup> Those who have tried it properly say the approach works really well.<sup>10</sup> However, it also takes a lot of

<sup>6</sup> S D Brookfield, *Becoming a Critically Reflective Teacher* (1995).

<sup>7</sup> P Sacks, *Generation X Goes to College: An Eye Opening Account of Teaching in Post-modern America* (1996).

<sup>8</sup> A Black, 'Student perceptions of Teaching Methods: An Analysis of How Perceptions Can Impact Upon the Learning Process' (1996) 14 *Journal of Professional Legal Education* 203.

<sup>9</sup> D Cruickshank, 'Problem-based Learning in Legal Education' in J Webb and C Maughan (eds), *Teaching Lawyers' Skills* (1996).

rethinking of course design and content and takes a considerable amount of time. It apparently also works best when there were numbers of adjunct professional help to assist the students. This also brings in a problem of resources. Despite these drawbacks, this method appears to be something worth trying, but in the context of this paper it was not something I could do for the impending semester.<sup>11</sup>

### Web-based learning

Web-based learning has mostly been seen in the United States so far, though it has also just started to be seen in Australia as well.<sup>12</sup> Its current use in law schools often focuses on delivery of reading materials, with a limited use in discussion or simulation of activities.<sup>13</sup> There is great potential for active learning and its advantages include its efficiency in terms of time and money and its ability to get around space constraints. Its primary disadvantage is the time it takes to set up and the expert help needed in doing that.<sup>14</sup>

There are useful recommendations on the setting up of web-based courses,<sup>15</sup> and some excellent examples of web-based course design exist.<sup>16</sup> In the international law field I have found web-based learning approaches used at Stetson Law School, in Florida: there is a compulsory email discussion group for international business students, which counts towards their grades, and a proposed international treaty simulation by email. Given the lead time needed to set up such a course, this is again something I could consider in the future, even if only for a segment of a course, but not for the impending trimester.

### Total quality management

Total quality management (TQM) is a system for quality assurance. It is not related to teachers in classrooms but to universities' standards, structures and processes for assuring good teaching in classrooms. It involves the application of business approaches with a client (student or employer) focus. In the United Kingdom quality audits, including teacher training for lecturers, is widespread and linked to funding. While this is a large area of writing and literature, it is not relevant to teaching methods per se.

In summary, the first three approaches are important, but I have not seen anything new that was particularly important to this exercise since I last taught.<sup>17</sup> Those with the most promise of introducing useful student activity into courses are the problem and web-based learning approaches. However, both of these take significant amounts of at least time and typically also of resources to implement. So for large groups and international law I was back to developing my own methods.

### Games we play

Activities can be successfully and easily introduced into an international law classroom, large or small. It just takes some conscious effort to think of how to do it (especially if you also want it to be fun!). I still use the standard methods of introducing activity by way of discussion of the materials in question. For example, asking

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<sup>10</sup> See, eg, Cruickshank, *ibid*; J Macfarlane and J Mainwaring, 'Using Problem-based Learning to Teach First Year Contracts' (1998) 16 *Journal of Professional Legal Education* 271.

<sup>11</sup> For more information on this approach, see the extensive lists of references in both the articles listed, *ibid*.

<sup>12</sup> See, eg, The Australian Law Courseware project of the Victoria Law Foundation <<http://www.viclf.asn.au>>.

<sup>13</sup> Although even the delivery of materials via the Web can transform classroom teaching. See, eg, M K Dubber, 'Webbing the Law' (2000) <<http://jurist.law.pitt.edu./lesmay00.htm>> on his use of the Penal Law Web in his criminal law classes at SUNY, Buffalo.

<sup>14</sup> See <<http://jurist.law.pitt.edu./lessons.htm>> for anecdotal examples and practical hints.

<sup>15</sup> See the Jurist website, *ibid*.

<sup>16</sup> Mike Szabo in Alberta has some excellent examples, even though these are not law courses. See <<http://www.quasar.ualberta.ca/DRMIKE>>.

<sup>17</sup> Although Peter Sacks' book makes some good points about teaching in modern times. Above n 8.

questions, sometimes letting students discuss the answer in small groups before answering, asking for opinions on statements and materials, and doing tutorial-type problems, designed to apply the law learned to the facts. But there are many more exercises and games that can be devised, and ones that do not take the students or the teacher much time to prepare. The hardest part is simply coming up with the idea and that gets easier with practice (and the allocation of time to do it!).

### The short quiz

To introduce a topic, or even a lecture, a short quiz is good for stimulating interest. The most fun seems to be had when the class is divided into small groups as teams to answer the questions: a co-operative, competitive exercise. An example of a fun quiz I have participated in is one that was used to introduce the role of the Secretary-General.<sup>18</sup> Students are given, on an overhead transparency, the following list of dates:

	Dates	Secretary-General	Country of Origin	World Events	
1	1964–1952	Trygve Lie	Norway	Korean War	Chinese Revolution
2	1953–1961	Dag Hammarskjöld	Sweden	Suez crisis	Congo gains independence
3	1961–1971	U Thant	Burma	Cuba missile crisis	Six-Day War
4	1972–1981	Kurt Waldheim	Austria	Iran hostage crisis	Vietnam War ends
5	1982–1991	Javier Perez de Cuellar	Peru	Fall of Berlin Wall	Rainbow Warrior sunk
6	1992–1996	Boutros Boutros-Ghali	Egypt	Civil War in Somalia	UN 50 <sup>th</sup> Anniversary
7	1997	Kofi Annan	Ghana	Kosovo airstrikes	Millennium Report

Then, in scrambled order, students are presented the list of names. Then, scrambled, the country of origin, and, finally, again in scrambled order, the world events. Students were asked to match them all up. It was great fun, made for better recall of the information, and stimulated interest in the topic. Plus it was useful for launching discussion of the different possible roles and styles of the Secretary-Generals over the years.

### The pizza game (10 to 15 minutes)

The object of the pizza game is for students to decide on toppings to order a pizza. They first do this in small groups of two or three, deciding what they could all agree on. I put some suggestions on an overhead transparency such as the thick-crust, tomato base, ham, cheese, tomato, garlic, and stuff like this. After they have done this in groups of two or three, I do not usually get their feedback on what they have chosen but I get them to record it. They then join with another group and see and compare results and see if they can all agree on the same type of pizza. We then typically just report back to the class as a whole and see what we could agree on if we were a whole class. Where necessary, I mention to students that they may abstain from the whole process, for example, if they simply refuse to eat pizza for one reason or another. They may also make reservations to particular toppings, for example, if they could pick off something or other but they are still happy with everybody ordering the rest. I also suggest that for people who completely object to anyone else having a pizza as well then they can make a formal objection to the whole thing or to just a particular topping.

Of course the object is to illustrate the difficulties that states have in agreeing to clauses in a treaty and that the result is typically the lowest common denominator. That is, the result is that which provokes the least disagreement: it is usually simply what people can agree on and is not what they would ideally have chosen for themselves. Students often come up with some creative suggestions for avoiding disagreement (such as the use of vegetable rennet-based cheeses instead of animal rennet-based cheeses). In some years my class has managed to order a pizza with a tomato base and cheese, but typically with nothing else on top. In some years there has been no agreement whatsoever on a class-wide basis; or the only agreement has been for one group to break away and order a different pizza. Past students comment that they still remember the exercise and remember the concept of lowest common denominator in relation to treaty drafting. I consider this one of more successful games I have tried and so use this every year.

<sup>18</sup> This quiz was developed by Susan Young for my VUW International Conflict Resolution Honours Seminar, 2000.

### The prisoners dilemma: the short version (5 minutes)

This prisoner's dilemma game is an exercise designed to illustrate that compromising in negotiations with another party or side can often produce a result that is best for all sides, but this is often very difficult to achieve in practice.<sup>19</sup> I do not bother to give any of the traditional description of the dilemma that the original prisoner was faced with. I simply tell students to write on one finger the capital letter 'N' (for 'no') on the outside of the tip of the finger just above the finger nail and on the finger next to it a 'C' (for 'compromise'). If written on the right hand, the 'compromise' goes on the forefinger and the 'no' goes on the middle finger (that is, so, when both held out to the facing player, they are read 'N C'). On an overhead transparency or on a board I put up the following table:

	NC	C
NC	2, 2	4, 1
C	1, 4	3, 3

The game is played a bit like the Scissors, Paper, Stone game. Players hide their hands behind their back and bring out either one finger showing the C or the two fingers showing the NC. Both players bring their fingers out simultaneously and hold them out in front so the other person can see. Every time they do that they score points according to the grid. For example, if they both compromise they both get three points; if neither of them compromise, they get two points each. If one compromises and one does not, then the one that does compromise only gets one point whereas the one that does not gets four. I tell students to do ten rounds of this and then see what the scores are. We then compare notes and discuss what was going through their minds. Students typically comment on how difficult it is to actually decide to compromise without some kind of explicit agreement between the two players to do that. The player who receives the highest score wins. Where that was through players consistently compromising, this was only achieved though explicit agreement made either prior to or during the middle of the game.

### Mini role plays

Mini role-plays can be easy to come up with, short to administer, and both fun and useful for teaching purposes. The mini role-plays that I have found best met these requirements involve the application of legal principles to try to resolve an international dispute, real or fictionalised. For example, take an international treaty that has a list of factors designed to be applied in such situations, invent a fact situation, and get students to apply them to resolve the 'dispute'. Other types of role plays including drafting such laws and arguing the application of laws before a dispute resolution body. However, I found the former takes more work in bringing the students up to speed with a topic such that they can come up with useful drafts, and the latter more time both in preparation and presentation. I thus do not use them much now. Despite some having such drawbacks, however, nearly any mini role play can work well on a number of levels: understanding the law to be applied; understanding how to apply the law, and how difficult that can be in practice; understanding how useful the law really is in the face of competing state interests; and understanding how difficult it can be to get agreement on what the law is or should be. When you think small, there are many more options for role plays than the full, hours-long type described by McCormack and Simpson. And they are a lot less work to put together.

### Example: inter-state conflict over fresh water supplies

I have used several role plays of my own, but the example that I describe here is one that I have experienced as a participant, so I can personally vouch for its success. The following role play was developed by Teresa Finlay, an Honours student in my 2000 International Conflict Resolution seminar (although the description of it is as recalled, and thus possibly modified, by myself!). She was presenting her Honours seminar on conflict over water in the Jordan Basin. Students thus had an introduction to the law in this area and to the types of real disputes that arise today between states over the sharing of fresh water supplies. Students are divided into groups of three to five, representing the parties listed below. They are given the description of their interests and positions.

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<sup>19</sup> This game is based on one used by Elena Tzventinova in my VUW International Conflict Resolution Honours Seminar, 2000.

The facts are that there is a water bore situated on Bob's property. Water flows down the pipe to two other properties. Next to Bob 'downstream' is Jane and Steve; downstream from them is Mary and Tom. The bore has just recently been producing 20 per cent less water than usual; tests show that this looks set to continue for the future. But the amount of water required by users is increasing. The students have to meet and try to work out an agreement for sharing the water. They should apply the factors in Article 6 of the United Nations 1997 Convention on the Law of Non-Navigational Uses of International Watercourses. Article 6 lists the factors that need to be taken into account in determining what is equitable and reasonable use (it gets put up on the board or an overhead transparency if they have not had it handed out first).

### Bob

- you have been using 60 per cent of the water from the bore for the last ten years
- you use most of this water for your prize-winning flowers (and you rely on the prize winnings for 50 per cent of your income)
- you have maintained the water bore (including paying for small repairs) for the last 10 years
- you live alone

### Jane and Steve

- you have used 40 per cent of the water from the bore for the last ten years
- you have just had twins, so you now need more water

### Mary and Tom

- you have not used any of the water from the bore in the past, as you had a natural spring on your property
- the spring has dried up now and you need to start using water from the water bore
- you have no children

This role play worked very well in class. It was easy to understand and administer and, most importantly, students saw first hand how the set of criteria agreed to in the Convention (Article 6) was not as helpful for resolving an actual dispute as its existence might suggest. While agreement might not be reached between the parties in the exercise, it will produce good discussion on the difficulties in reaching agreement and the consequent generalities included in international documents so as to enable agreement between the drafting parties.

### Self-determination exercise

All of the above games are in addition to the standard, participatory exercise we typically use in class. One such exercise that has worked well for me has been in relation to the change over the years of the international documents on self-determination. In this exercise I put on an overhead transparency (although they also have it in their materials) the terms of the 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples.<sup>20</sup> I ask students on what argument they can make on the text for the inclusion of indigenous peoples as peoples entitled to self-determination. I get them to do this in small groups of two or three. I then put on the board General Assembly Resolution 1541 and ask the same question. I do the same with the 1970 Declaration on Friendly Relations. I then put up the text of one of the later resolutions linking oppressed peoples with colonialism or other forms of external forms of domination, such as General Assembly Resolution 3163 of 1973.<sup>21</sup> Whether I put any further documents up with the same question, depends on how much time I have for

<sup>20</sup> UN Doc GA Res 1514.

<sup>21</sup> There are several such resolutions. For a list, see C Iorns Magallanes, 'Indigenous Peoples and Self-Determination: Challenging State Sovereignty' (1992) *Case Western Reserve Journal of International Law* 199, 257, fn 277.

the exercise. Sometimes I stop there and then just put up the statement in the Draft Declaration on the Rights of Indigenous Peoples that indigenous peoples are entitled to self-determination. All students have already covered the Belgium thesis and other discussion from the 1950s, so they know what states intentions are. This exercise is designed to show how lawyers typically approach such arguments: by parsing the text, whether or not this is relevant given the political context and states intentions in the development of the law. This particular exercise is one of the more standard variety of engaging students: asking students questions and getting them to discuss the answers about what is covered by a legal text. Nonetheless, it is one which has had good feedback in the sense the students say they will always remember the points that were made, the laws and the politics in this particular area partly because of the exercise.

## Conclusion

There are various themes I wish to draw from this paper. The first is that the aim of a teacher should be to be the 'guide on the side' rather than the 'sage on the stage'.<sup>22</sup> The methods that best achieve this seem to be problem-based and ones where students direct their own learning.<sup>23</sup> The second theme is that students learn best when they are active participants in their learning, and this includes in the classrooms. If you want to attempt to achieve these aims, you do not have to change your whole course, all at once; you can modify parts of it at a time, and introduce various smaller forms of activity by students. However, thirdly, there are not a lot of helpful examples in the literature on how to make classes more active in the field of international law. Therefore, fourthly, it is up to teachers to invent them ourselves and hopefully to share their examples with others by writing about them. Fifthly, there is a lot of student resistance to anything that require more preparation than they already do. Student exercises thus have to be carefully thought out and linkages to educational and course objectives have to be clear. If activities are fun and non-threatening then classes are great and students and teachers look forward to them.

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<sup>22</sup> M Szabo, 'Instructional Technology and Educational Reform: Reality or Rhetoric', Staff Development Seminar, VUW, May 2000.

<sup>23</sup> Such as the web-based courses by Mike Szabo and others mentioned above.

## Appendix

### Lecturer active

Lecturer			Student
<u>Talks</u>	❖ presents information	→	listens/takes notes
	❖ revises	→	
<u>Talks</u>	with audio-visual aids	→	listens/takes notes
	❖ used passively (eg headings)	→	listens/takes notes
	❖ used actively (eg questions for students to answer)	→	listens/takes notes + discusses/thinks/understands
Ask questions	❖ generally, with whole group	→	participants/answers/others listen
	❖ of individual student	→	participants/answers/others listen
	volunteer	→	participants/answers/others + comment?
	chosen by lecturer	→	participants/answers/others + comment?
Initiates discussion	❖ generally, with whole group	↔	participants/answers/others listen
	❖ in groups	↔	discusses/thinks/understands
Lecturer <u>responds</u>		←	ask question of lecturer
<u>Listens, comments</u>		←	<u>presents paper</u>
Initiates discussion		←	(participants speak/others listen)
Initiates discussion		←	group of students ' <u>perform</u> ' eg moot, role play (participants act/learn, others listen/learn/understand)

### Students active



# Some Thoughts on Resisting Hierarchies in the Teaching of International Law

Dianne Otto\*

I want to address the question of what assumptions, or values, we teach in international legal education and, connected with that question, what we encourage our students to imagine to be the role of international law in the world of today and of the future. I will argue that the ability to practice international law as economic and social justice, consistent with the principles of fairness and egalitarianism implicit in the United Nations Charter,<sup>1</sup> is impeded if the teaching and learning of international law has been experienced as hierarchy. By hierarchy I mean practices and beliefs that take for granted or normalise the inequalities in power, wealth and status that are reflected in the inequitable global order of today, such as those shaped by colonialist, nationalist, racist and sexist ideologies. The particular hierarchy that I am concerned with here is that which has developed between market values, on the one hand, and the values of public international law, on the other.

I am raising, in the teaching context, the concern that Philip Alston raised several years ago when he drew attention to the apparently myopic response of international lawyers to the changes to the role and power of the state being wrought by globalisation.<sup>2</sup> The result, in Alston's view, is that much of mainstream international legal scholarship remains preoccupied with yesterday's issues and concepts and is reduced to 'little more than [an] exercise in nostalgia'.<sup>3</sup> The effect of this nostalgia is that international lawyers, perhaps unwittingly, have served as 'handmaidens'<sup>4</sup> to a form of globalisation that serves the elite interests of global capital, rather than promoting economic and social justice. My question is whether our teaching of international law is producing more handmaidens of free-market expansionism who are incapable of adopting alternative practices, or whether we are training advocates for the type of international peace and security that is based on the values of friendly and cooperative relations, human rights and equitable solutions to international problems.

I do not want to suggest that all teachers of international law share a common view of the assumptions or values of public international law, beyond the broad purposes of the UN Charter. Rather, I want to suggest that critical thinking is essential to the continuing dynamism and effectiveness of both public and private international law, and that one important role for an international lawyer is to promote the contestation of social inequalities and economic injustices through law, as a means of promoting a more peaceful and secure international order. I will focus on three ways that the teaching and learning of international law can normalise hierarchy and thereby hamper critical thinking. First, in the student-teacher relationship. Second, in the assumptions implicit, and perhaps explicit, in course content and structure. Third, in the specialisations that are rapidly developing in international legal education and, in particular, the diminishing importance of public international law. My conclusions are based on a survey of the undergraduate courses in international law available to Australian law students in 2000 (see Table 1).

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<sup>1</sup> *Charter of the United Nations* (1945) art 1, describes the purposes of the United Nations as including the maintenance of international peace and security; the development of friendly relations among nations; the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian nature and in encouraging respect for human rights for all; and for harmonising the actions of nations to attain these common ends. There are a diversity of views about how these purposes might be achieved. My use of the terms 'fair' and 'egalitarian' indicate something of my own view.

<sup>2</sup> P Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435.

<sup>3</sup> Ibid 447.

<sup>4</sup> S Scott, 'International Lawyers: Handmaidens, Chefs, or Birth Attendants? A Response to Philip Alston', (1998) 9 *European Journal of International Law* 750, 752-753 observes that Alston's use of the term 'handmaidens' casts international lawyers as out-dated servile attendants of the process of globalisation.

### The student-teacher relationship: hierarchy or critical dialogue?

Although the act or, more aptly, the interaction of teaching and learning plays a constitutive role in the production of international legal knowledge, it has received little attention. Yet, as progressive Brazilian educator Paulo Friere said in the 1960s, it is not possible to learn how to be a democrat when the process of learning is authoritarian.<sup>5</sup> Friere is critical of the 'banking system' of education whereby a teacher's task is understood as 'filling' students by 'depositing' information that is considered by the teacher to be 'true' knowledge.<sup>6</sup> Friere's crucial insight is that the dialogic act of learning by re-discovering existing knowledge is not the same as the one-way transference of knowledge that takes place in traditional education. Rather, the act of re-discovering or re-creating existing knowledge should be understood in the same way as the act of producing or creating new knowledge: for both acts, the student's learning must be predicated on critical reflection, curiosity, problematisation, uncertainty and creativity.<sup>7</sup> Where knowledge is simply transferred as uncontested and certain, learning produces domesticated students who treat the hierarchies of the status quo as immutable, like the hierarchy of banking education's teacher-student relationship.

There has undoubtedly been considerable innovation in the teaching of international law that actively engages students in the process of re-discovering knowledge for themselves — simulations, moots,<sup>8</sup> internships, debates, model UN conferences, treaty-drafting and so on. But these learning opportunities are generally extracurricular activities that remain supplementary to classroom teaching of the banking variety, with the notable exception of the coursebook by Weston, Falk and Charlesworth which is entirely based on problem-solving.<sup>9</sup> These authors, in a Friere-like undertaking, set out to test the analytical skills of their students in order 'to develop a critical understanding of the possibilities of international law and thereby engage their creative imaginations'.<sup>10</sup> While the unequal relationship between teacher and student and the continuing preponderance of banking education are, in large part, driven by the demands of large classes and assessment imperatives, the question remains as to how to engage more in dialogical education despite these constraints.

### Countering hierarchies in the curriculum content of basic courses

Of the 28 Australian Law Schools teaching LL.B courses in 2000, 26<sup>11</sup> offered a basic undergraduate course in public international law.<sup>12</sup> Only one of these courses was a full year in length,<sup>13</sup> the rest being offered over a semester or during summer school. At two universities, the University of Sydney and the Australian National University, the basic course was compulsory,<sup>14</sup> while in several other cases it was one of a group of

<sup>5</sup> M Gadotti, *Reading Paulo Friere: His Life and Work* 18 (trans. J Milton, 1994).

<sup>6</sup> P Friere, *Pedagogy of the Oppressed* 57 (trans. M Bergman Ramos, 1995).

<sup>7</sup> Gadotti, above n 5, 12-13.

<sup>8</sup> Of 28 Australian law schools, 17 offer participation in the P C Jessup International Court Moot Competition as an undergraduate subject. The first entry of Australian teams was in 1975. Unfortunately, however, because of the highly formal requirements of legal argument before the International Court of Justice, it is very difficult for students to incorporate alternative perspectives into this learning exercise, especially during the initial rounds of the competition which involve the majority of students.

<sup>9</sup> B Weston, R Falk and H Charlesworth, *International Law and World Order: A Problem-Oriented Coursebook* (3<sup>rd</sup> ed, 1997). The first two editions were edited by Weston, Falk and D'Amato.

<sup>10</sup> Ibid vii.

<sup>11</sup> The two exceptions are the law schools at Deakin University and the University of Canberra which have a commercial orientation. The survey does not include Legal Studies courses, except to the extent that they overlap with LL.B teaching as, for example, at Griffith University.

<sup>12</sup> As distinct from the public international law of international economic institutions.

<sup>13</sup> Public International Law is offered as a year-long (two semester) course at the University of Western Australia.

<sup>14</sup> International Law has been a compulsory subject at the University of Sydney since 1987 and at the Australian National University since 1999.

international law electives from which students are required to choose at least one subject.<sup>15</sup> In 2000, these basic public international law courses attracted an enrolment of between 15 per cent and 100 per cent of law students in each law school. On the figures provided to me, this means that, currently, about 50 per cent of Australian law graduates have a general understanding of Charter-based public international law.

The questions I want to raise are about what should be covered by basic courses in public international law in the new millennium, and what values our choices of content and focus are promoting. For Weston, Falk and Charlesworth, contemporary concerns include 'devastating civil wars in Europe and Africa, gross violations of the most fundamental human rights as well as the continuing oppression of women and other marginalised groups, an increasing divide between rich and poor, and rapid environmental degradation'.<sup>16</sup> Their concerns are similar to those outlined by Alston in 1997.<sup>17</sup> Alston contrasts his agenda with the priorities identified by transgovernmentalist Anne Marie Slaughter: 'terrorism, organized crime, environmental degradation, money laundering, bank failure, and securities fraud'.<sup>18</sup> Slaughter's list confirms Alston's view that the present priorities for international law tend to be those determined by Northern states and transnational business interests, and that the values inherent in this agenda are those of the free market which can legitimately trump other values, including human rights.<sup>19</sup> The question of what *should* constitute a basic or introductory course in public international law has been agonised over for decades, but the context of economic globalisation presents new dilemmas. At the centre of today's debates, the public values of human rights, labour standards and equity are competing with the private imperatives of free-market globalisation.

In the Australian context, a survey of the prescribed texts for the basic courses in international law is instructive (information was available for 25 of the 26 courses offered in 2000). In the majority of courses, one of two cases and materials compilations are prescribed: either the book by David Harris<sup>20</sup> (in 14 cases) or by Martin Dixon and Robert McCorquodale<sup>21</sup> (in six cases). The volume providing an Australian perspective on public international law edited by Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi<sup>22</sup> is prescribed or strongly recommended in eight courses, usually in addition to one of the cases and materials compilations. Likewise, Shearer's edition of *Starke's International Law*<sup>23</sup> is prescribed or strongly recommended in six courses. Four other texts are prescribed — Akehurst,<sup>24</sup> Dixon,<sup>25</sup> Reicher<sup>26</sup> and Shaw<sup>27</sup> (in one case each) — while the books by and Greig<sup>28</sup> and Reicher are suggested as further reading (in at least one case).

What is included and excluded by basic courses, and whether a chosen topic or issue is given prominence or marginalised, sends very powerful messages to students about the values of international law and its role in

<sup>15</sup> Griffith University and University of Tasmania.

<sup>16</sup> Above n 9, vii.

<sup>17</sup> Alston, above n 2, 439.

<sup>18</sup> Ibid referring to the views expressed in A M Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.

<sup>19</sup> Ibid 442-443. Alston contends that the means of free market globalization have themselves taken on the status of values: privatisation, deregulation, reliance on the free market as a mechanism that allocates value, minimal government and minimal international regulation, except with respect to narrowly defined law and order functions.

<sup>20</sup> D J Harris, *Cases and Materials on International Law* (5<sup>th</sup> ed, 1998).

<sup>21</sup> M Dixon and R McCorquodale, *Cases and Materials in International Law* (3<sup>rd</sup> ed, 2000).

<sup>22</sup> S Blay, R Piotrowicz and M Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997).

<sup>23</sup> I Shearer, *Starke's International Law* (11<sup>th</sup> ed, 1994).

<sup>24</sup> P Malanczuk, *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> ed, 1997).

<sup>25</sup> M Dixon, *Textbook on International Law* (1990).

<sup>26</sup> H Reicher (ed), *Australian International Law: Cases & Materials* (1995).

<sup>27</sup> M Shaw, *International Law* (4<sup>th</sup> ed, 1997).

<sup>28</sup> D W Greig, *International Law* (1976).

international affairs. Judging from these teaching texts, and as Gerry Simpson has also observed,<sup>29</sup> contemporary courses tend to repeat the structure and topics that have animated international legal education since its inception in the nineteenth century. It is also notable that none of these courses prescribe the problem-oriented coursebook of Weston et al, which would assist dialogic teaching. The traditional course structure tells a story of colonial territorial acquisition followed by a beneficent process of self-determination, of state-centred consent-based law-making in which all states are equal, and of rules that profess to justly regulate the use of force by legitimating some forms of inter-state violence and outlawing others. In the absence of critical thinking and diverse perspectives, this traditional narrative assumes a cloak of neutrality that affirms the hierarchies of the global community today. If unquestioned, the traditional curriculum values the 'order' of hierarchy over economic and social justice. In this sense, it is more aligned with Slaughter's private transnational agenda of bolstering free-market forces than with the public human rights agendas of Alston and Weston et al, which resonates with Alston's 'handmaidens' analogy of a profession in the service of global capital.

Of course, I am overstating the problem to some extent, in order to make my point. When the Australian basic courses are examined more closely, most include supplementary materials in addition to the prescribed texts, and many of these materials seek to address some of the issues I have raised. For example, the supplementary materials used in the Public International Law course at the University of NSW vary depending on the lecturer, not only giving students choices about the emphasis they want to pursue, but also clearly indicating to students that there are, legitimately, a diversity of views about what is 'basic'. Another example of countering some of the hierarchies of the traditional curriculum is the Flinders University course, which supplements the textbook with feminist, post-colonial, queer and indigenous perspectives. However, despite these efforts, supplementary materials still convey to students a message that their import is secondary to that of the main text.

In my view, basic courses in international law need to unsettle the 'givens' of classic international law, to question its structure, content and underlying values. In the absence of critical reflection, the hierarchies of the global community are represented as immutable and our students are not equipped with the critical skills that will enable them to practice international law as social and economic justice. An important element of such a project is to identify, as problematic, the widening gap between the public law of the UN Charter and the rapidly developing law of international economic institutions (international economic or trade law), and the chasm between these two bodies of public international law<sup>30</sup> and the law governing business, trade and commercial relations between non-state or private economic actors (private international law).<sup>31</sup> The only basic international law course in Australia that attempts to cross some of these boundaries is offered at the University of Sydney, where roughly equal weight is given to public and private (in the sense of conflicts of laws) international law. As the handbook explains, 'the unit provides an opportunity to consider the implications for Australia of globalisation, from the perspective of both private and public international law'.<sup>32</sup> While the border transgressions thus envisaged are somewhat limited from a social justice perspective, they offer a start.

It is crucial that we encourage students to recognise the arbitrariness and contestability of the boundaries that are constructed by the categories created in international legal education, so that the linkages that are thereby obscured become visible and contestable. In the current climate of economic globalisation, the linkages that are most at risk of erasure are those between the public and private realms of international law — between, for instance, human rights and economic globalisation, between economic and social cooperation and international business transactions, between resort to the use of force and the policies of international economic institutions, and between international labour standards and free trade.

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<sup>29</sup> G Simpson, 'On The Magic Mountain: Teaching Public International Law' (1999) 10 *European Journal of International Law* 70, 87. For a critique of these models, Simpson refers to Hirst, 'The Global Economy - Myths and Realities' (1997) 73/3 *International Affairs* 409.

<sup>30</sup> They are both bodies of 'public' international law in the sense that they are concerned with the behaviour of states.

<sup>31</sup> Although the term 'private international law' is widely used in Australia to refer to conflicts of laws, I am using it here in the North American sense of the laws governing international commercial transactions between private economic actors.

<sup>32</sup> The University of Sydney, *Faculty of Law Handbook*, 8.

### Countering hierarchies in international law electives

In 1960, each of the then seven law schools in Australia offered just one general course in international law.<sup>33</sup> The introduction of specialised international law subjects, in addition to the general courses, began with the substantial increases in funding for staff development that occurred during the 1960s.<sup>34</sup> Ivan Shearer notes that the first of these was a course in international organisations offered at Sydney University in 1961.<sup>35</sup> James Crawford's 1984 survey found that each of the 11 Australian law schools<sup>36</sup> offering professional law courses offered a general course and, between them, a total of 17 specialised courses at the undergraduate level.<sup>37</sup> That is, in addition to offering a basic course in public international law, law schools were offering an average of 1.5 additional international law electives, although they were not all offered every year.<sup>38</sup> In 2000, I have found 26 Australian law schools<sup>39</sup> offering a total of 184 international law electives, in addition to their basic courses in public international law (see Table 1). This means that, on average, law schools in 2000 offered an additional seven specialist international law electives. This result indicates a very rapid snow-balling of undergraduate electives during the 1990s which, I have no doubt, is also reflected at the graduate level, although my survey did not cover this. While it should be noted that not all of these subjects are available to students every year, these figures nevertheless represent a remarkable development.

However, comparing the two surveys, Crawford's and my own, in this way is somewhat misleading. Crawford excluded courses in international trade law (with an emphasis on private and commercial relations) and conflicts of law,<sup>40</sup> although he notes that most Australian law schools did offer courses in these two areas in 1984.<sup>41</sup> Also, Crawford did not include comparative law courses or subjects offering international mooted participation in his survey, while I did. But even accounting for these differences, it seems safe to say that the number of specialised undergraduate courses in international law offered by Australian law schools has at least doubled between 1984 and 2000, at the same time as the number of law schools has itself more than doubled. This represents a veritable explosion of interest in international law at the undergraduate level.

After grouping the 184 international law electives offered in 2000 into categories, including those used by Crawford in 1984, the explosion in coverage appears to have taken place in four main areas, if we accept Crawford's observation that conflicts and trade law courses were offered by most law schools in 1984. These four areas are Asian and/or Pacific Law (26 courses); International Business/Commercial Law (17); European Union Law (10); and International Environmental Law (8). The only clearly public law area of growth is in the development of new courses concerned with international environmental law.<sup>42</sup> The rest of the new categories are primarily concerned with aspects of private international law, although it is not always easy to tell how much of these courses also cover public law issues. The rapid growth of courses concerned with Asian and Pacific legal systems can be attributed to economic globalisation, although Australia's assumption of a more significant political role in the region may also account for some of this growth. The courses grouped together in the category of International Business/Commercial Law have clearly developed in response to the demands created

<sup>33</sup> J Crawford, 'Teaching and Research in International Law in Australia' (1987) 10 *Australian Yearbook of International Law* 176, 184. One university in each state and the Australian National University had a law school.

<sup>34</sup> I Shearer, 'The Teaching of International Law in Australian Law Schools' (1983) 9 *Adelaide Law Review* 61, 77.

<sup>35</sup> Ibid.

<sup>36</sup> Crawford also included LaTrobe University's Legal Studies course in his survey, despite the fact that it did not offer an LL.B program. Therefore, his survey covers 12 institutions.

<sup>37</sup> Crawford, above n 33, appendix 1, 197-201. Note, the chart at 183-184 includes undergraduate and postgraduate courses, and the Legal Studies course offered at LaTrobe University.

<sup>38</sup> Ibid 184

<sup>39</sup> I have excluded the two law schools that did not offer a basic international law course in 2000 from these numbers - Deakin University and the University of Canberra.

<sup>40</sup> Crawford, above n 33, 183

<sup>41</sup> Ibid 201.

<sup>42</sup> The only environmental course offered in 1984 was International and Comparative Environmental Law and Policy offered in the department of Legal Studies at LaTrobe University. See *ibid* 199.

by the globalised marketplace, and increased interest in European law can be similarly accounted for. While Australian law schools have retained a significant commitment to teaching public international law, as evidenced by 80 per cent of law schools offering Human Rights (up from 54 per cent in 1984), my survey indicates that this commitment may be weakened by the increasing emphasis on private international law. If all 184 of the specialised courses are grouped into either public or private areas of international law, 116 or 63 per cent cover primarily private international law topics. In sum, most of the growth since 1984 has been in areas of private, not public international law which, again, tends to confirm Alston's handmaiden theory.

Just as the approach and coverage of basic courses shape students' views of the role and potential of international law, so does the range and focus of specialised courses. It is therefore important to ask what is driving these new developments in international legal education. Are they being driven by the values of the expanding free market, or by the human rights and social justice values of the UN Charter? Are they motivated by the demands of prospective corporate employers or by the desire to educate students towards a critical understanding of international law's possibilities and active international citizenship? What messages are we conveying to students about the values of international law by diminishing the space in our classrooms devoted to public international law and devoting increased attention to the private law of commercial transactions?

One response to these concerns is to revive the public presence in international legal education. By this I mean, not just the public of international economic law, but also of human rights and global cooperation. This revival needs to take place across the whole range of specialist options as well as in the basic courses. This means rethinking the boundaries that have been constructed between public and private, human rights and trade, international peace and security and economics, and international citizenship and private entrepreneurialism. Such rethinking is starting to occur in new courses dealing with globalisation, such as the one taught at the University of British Columbia by Ruth Buchanan entitled 'The Regulatory Impact of Globalisation'. A similar course called 'Globalisation and the Law' will be offered at the University of Melbourne by Buchanan and one of my colleagues, Sundhya Pahuja, in 2001. Further, Queensland University of Technology has just introduced a compulsory first-year course called 'Laws and Global Perspectives' which has similar critical aims. These courses not only question the boundaries between public and private that I have been concerned with, but also recognise the porous nature of the boundary between domestic and international law in the context of globalisation.

## Conclusion

The method and the content of legal education help to shape the values and assumptions by which students come to imagine the role of international law and embody it in their future practice. As the globalisation of capital deepens North-South disparities in wealth and power, the egalitarian aspirations of the UN Charter become increasingly important and the need to practice international law as economic and social justice becomes more urgent.

Yet public international law in Australian law schools appears at risk of becoming marginalised as courses in private international law proliferate, and public values of human rights and equity are being replaced by the private values of global capital. This shift relocates responsibility for equality, wealth redistribution, social justice and human rights in the marketplace and the disastrous result is already apparent in the ever-widening gap between the rich and poor. While hierarchies of privilege will always exist in one form or another, the question is how to make them transparent and contestable in international legal education so that students are equipped with the critical skills that enable them to recognise that hierarchies are not immutable, and to see the possibilities for challenging and shifting them.

Table 1

## Undergraduate Courses in International Law offered by Australian Law Schools 2000

(Data collected from Internet University Handbook entries, and checked directly where possible)

Institution	Basic Courses	Teaching Materials (full citations below)	Enrol't 2000	Electives (*listed in Handbook but not offered 2000)
Australian National University, Faculty of Law, ACT	International Law (compulsory) Hilary Charlesworth, J-P Fonteyne, Pene Mathew	Texts: Dixon & McCorquodale; Blay, Piotrowicz & Tsamenyi Supp Mat'l: ?	350 100%	Conflict of Laws Int'l Dispute Resolution Int'l Environment Law* Int'l Human Rights Law Int'l Trade Law Issues in Contemp Asian Law Japanese Law Jessup Moot Law & Society in SE Asia Law of the Sea Rousseau Moot
Bond University, School of Law, Qld	International Law (elective) Goh Bee Chen	Text: Blay, Piotrowicz & Tsamenyi; Reicher; Harris Supp Mat'l: course materials on topics covered	22	Comparative Law Comparative Commercial Law Conflict of Laws* European Law* Int'l Law Project (Jessup Moot) Int'l Trade & Business Law Law of Int'l Institutions* Maritime Law* Pacific Legal Systems
Deakin University, Faculty of Business & Law, Vic				Int'l Commercial Law Shipping & Air Transport Law
Flinders University, School of Law, SA	International Law (elective) Wayne Morgan	Text: Dixon & McCorquodale Supp Mat'l: mainly alt views not in text – feminist, postcolonial, indigenous, queer perspectives	130 50%	Comparative Aspects of Malaysian Law* Conflict of Laws* Human Rights* Law & Culture in PRC* Women's Rights & Int'l Human Rights*
Griffith University, Faculty of Law, Qld	Public International Law (students required to take one int'l law elective) Afshin A-Khavari	Text: Harris Supp Mat'l: articles on int'l relations theory	92 85%	Asian Jurisprudence (compulsory) Chinese Law Devt & Law in the Asia-Pacific* Int'l Litigation Int'l Mooting (Viz or Jessup Moot) Int'l Trade Law
James Cook University, School of Law, Qld	Public International Law (elective) Alex Amankwah	Text: Harris	35	Comparative Law Conflicts of Law Human Rights Law Jessup Moot Lauterpacht Research Centre
LaTrobe University, School of Law & Managem't, Vic	International Law (elective) Savitri Taylor	Texts: Harris; Blay, Piotrowicz & Tsamenyi Supp Mat'l: topical case studies eg East Timor	35	Human Rights Int'l Business Law

Institution	Basic Courses	Teaching Materials (full citations below)	Enrol't 2000	Electives (*listed in Handbook but not offered 2000)
Macquarie University, Division of Law, NSW	International Law (elective) Rafiqul Islam	Text: Shaw Supp Mat'l: primary materials, contemp briefs & specialised scholarly articles	152 30%	Comparative Law* Conflict of Laws* European Law & Instits Int'l Human Rights Law Int'l Trade & Finance Law of Int'l Orgs* Special Project (Jessup)
Monash University, Faculty of Law, Vic	International Law (elective offered twice pa) Alison Duxbury, Richard Garnett	Text: Harris; strongly recommend Blay, Piotrowicz & Tsamenyi for Australian perspective Supp Mat'l: theoretical perspectives & recent information;	215 40%	Comparative Eur Legal Systems* Conflict of Laws* Human Rights Int'l Business Transactions* Int'l Environmental Law* Int'l Organisations* Int'l Space Law* Intro to EU Law* Jessup Moot Maritime Law* Pacific Comparative Law* Viz Int'l Arbit'n Moot
Murdoch University, Law Programme, WA	Public International Law (elective offered every 2nd year) Fernand de Varennes	Text: Dixon's textbook; Dixon & McCorquodale Supp Mat'l: rights of minorities; the UN system	60	Human Rights in the Asia- Pacific Region Int'l Environmental Law Maritime Law
Northern Territory University, School of Law, NT	International Law* (elective) previously, Wayne Morgan	Text: Dixon & McCorquodale	45 (*99) 37%	Conflict of Laws* Indonesian Law Law & Society (Malaysia)*
Queensland University of Technology, Faculty of Law, Qld	Fundamentals of Public International Law (elective) Emilia Della Torre	Text: Harris; Supp Mat'l: Australian materials	95	Asian Legal Systems Jessup Moot Laws & Global Perspectives (compulsory 1 <sup>st</sup> year course) Maritime Law Private Int'l Law
Southern Cross University, School of Law & Justice, NSW	International Law (elective) Gail Evans, Brian Fitzgerald, Sam Garkawe	Text: Dixon & McCorquodale Supp Mat'l: study guides for distance delivery & extra readings giving Aust flavour	36	Human Rights Int'l Business Law Int'l Criminal Justice
University of Adelaide, School of Law, SA	Public International Law (elective) Judith Gardam	Text: Akehurst Supp Mat'l: covers whole course	85 33%	Choice of Law Comp Corp Law & Theory Human Rights: Int'l & National Perspectives Int'l Environmental Law Introduction to Int'l Law (1 <sup>st</sup> year option) Jessup Moot Selected Issues in Int'l Law
University of Canberra, School of Law, ACT				(Int'l Trade Law offered, but not part of LL.B curriculum)



Institution	Basic Courses	Teaching Materials (full citations below)	Enrol't 2000	Electives (*listed in Handbook but not offered 2000)
University of Melbourne, Faculty of Law, Vic	International Law (elective) Gillian Triggs	Text: Harris; Shearer's Starke Supp Mat'l: practice in Asia- Pacific region, analytical material & tutorial materials	210  50%	Commercial Law in Asia Comparative Constit'l Law Current Issues in Int'l Law* European Union Law* Human Rights Law Issues in Chinese Law Int'l Trade & Economic Orgs Int'l Trade Law Jessup Moot Land, Race & Law in SE Asia* Law & Civil Soc in Asia* Law & Labour Rels SE Asia* Law & Soc in China* Law & Soc in Japan* Law & Soc in SE Asia Maritime Law* Private Int'l Law
University of Newcastle, Faculty of Law, NSW	Public International Law (elective) Greg Carne	Text: Dixon & McCorquodale Supp Mat'l: extensive materials including cases, documents & further readings	30  25%	Conflict of Laws Human Rights Law (domestic & int'l)
University of New England, School of Law, NSW	Public International Law (elective) Hossein Esmacili	Text: Harris; Shearer's Starke Supp Mat'l: ?	?	Human Rights Int'l Environmental Law Int'l Trade Law Private Int'l Law*
University of NSW, Faculty of Law NSW	Public International Law (elective taught 2-3 times pa) Stephen Hall, Sarah Pritchard & Rosemary Rayfuse	Text: Harris Supp Mat'l: depends lecturer: SH – focus int'l econ law & natural law foundations; SP – focus human rights & indigenous peoples; RR – focus use force & humanitarian issues	60-80  30%	Asian Legal Systems & Business Law Comparative Law Conflict of Laws EU: Econ & Trade Law EU: Instits & Legal Systems Human Rights Law Int'l Environmental Law Int'l Humanitarian Law Int'l Trade Law Jessup Moot Law & Politics in Post-Mao China Legal Instits in Post-Mao China Legal Regulation of the Use of Force Pacific Islands Legal Systems
University of Notre Dame, Australia, WA	International & Comparative Law (compulsory?)	Text: ?	?	Comparative Constit Systems Conflict of Laws Human Rights Indian Pacific Trade Law
University of Queensland, School of Law, Qld	International Law (elective) John Kidd, Anthony Cassimatis	Text: Harris; suggest also Starke; Reicher; Grieg; Akehurst Supp Mat'l: study guide & tutorial materials including module on treaties	73  30%	Asian Legal Systems Comparative Law EU Law Int'l Arbitration/Commercial Law Jessup Moot Maritime Law Viz Moot

Institution	Basic Courses	Teaching Materials (full citations below)	Enrol't 2000	Electives (*listed in Handbook but not offered 2000)
University of Sydney, Faculty of Law, NSW	International Law (compulsory) D Rothwell, J Bird, R Anderson (I Shearer on leave)	Text: Harris; Supp Mat'l: on private int'l law (half the course) & int'l law in Australia	250 100%	Advanced Public Int'l Law Chinese Laws & Legal Systems Comparative Law* Int'l Human Rights Law Int'l/Comparative Juris Jessup Moot Philosophy of Human Rights* Private Int'l Law
University of Tasmania, Law School, Tas	International Law (students required to take one int'l law elective) Stuart Kaye	Text: Blay, Piotrowicz & Tsamenyi Supp Mat'l: occasional handout & Law School file server	105 80%	Advanced Int'l Law Antarctic & Sth Ocean Law Comparative Law Conflicts Human Rights International Trade Jessup Moot Law of the EU* Law of the Sea* Maritime Law*
University of Technology Sydney, Faculty of Law, NSW	Public International Law (elective) Sam Blay	Text: Blay, Piotrowicz & Tsamenyi Supp Mat'l: jml articles, internat resources, int'l instruments	35 15%	Adv Conflict of Laws* Comparative Law A* Comparative Law B* Conflict of Laws European Comm Law* Human Rights Int'l Economic Law Int'l Trade Law Jessup Moot
University of Western Australia, Faculty of Law, WA	Public International Law (elective, full year) Francis Auburn	Text: Shearer's Starke; Harris Supp Mat'l: only course outline	80 40%	Conflict of Laws Int'l Trade Law Jessup Moot Int'l Humanitarian & Refugee Law Shipping Law*
University of Western Sydney, Macarthur, School of Law, NSW	Public International Law (elective) Alexis Goh	Text: Shearer's Starke; Blay, Piotrowicz & Tsamenyi Supp Mat'l: mainly Aust and int'l cases	60-70 50%	Asian Laws & Cultures Conflict of Laws EU Law Human Rights & Civil Liberties Int'l BusinessLaw Jessup Int'l Moot Manfred Lachs Space Law Moot Space Law US Legal System (Comparative)
University of Western Sydney, Nepean, School of Law, NSW	Public International Law (elective) Peter Gerangelos	Text: Harris Recommended Ref: Shearer's Starke Supp Mat'l: structure UN	30 33%	Aspects of Int'l Technol Law Comparative Law* Conflict of Laws* Human Rights Law Int'l & Comp Employment Rels* Int'l Trade Law* Int'l Business Transactions Int'l Finance & Investment Law Jessup Moot

Institution	Basic Courses	Teaching Materials (full citations below)	Enrol't 2000	Electives (*listed in Handbook but not offered 2000)
University of Wollongong, Faculty of Law, NSW	International Law (elective) Tom Musgrave	Text: Blay, Piotrowicz & Tsamenyi; & Harris Supp Mat'l: none	45  30%	Comp Studies in Law Foreign Investment Law in the PRC Int'l Environmental Law Int'l Law & Diplomacy Int'l Maritime Environmental Law Int'l Trade Law Law of the Sea

Prescribed texts:

P Malanczuk, *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> edition, 1997)

S Blay, R Piotrowicz & R Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997)

M Dixon & R McCorquodale, *Cases & Materials in International Law* (3<sup>rd</sup> ed, 2000)

M Dixon, *Textbook on International Law* (1990)

D W Greig, *International Law* (1976)

D J Harris, *Cases & Materials on International Law* (5<sup>th</sup> ed, 1998)

H Reicher (ed), *Australian International Law: Cases & Materials* (1995)

M Shaw, *International Law* (4<sup>th</sup> ed, 1997)

I A Shearer, *Starke's International Law* (11<sup>th</sup> ed, 1994)



# Teaching International Law to Non-Lawyers

Shirley Scott\*

I teach general international relations courses as well as ones on the politics of international law in the School of Politics and International Relations at the University of New South Wales, Sydney. I suppose that my teaching could be situated in the context of a movement towards greater interconnectedness between international law and international relations. While I am a great advocate of strengthening such links I am, as you will see, critical — I hope in a constructive way — of where we have got to so far in our attempts at inter-disciplinary scholarship. My comments today thus concern not only my teaching but the philosophical rationale for my research endeavours, for as with all of us, both my teaching and my writing are a reflection of my thinking on international law.

I would like to direct my comments to the question of how we deal with the political dimension of international law in our teaching and writing. As you are well aware, international law is a medium through which international politics — and inter-state relations in particular, are often conducted. Some Australian departments of political science do teach a course on international law, usually at a masters rather than an undergraduate level. The inclusion of law in the politics curriculum reflects a Grotian or liberal influence, for, while most political scientists, looking through the dark lenses of their realist glasses, have not been very interested in international law, some *have* written about international law and did so; even in pre-Slaughter days!

The politics-law boundary is not only crossed in one direction. Naturally interested in how their work relates to the broader political environment and how international law might be made more effective, lawyers have sometimes ventured to explore questions *of* as opposed to *in* international law such as, for example, the role of the legal adviser in foreign policy formation, the role of international law in international disputes, the relationship of international law to power, or how to enhance compliance with a particular treaty regime. While it is rare for a law school to advertise a whole course on such topics all teaching of international law is underpinned by a philosophical perspective on how international law relates to international politics, if only by default. To exclude any mention of politics, or to refer to the ‘p’ word as if politics and law could be neatly separated conveys a very strong message about the nature of the international law–international politics relationship.

The philosophical starting point for my teaching and research on international law demands a little more of us than that we simply cross the boundary between international law and international politics. I believe that in order better to understand the political operation of international law we not only have to cross the boundary but to then look back at international law with a different set of theoretical assumptions and analytical goals. My criticism of most ‘inter-disciplinary’ thinking so far is that the assumptions of international law have been carried across the disciplinary divide into the analysis of questions *of* as opposed to those *in* international law. I am not simply advocating a new set of jargon, although the fact that some legal terms are also used in a lay sense does complicate things somewhat. What I am saying is that the analytical assumptions with which we begin our explorations of the politics of international law have to be different from those of legal positivism. And the goal of my enquiry — and what I ask of my students — is in the first place to draw conclusions about politics rather than about international law.

Let me give one simple example; one that I raised at last year’s ANZSIL meeting. This is the concept of compliance and the question of how to enhance compliance with international law. In last year’s paper, which is published in the *Australian Year Book of International Law*,<sup>1</sup> I tried to show that the very concept of compliance assumes an ontology of international law that is internal to international legal discourse but that does not have a corresponding political reality. And so, in writing about enhancing compliance with international law — a political question of international law — we are stepping across the boundary from law to politics without leaving behind the assumptions about international law internal to legal discourse. We are, in other words,

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<sup>1</sup> S Scott, ‘Beyond “Compliance”: Reconceiving the International Law-Foreign Policy Dynamic’ (1999) 19 *The Australian Year Book of International Law* 35.

attempting to explain politics with the intellectual tools of law. And, while the results of many studies of compliance have indeed been valuable in their own right, few would pretend that all the ends have been tied up.

What I am calling for, therefore, is a mode of enquiry that views international law from a position distinct from, and external to, but in no way replacing, international law. Here I would draw parallels to international political economy (IPE), a distinct field of enquiry within international relations. As you may well be aware, IPE scholars study the international economy. While there are many approaches to the study of international economic relations — marxist and neo-marxist, system-theoretical, historical, critical-sociological, institutionalist and so on — IPE scholars are united in their belief that ‘the very problems of a political economy ... cannot be attacked within the strict limitations of neoclassical economics’.<sup>2</sup> In an article seeking to elucidate how the study of political economy differs from that of economics, Rothschild argued that one particular school of writing known as ‘economic theory of politics’ could not be regarded as IPE because it had not left the orthodox assumptions of economics behind but rather had ‘inhale[d] politics in order to make it a branch of economics’.<sup>3</sup>

IPE scholars tend to be critical of mainstream, neoclassical economics. But it is not its position on the political spectrum that distinguishes IPE from the work of orthodox economists. It is possible to be a conservative or a radical political economist just as it is possible to be a conservative or a radical orthodox economist. What distinguishes the two fields of enquiry is the set of assumptions on which each is based. Some IPE scholars do reject out-of-hand neoclassical economics; others do not have problems with it *per se* but object to ‘economic imperialism’;<sup>4</sup> the attempt to use that paradigm to explain political, sociological, or historical phenomena.

In a 1975 article that became a landmark in the history of IPE in the United Kingdom, Susan Strange noted the lack of studies dealing with the middle ground between ‘international economics and international politics in which the political analysis predominat[ed] over the economic analysis’.<sup>5</sup> She noted that the literature contributed by economists suffered from a certain political naivete in its conclusions:

Too often they write on international economic problems as though political factors and attitudes simply did not exist, and could be brushed aside as some kind of curious quirk or aberration of dim-witted politicians. When the economists tell you that it is all just a matter of *will*, of summoning up the necessary will-power, does it not remind you of those who used to say and write so glibly, forty odd years ago, that the League of Nations would be fine and all international problems could be resolved if only the members showed the necessary will to make the system work?<sup>6</sup>

Strange, like Rothschild to whom I referred earlier, warned of the dangers of allowing the intellectual habits of economists (she gave the example of reducing individuals to units of a statistic and then jumping to the assumption in model-making that at all times these units are fully interchangeable with one another) to influence judgment about the behaviour of states in international society.<sup>7</sup>

I would suggest that, in parallel to economic imperialism, ‘legal imperialism’ is evident in much of what is written about the intersection of international law and international politics, although I do not really like the analogy of imperialism. If we are going to call the application of legal assumptions to politics legal imperialism

<sup>2</sup> K W Rothschild, ‘Political Economy or Economics’ (1989) 5 *European Journal of Political Economy* 5–6.

<sup>3</sup> Ibid 4.

<sup>4</sup> Eichengreen commented that economists are notorious for their intellectual imperialism. B Eichengreen, ‘Dental Hygiene and Nuclear War: How International Relations Looks from Economics’ (1998) 52 *International Organization* 993.

<sup>5</sup> Susan Strange, ‘International Economics and International Relations: A Case of Mutual Neglect’ (1970) 46 *International Affairs* 308.

<sup>6</sup> Ibid 309.

<sup>7</sup> Ibid 310.

when carried out by international lawyers I think we will have to refer to larceny or some such equivalent when discussing the work of political scientists that incorporates positivist assumptions about international law.

So, what are the assumptions that underpin positivist international law discourse but that do not match political reality and so need to be left behind when crossing the boundary to ask a question *of* international law? Well, here is the list with which I currently work:

- International law is ultimately distinguishable from, and superior to, politics.
- It is compulsory for a state to comply with its international law obligations.
- It is possible to distinguish objectively between legal and illegal actions.
- International law is politically neutral or universal in the sense that it treats all states equally.
- International law is virtually timeless — at least in the sense that it predates policy.
- It is possible to apply objectively international law so as to settle a dispute between states.
- International law can deal with any issue that arises between states.

The challenge for students of the politics of international law is, I would suggest, to explain how a system underpinned by these ideas is maintained and how at the same time these ideas are used to advance particular political causes. I refer to these principles as together constituting an ‘ideology’ of international law.<sup>8</sup> I have found it interesting when introducing these sort of ideas to my students that while most international lawyers are, on some level, well aware that these principles are not true — and this has, of course, been emphasised in theoretical terms by critical theorists — their verity is believed in much more strongly by non-lawyers. The image of international law deriving from these principles is that of a rule book which can be consulted to determine impartially appropriate state behaviour in any given situation. It is an image that many non-lawyers are particularly loathe to leave behind.

The development of more sophisticated theoretical explanations of the relationship of international law to international relations and the teaching of the politics of international law as a mode of enquiry distinct from that of positivist international law is, from my perspective, one that could be undertaken either in faculties of international relations or in international law. As I have attempted to suggest, the emergence of such a sub-field of enquiry would be characterised not by the letterhead at the top of the course guide but by the investigation of the political operation of international law in a way that does not involve the transferral of the assumptions of legal positivism. The questions asked would in the first place be political. But given that international law is a medium through which politics is conducted, a better understanding of the political dynamics of legal rhetoric could not help but facilitate practising lawyers to determine effective legal strategy. Positivist international lawyers who eschew the ‘p’ word in teaching their students the intricacies of international law could ask for no more.

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<sup>8</sup> See, *inter alia*, S V Scott, ‘International Law as Ideology: Theorising the Relationship between International Law and International Politics’ (1994) 5 *European Journal of International Law* 313 and ‘Building Bridges with Political Science?: A Response from the Other Shore’ (1996) 16 *Australian Year Book of International Law* 1995 271.





# **Indigenous Rights in International Law**



# Brackets and Footnotes: Indigenous Women and the International Human Rights Regime

Larissa Behrendt\*

Angela Harris has noted that women of colour in essentialised feminism are placed in footnotes or in brackets.<sup>1</sup> She observes that footnoting of women of colour silences them, does not reflect their experience, and can even remove us, leaving only white women in the theoretical framework. The bracketing of race defines the experiences of women by their gender first, then their race. Bracketing and footnoting essentialise the experiences of women of colour excluding their historical and contemporary experiences.

The difficulty of finding a conceptual space for women of colour, and I want to talk particularly about indigenous women, occurs in any context where ‘otherness’ complicate the story, especially the double ‘otherness’ of race and gender. International law seems to have the same difficulty in placing indigenous women within its framework and dominant narratives.

## A story of international law and indigenous people

The meta-narrative of international law as it relates to indigenous people is one that overlooks gender or brackets it by making race the most important identifier. It tells that Francisco de Vitoria and Grotius and other European jurists believed that indigenous people did have inherent and fundamental rights under international law. However, these rights were ignored and violated by the international legal regime adopted by European powers to legitimate their claims over the sovereignty and lands of indigenous people across the globe.

Vitoria believed us to be rational human beings and as such believed that we enjoyed certain fundamental rights. For this reason, he rejected the view that papal donation to the Spanish provided a sufficient and legitimate basis for Spanish rule over indigenous lands.<sup>2</sup> He maintained that discovery of the indigenous land alone could not confer title to the Spaniards any more than if the indigenous people had discovered Spain.<sup>3</sup> Vitoria believed that colonisation could be justified if there was no sovereign over a territory. He said that if indigenous people were unfit to be sovereign the Spanish could legitimate a claim of sovereignty. In such a case, the coloniser could administer the territory.<sup>4</sup>

This dominant meta-narrative tells that during ‘the colonising period’, Europeans relied on an international law — or rule of general understanding between states — to agree between themselves on the appropriate way to acquire colonies. Thus, the doctrines of ‘discovery’, conquest and *terra nullius* were all developed as norms and rules of international law during this period, all to the disadvantage of indigenous people.

Vitoria put two provisos on this claim to sovereignty. First, the claim of sovereignty was temporary and had to be relinquished once the indigenous people were capable of governing themselves; second, sovereignty claimed

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<sup>1</sup> A Harris, ‘Race and ssentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 580.

<sup>2</sup> Honorio Munoz, *Address on the International Community: Its law; Its forms; Its rights: According to Francisco de Vitoria* (1946) 92. Vitoria recognised that occupation has been looked upon as one of the original titles for the acquisition of ownership. Both Roman law and canon law recognised this title as legitimate.

<sup>3</sup> Ibid 93. Discovery alone could only be a prerequisite to acquisition being not enough to legitimate acquisition on its own. Discovery could only be a prerequisite if the land belonged to no-one already. Vitoria rejected the Spaniards right to claim the Americas since he believed that the assertion of *res nullius* could not be sustained as the lands were already populated.

<sup>4</sup> Ibid 95. Vitoria believed that since the indigenous people were wanting in intelligence the Spanish could, indeed had a duty to, administer the lands.

by the Spaniards had to be administered in the interests of the indigenous people, not for the profit of the colonisers.<sup>5</sup>

Indigenous people were believed to have rights essential to humanity but we lose those rights following a 'just war'. Grotius endorsed the concept of a just war under three broad categories: defence; recovery of property; and punishment.<sup>6</sup> He rejected, however, the idea that conversion to Christianity was enough to fulfil this criteria. Grotius believed that indigenous people and other non-Christians did not lose their property rights merely because they were non-Christians, whether their lands were discovered or conquered.<sup>7</sup>

Indigenous sovereignty was recognised in varying degrees during the 'colonising period' in which Europeans came to take our lands. Sometimes treaties were signed with indigenous people, as they were in New Zealand and in North America though, in Australia, no treaty was signed with the indigenous people.<sup>8</sup> Where they were entered into, treaties, when first signed were considered by both sides to be documents entered into by two or more sovereigns.<sup>9</sup> This status changed as the laws of the colonising power reclassified those treaties as domestic agreements to be considered under the domestic law of the nation rather than international law. Documents instead became intentionally unbinding documents.<sup>10</sup> This move from considering a treaty as an agreement between two nations to considering it as an internal matter for each country, stripped indigenous nations of any recognition of indigenous sovereign capacity.

With its agenda up until the First World War of asserting claims of colonisation and negotiating disputes between colonial powers, international law developed as a eurocentric body of law. This eurocentrism was compounded by the agenda set by the (primarily European) world wars that moulded international law through European politics, European stability and European control over the world order.

Given this genesis and climate of development, indigenous rights, from the colonial period until the end of the First World War, did not have a protective place within the rubric of international law. Any reference to indigenous people at all was usually to enable colonial powers to justify their actions over their acquired territories. For example, the Covenant of the League of Nations, adopted in 1919, committed all League members to undertake to secure the just treatment of native inhabitants under their control but this provision was designed to validate colonial occupation rather than to ensure that indigenous populations were allowed rights protection. International law was also held not to apply to wandering tribes so that those indigenous people who could not fit into a European concept of 'society' were denied protection of their sovereignty and fundamental rights. It would not be until 1975 that the International Court of Justice would determine that the nomadic nature of indigenous people would be considered to not deprive them of their sovereignty.<sup>11</sup>

International law may have been a tool to justify colonisation. But colonised people, after the Second World War, adopted the rhetoric of international human rights law and sought to gain access to the institutions of the United Nations to assert claims of sovereignty, autonomy and the protection of human rights. Much of the assertions for independence and recognition of indigenous rights focused on the principle of self-determination.

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5 Ibid 96.

6 Grotius, *De Jure Praedae* (1950 (1604)) see esp ch XII.

7 Ibid.

8 Cf, Henry Reynolds, *Fate of a Free People* (1995). Reynolds argues the case that a treaty was made with indigenous Tasmanians.

9 Eg, in the United States, Justice Marshall in *Cherokee Nation v Georgia* 30 U.S. (5 Pet) 1 (1831) upheld the natural rights of Indians over their land which could not be lost by discovery alone. Voluntary cessation and actual conquest were the bases for gauging whether an Indian tribe had been divested of its rights. In the absence of actual conquest the US protectorate over the Indians was a matter for treaty arrangement, not unilateral imposition.

10 Eg, the Treaty of Waitangi, signed in New Zealand, had two versions. One that was presented to the Maori peoples. The other, in English, had a different account of what the treaty was supposed to contain. No prizes for guessing which document the Courts used to validate the colonisation process. See, Nin Tomas, 'The Maori Language — The Chiefly Language of Aotearoa — The Long Struggle' in Greta Bird, Gary Martin and Jennifer Nielson (eds), *Majah: Indigenous People and the Law* (1996) 166.

11 Advisory Opinion on Western Sahara [1975] ICJR.

And it is here erroneous to think that we, as indigenous people, have not challenged these assertions and then sought to rebut, counter or subvert the claims to our sovereignty and land that our colonisers have cloaked in the rhetoric of international law.

### **Self-determination as an international norm**

Debates within the international arena during the inter-war period and in the early post-Second World War period were concerned with restructuring Europe and dividing up the colonial empires of the defeated nations. A framework of individual rights was structured on the theory that members of minority groups would be satisfied if individual rights to equality and non-discrimination were respected.

In the ashes of the Second World War, the right of self-determination was considered to be the foundation stone of a new and stable world order and enshrined in the new human rights framework in Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>12</sup> and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It was envisaged as being applicable to 'peoples' or ethnic minorities within the territory of defeated European empires; it was not though to apply to overseas colonies and certainly not envisaged when it was drafted as applying to indigenous people.

However, this new framework of self-determination was used by various minority groups or colonised nations who harnessed the rhetoric in a movement that started a 'decolonisation' of some African and Pacific nations. This subversive moment saw the principle of self-determination extended from European minorities of some colonial situations. However, this 'decolonisation' was generally deemed inapplicable to colonial situations where indigenous populations constituted a minority. This extension of the principle of self-determination in certain colonial situations did not give any relief to claims made by indigenous nations who had been over-run through population invasions by colonisers, while having their own population levels lessened through the implementation of genocidal practices by the conquering nations.

### **Indigenous people and international law: a subversive sub-text**

Despite the fact that international law has been a tool of colonial powers and has helped to naturalise the colonisation and claims to sovereignty by European powers over indigenous people, indigenous people have been active in using the international human rights regime. As international law sought to normalise the claim to indigenous land, indigenous people have looked to international arenas for places to enforce, subvert and seek accountability with varying degrees of success. Some avenues for action by individuals have opened up in recent times in relation to the human rights covenants. For example, if a state has signed the Optional Protocol to the ICCPR it opens an avenue of redress for an individual who claims state violation of their individual rights under that instrument. The Convention for the Elimination of all Forms of Discrimination against Women is developing a similar mechanism.

This international arena has been especially important to indigenous people as the domestic arena is not responding, nor capable of responding to our needs for rights protection. For Australia's indigenous people, the use of the international human rights regime, such as recent non-government organisation submissions to the Committee for the Elimination of all Forms of Racial Discrimination, is necessary because of the limitations of legislative rights protection within the domestic arena. Ours is a domestic legal system that has only few and minimal rights protected by the constitution and no internal domestic rights framework. This international arena has been all the more important to indigenous people as the domestic arena is not responding, nor capable of responding to our needs for rights protection. For Australia's indigenous people, the use of the international human rights regime is necessary because of the limitations of legislative rights protection, and the racist legacy of the Australian Constitution.

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12 Article 1(1): All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(a) The limitations of legislative rights protection

The *Racial Discrimination Act 1975* (Cth) is actually, in one way, an example of the normative effect of international standards on domestic legal systems since the Act was supposed to go some way towards implementing our obligations under the *Convention for the Elimination of Racial Discrimination*. But we only have to look at section 7 of the *Native Title Act 1993* as amended by the *Native Title Amendment Act 1998* to see that the *Racial Discrimination Act 1975* (Cth) can be overridden. In the case of native title it does not, for example, apply to the validation of particular acts that would extinguish native title.

The fundamental problem with legislative protection is that it is vulnerable to legislative whim and at the mercy of competing interests. It is for this reason that we also need to look to the other place where one may expect to find some protection against the impulses of the legislature that result in the erosion of fundamental rights: the Constitution.

(b) The racist legacy of the Australia Constitution

If court victories offer only sporadic and episodic protection, which are limited or overturned by the legislatures political will, the Constitution remains the last bastion for rights protection.

The argument that the Federal Government could only use the race power for the benefit of indigenous people was raised by the plaintiff in *Kartinyeri v The Commonwealth* (the *Hindmarsh Island Bridge Case*).<sup>13</sup> In that case, brought in a dispute over a development site that the plaintiff had claimed was sacred to her, the Government sought to settle the matter by passing an Act, the *Hindmarsh Island Bridge Act 1997* (Cth). That Act was designed to repeal the application of heritage protection laws to the plaintiff (another example of the easy ability of Parliament to override legislated rights). The plaintiff argued, *inter alia*, that when Australians voted in the 1967 referendum to extend the Federal race power (s 51(xxvi)) to include the power to make laws concerning Aboriginal people it was with the understanding that the power would only be used to benefit indigenous people. The court did not directly answer this issue, finding that the *Hindmarsh Island Bridge Act 1997* (Cth) merely repealed legislation. The majority held that the power to make laws also contains the power to repeal or amend them.

This decision was seen as a victory by the Howard Government who saw constitutional challenges to amending legislation that extinguished native title rights as much harder to mount, those rights being much less protected. Many were shocked to find that Australia's Constitution may offer no protection against racial discrimination but one need only look at the intention of the drafters to see why it remains this way. In fact, a non-discrimination clause was proposed in the Constitution when the instrument was being drafted.<sup>14</sup>

Proposed clause 110 included the phrase:

...nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.

This clause was rejected for two reasons:

- It was believed that entrenched rights provisions were unnecessary; and
- It was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of these attitudes held by the drafters of the Constitution then it comes as no surprise that the Constitution is a document that offers no protection against racial discrimination today. It was never intended to do so and the 1967 Referendum in no way addressed or challenged those fundamental principles that remain entrenched in the document.

13 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

14 See George Williams, *Human Rights under the Australian Constitution* (1999).

Within this domestic legal landscape, the international human rights regime provides a normative backdrop. The international human rights regime also provides an avenue that can be included in domestic strategies for rights protections by the utilisation of avenues in the international arena to impact on our situations domestically.

But the use of these mechanisms is perhaps the least interesting aspect of the subversive story. Indigenous people have not only explored these formal mechanisms but have, in the recent years, developed a very distinct presence at the United Nations in order to assert our rights, autonomy and independence. Considering that there is limited scope for non-government and individual participation in the international arena where states have tried to maintain a firm grip on their power within the international process, this has been a remarkable achievement.

One area in which we have changed the process within the United Nations was with the development of the Working Group on Indigenous people. This forum was unique within the United Nations because it developed a procedure whereby indigenous persons and organisations could participate without having to get consultative status. This effectively opened up the forum to indigenous groups and individuals from around the world and allowed an indigenous perspective to be developed within the working group.<sup>15</sup> This was the first time that a group who would be the direct beneficiaries of a United Nations declaration had such a strong role to play in its initial drafting.

The open forum developed as a meeting place for indigenous people to meet and discuss issues with our brothers and sisters from all over the world, allowing an information exchange and network building that has strengthened indigenous rights movements around the world. Second, it provided the ability to raise grievances outside of the rhetoric of election campaigns and vote-winning tactics in the domestic arena. Participation in the working group gave confidence to indigenous people. Our assertions of our human rights were reinforced by the development of the human rights instrument, the *Draft Declaration on Indigenous people*, that could articulate the legitimacy of the claims we are making at home.

The draft declaration was the major achievement of the Working Group on Indigenous People. As the document stands, it reflects our aspirations and our political agenda in a way that no other United Nations documents has. The tone of the document was achieved because it was the result of indigenous input, not controlled by states. Even though that aspirational tone captured within the draft declaration is unlikely to remain once states regain control of the process of amending and drafting the document, this starting point is an important precedent and the document will remain an important tool. The experiences and achievements of the working group shows the ability for individuals, even those from minority groups, to target discrete areas within international human rights institutions in which subversive moments can occur. It highlights how indigenous people use their presence in the international arena for pragmatic, domestic-oriented outcomes such as networking and confidence building.

The dominant meta-narrative that paints and taints indigenous people as mere victims of international law ignores the subversive and transformative ways in which indigenous people have used international law. What this narrative overwrites are the moments at which indigenous people have used the international arena for empowerment. It overwrites the fact that indigenous people have adopted the rhetoric of 'self-determination' as an expression of the right to certain political aspirations in the domestic context, even if its practical invocation in the international arena remains elusive.

The use that is made of international mechanisms is one that could perhaps be characterised as both an attempt to claim rights and an attempt to hijack and subvert dominant interpretations of those rights and norms so that they can better meet the aspirations of indigenous people in the domestic arena where they most matter.

### **Indigenous women as agents under international law: the role of 'otherness'**

However, these confident assertions of agency by indigenous people also overwrites the experiences of indigenous women. It brackets us by highlighting our experiences in relation to our racial and cultural identities,

<sup>15</sup> E/CN.4/Sub.2/1994/L.60, 24th August 1994.

lessening the distinct colonial experience we have because of our gender. It is silent on the sub-text that indigenous women feel that the male-dominated international arena has not fostered our presence and our distinct issues. This view of exclusion was expressed at the recent indigenous women's forum that preceded the Beijing +5 Platform for Action meeting.

The Beijing +5 Platform for Action with its mere two references to indigenous women reinforced our double 'otherness' in the international arena. If we are not adequately represented in the instruments that deal with race, nor are we adequately represented in the instruments that deal with gender.

In fact, I feel that we are footnoted in those areas that deal with the protection of women's rights in general. It is here that there is a tendency to overlook our experience, even remove us altogether, leaving only white women in the theoretical framework. For example, the Convention on the Elimination of Discrimination Against Women is an exemplar of this. It is a document in which there is no mention made of indigenous women, though mention is made of rural women.

Indigenous women need to break away from being the brackets and footnotes of international law. Instead, I propose the following role for indigenous women in the international arena that recognises our unique status as an embodiment of 'otherness'. It is a role that Felix Cohen suggested for Native Americans in the United States: 'the Indian plays the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities reflects the rise and fall of democratic faith.'<sup>16</sup>

In international law, women of colour need to be the miner's canary, the measure for whether all is well with international legal norms and institutions. The practical outcome of using indigenous women's experiences as a measurement of the effectiveness of international norms is that it will require an investigation and understanding of those unique experiences, histories and identities.

In addition, there needs to be an adoption of hybridity to bring dominant identifiers into better focus with each other. To cleanse our men with the politics of gender and to cleanse feminism with the politics of race. The practical outcome of this is that it will begin to make our male-dominated organisations accountable for indigenous women and it will require dominant women's groups to include women of colour.

We need to stop the destruction of our cultural heritage that occurs at a faster rate than for men. We need to stop colonial-induced violence that in some places kills one-in-three indigenous women. We need to protect indigenous women from medical procedures performed on their bodies without their informed consent. We require protection of our women's stories, knowledge and medicines.

I put forward these possible pathways — of miner's canary, litmus test and starting point, and of pushing identifiers against each other — not for the intellectual, theoretical and conceptual gymnastics that these approaches may fertilise, but because we need pragmatic, effective approaches to our situations, approaches that challenge international law to come to terms with our double 'otherness'.

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16 Felix Cohen, 'Anthropology and the Problems of Indian Administration' in L Cohen, *The Legal Conscience: Selected Papers of Felix S Cohen* (1960) 202.



# Creating the Architecture of a Global World Order: The Need for a New Ontology

Makere Harawira\*

The modern world order of nation states arguably had its origins in the search for wealth and domination that characterised the fifteenth and sixteenth centuries. Some would claim that it predated that period by several millennia. Most certainly it was created over the top of indigenous nations and civilisations that had existed for thousands of years and that had their own structured societal relationships based upon particular understandings of their location within the natural world and their relationships to both human and non-human lifeforms. The trade that from its earliest beginnings drove the evolution of the nation state world order was drawn largely from the exploitation of indigenous lands and territories. Its name, one can argue, was imperialism — by multiple imperialist agencies — and which occurred at a number of levels. Amongst its most devastating outcomes can be included the wide-spread genocide of indigenous peoples throughout the lengthy period of European, British and more recently United States imperialism, all of which has been sufficiently well-documented. At the beginning of the twenty-first century the contemporary global economic order of trade and investment is being developed as a system of rules and regulations in which the remaining non-privately owned resources of the world are predicated as ‘global commons’<sup>1</sup> while indigenous elites are co-opted under the rubric of self-determination. Combined with the construction of a global commons is the privatisation and commodification of the ‘commons’, thus removing any remaining apparent ability of the indigenous peoples of those territories to protect and preserve them while failing to protect these same resources from exploitation and ecological pollution. Simultaneously, with this global land and resource grab, there is an increasing clamour for the protection of rights: human rights, environmental rights, indigenous rights, and certain animal rights.

Like shifting tectonic plates, trade interests and human rights — the foundational pillars of the post-war world order are colliding against each other with increasing force. The resulting eruptions are manifesting at many levels — in the genocide of indigenous peoples and activists who refuse giant transnational oil companies access to their traditional lands,<sup>2</sup> in the burning of fields of genetically modified plant material in India, and in the global wave of extreme brutality and fear-mongering by the official security arm of states who host forums of the global economic order such as the World Trade Organization forum in Seattle, November 1999, the meeting of the World Economic Forum in Davos during January 2000, and the International Monetary Fund and World Bank meeting in Washington, April 2000. Where just a few short years ago the numbers of protesters at such functions numbered in the lower hundreds, the months ‘since Seattle’ have seen this number swell to tens of thousands. Accompanying this is a level of overt police brutality and surveillance of citizens unprecedented in western countries. Across the globe the movement of indigenous peoples, human rights activists, environmental campaigners, grandmothers, mothers and children are engaged in what might be termed a life-and-death struggle which involves wresting back from the hands of an elite class of transnational interests the power to atomise, to commodify, to clone and to plagiarise the remaining lifeforms that exist on and within *Papatuanuku*.

Indigenous peoples and indigenous women in particular, like molten magma erupting from the impact of colliding tectonic plates, are re-emerging in positions of strength and power drawn from the flaxroots mobilisation of peoples who, although widely disparate in character, have in common the goal of restoring sanity to the concept of a global order, of social, political and economic frameworks which enhance rather than diminish the quality of life of future generations. For indigenous peoples, at stake is not only their own right to self-determination in the global order but most importantly, the protection of *Papatuanuku*, of Earth Mother and of all her offspring. It is at the intersection of transnational interests, nation-states and the global economic order on one hand, and the rights of indigenous peoples, of groups, individuals and the environment on the other, that the most violent eruptions are occurring. One direct outcome of these eruptions is that, more than ever in recent

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<sup>1</sup> See *United Nations Human Development Report* (1999) ch 4.

<sup>2</sup> One notable example are the U’wa people of Columbia.

months, issues of ecology, the biosphere, and humankind's relationship to other forms of existence have occupied increasing space within multilateral and bilateral discourses and negotiations.

In this paper, I begin by examining the epistemologies that underpinned the evolution of the world order of nation-states through international law during the fourteenth, fifteenth and sixteenth centuries as it impacted on indigenous peoples during that period and follow with comments on the contested interests involved in the creation of the twin pillars of the post-war democratic world order of nation-states and the positioning of indigenous peoples within that. The changing shape of the world order is reflected in changes in the role and functions of the various agencies of the United Nations. This is nowhere more apparent than in the tensions between the United Nations Economic and Social Council (ECOSOC) and the United Nations Conference on Trade and Development (UNCTAD) — now in partnership with corporate interests under the banner of The Global Compact. In tracking the struggle between the two moving plates of the world order as the rhetoric of rights has given way to the rhetoric of the market, I will comment on the changing role of the United Nations as a site within which this struggle is encapsulated. The final section of my remarks is concerned with the regulatory architecture of the global economic order and its impact on the wellbeing of the planet as reflected in the biosphere, indigenous rights, and social and economic indicators. In particular, I comment on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and the World Intellectual Property Organisation (WIPO) as instruments of the unregulated market as a prelude to a fuller examination at a later time of the role of international law in the contested area of rights versus markets. My final comment will be to suggest that for the continued preservation of the rights of individuals, groups, indigenous peoples and the environment, a new ontology is urgently required. Some remarks then about international law and the earliest beginnings of the construction of the imperialist world order.

### International law, indigenous peoples and the construction of world order

A number of authors have chronicled the jurisprudential debates of the fifteenth and sixteenth centuries concerning the status of indigenous peoples in the era of Spanish and Portuguese imperialism as well as later imperialising powers such as the Dutch, French and English. These accounts provide a framework for understanding the shift that occurred within international law over that period, which saw a transformation of the status of indigenous nations within international norms from one of international equals to 'uncivilised savages' at worst and 'dependent nations' at best. Paul Havemann equates the shift from feudalism to liberal societies with its accompanying 'duty-based discourses on membership of the family of nations, personhood, possession, property, the social contract, citizenship and sovereignty' as the beginning of the contemporary jurisprudence from which 'the recognition and definition of indigenous rights in the Anglo-Commonwealth' evolved directly.<sup>3</sup> From its earliest inception international law has been premised on certain views of the structure of the world as well as of human society, and on the particular forms of knowledge and understanding that rest upon these ontologies. James Anaya has described international law as 'a universe of authoritative norms and procedures — today linked to international institutions — that are in some measure controlling across jurisdictional boundaries'.<sup>4</sup> In his extremely important and thorough analysis, *Indigenous Peoples in International Law* Anaya argues that 'although once an instrument of colonialism, international law, however grudgingly or imperfectly, has developed and continues to develop to support indigenous peoples' demands'. This section revisits that claim and explores some of its implications.

As my colleague Larrisa Brendt has reminded us, international law has its roots in the jurisprudential treatises which originated out of classical western thought, the legacy of medieval humanism.<sup>5</sup> Authority was rooted in the concept of natural law, conceived of by the Spanish school of thought and in particular, the theorist Francisco de Vitoria as divine law, the law of God, and, a century later, by Grotius (1625) as a 'dictate of high reason'.<sup>6</sup> As conceived of by Vitoria and Grotius, the dictates of natural law saw the legal position of indigenous

<sup>3</sup> P Havemann (ed), 'Euro-American Law of Nations and Indigenous Peoples' in *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999) 13–17.

<sup>4</sup> S James Anaya, *Indigenous Peoples in International Law* (1996) 4.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid 12; Havemann above n 3, 14.

peoples as defined by both their humanity and their modes of social organisation. Morris points out that the Bull *Inter Caetera* of 4 May 1493 in its reference to the 'certain remote islands and also mainlands' discovered by Columbus and within which '... these nations living in the said islands and lands believe that there is one God and one Creator in the heavens'<sup>7</sup> represents the first European acknowledgement of the nationhood of the indigenous peoples of the Americas.

Glenn Morris' study of fifteenth century international law and its application to indigenous peoples details the theological debates initiated by the Papal Bulls of 1493 in which both Aristotelian notions of slavery as the natural state of the American Indians and the notion of the Just War as applied to the indigenous peoples of the Americas was strongly refuted by Matias de Paz. In arguing that indigenous nations had the right to self-defence, de Paz's work *Concerning the Rule of the Kings of Spain over the Indians* affirmed the sovereignty of indigenous peoples and the illegality of Spanish dispossession of indigenous nations from their lands or of their 'inherent sovereign right to govern themselves'.<sup>8</sup> Similarly, Franciscus de Victoria concluded that the indigenous nations of the Americas exercised 'true dominion over their property in both public and private matters, just like Christians, and ... neither their princes nor private persons could be despoiled of their property on the ground of not being true owners'.<sup>9</sup>

In such fashion the international legal norms of the period dictated that, as with other civilisations with whom the western world had been in contact for several millennia, indigenous peoples in newly discovered lands were regarded as having sovereign status in the Law of Nations which prevailed at the time. As chronicled by a number of authors,<sup>10</sup> dominant notions of European intellectual and moral superiority saw these norms hotly debated throughout the early period of imperialism.

The influence of Hobbes and Locke saw the natural law function of protecting the common ownership of land and its produce transformed to protection of 'the freedom to act, trade and to own property'.<sup>11</sup> The principle of individual ownership based on labour defined in Locke's second *Treatise*<sup>12</sup> legitimated the dispossession of indigenous peoples from their own territories by colonising interests who saw land as a resource for the extraction of wealth and the allocation of rights on the basis of individual ownership. Thus legal decisions of the time which functioned to legitimate western imperialism and the doctrine of discovery became part of the foundational jurisprudence of the international system of nation-states and the means by which indigenous peoples not only became orphans in their own territories but were denied equal rights under the law. Touraine identifies Locke's rationalism as supplying 'new foundations for the divorce between individual and society'. According to Touraine, Locke establishes a total discontinuity between the state of nature and social organisation by giving the state of nature 'political expression' in which 'The analysis of a community and the needs of its members is replaced by an analysis of labour and property which must be protected by laws.' Ultimately, as Touraine depicts it, the growing opposition between the empiricism that leads to positivism and the idea of natural law which 'inspires all the social movements that resist the established order' culminated in the separation between traditional holism and modern individualism which for Touraine<sup>13</sup> represents the divorce or separation between the two faces of modernity. These disjunctures are reflected in the transition from indigenous peoples treatment as international citizens with natural law rights and their relegation to the category of uncivilised savages incapable of self-governance and from whom the wresting of their traditional lands could be legitimated on the basis of positivist ideologies underpinned by racist rationalisations.

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<sup>7</sup> Cited G Morris, 'International Law and Politics. Toward a Right to Self-determination for Indigenous Peoples' in M A Jaimes (ed), *The State of America: Genocide, Colonisation and Resistance* (1992).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> In particular, see Havemann above n 3; Anaya above n 4; F Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (1993); Morris above n 7.

<sup>11</sup> A Touraine, *Critique of Modernity* (trans D Macey 1995) 49.

<sup>12</sup> Locke (1690) 287–288.

<sup>13</sup> Above n 11, 52–54.

In the climate of the post-Thirty Year War period and the emergence of autonomous European state societies, Vattel's *Law of Nations* articulated what was to become the precursor to the doctrine of state sovereignty that became a central precept in international law. Inherent in this body of international law were ideologies based on racist notions of culture and civilisation that determined who and what counted as 'nations'. Although Vattel's definition of states included 'all political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security' Vattel himself distinguished between what he termed the 'civilised Empires of Peru and Mexico' and the peoples of North America who 'rather roamed over them than inhabited them'.<sup>14</sup> This Lockean distinction between different types of indigenous societies based on a natural law duty to till the soil became in due course the basis for the denial of land rights and status as nations or states subject to international law for indigenous peoples. The ultimate outcome was a redefining of international norms within a positivist legal theoretical framework legitimated by racist notions of culture and civilisation.

### Exclusionary ideologies

By the end of the sixteenth century, Spanish, Portuguese, French, Dutch and English imperialist policies of expansion and resource extraction for export to core countries saw the invasion of a number of indigenous peoples' territories, accompanied in many instances by the genocide of the *tangata whenua*<sup>15</sup> of those lands. During the seventeenth and eighteenth centuries, dissimilarity between indigenous and non-indigenous peoples became the dominant ideology by which moral exclusion was legitimated.<sup>16</sup> In the nineteenth century, Hegel's political philosophy which relegated to the realm of 'prehistory' the historical realities of civilisations whose modes of organisation differed from Hegelian conceptions of the state as the nexus of reason, truth and freedom, denied other modes of social organisation as civilised and legitimate.<sup>17</sup>

The exclusion of indigenous peoples from status and therefore protection within international law was definitively elaborated by doctrines such as those of US Chief Justice John Marshall's 'dependent nations' and reinforced in international law by treatises such as W E Hall's *A Treatise on International Law* which in declaring international law to be a product of the special civilisation of modern Europe, took the exclusion of indigenous peoples from international law for granted as 'such states only can be presumed to be subject to it as are inheritors of that civilisation'.<sup>18</sup> The principle of recognition which Strang<sup>19</sup> points out is peculiar to the Westphalian state system of international order, was elaborated in Lassa Oppenheim's *International Law* which stated 'statehood alone does not imply membership of the Family of Nations ... Through recognition only and exclusively a State becomes an International Person and a subject of International Law' and delineated the conditions under which acceptance and recognition might occur.<sup>20</sup>

These conditions expressly did not apply to 'organised wandering tribes' who were emphatically excluded from the law of nations. Western definitions of civilisation which were used to evaluate non-western polities defined a 'civilised' state according to such practices as 'freedom of traffic, guarantees of the life and liberty of foreign nationals, the egalitarian application of law, acceptance of European international law including the rules of war, and the maintenance of continuous diplomatic relations with other members of the system'.<sup>21</sup> In this manner the

<sup>14</sup> Cited Anaya above n 4, 15.

<sup>15</sup> Translation 'people of the land'.

<sup>16</sup> Optow (1990) cited in Wilmer above n 10, 72 identifies three rationalising antecedents by which moral exclusion was legitimated, of which dissimilarity became the dominant discourse. The other two antecedents were a negative linkage (or the absence of any positive linkage) and conflict.

<sup>17</sup> See, eg, Hegel, *Reason in History* (trans R S Hartmann, 1953). Originally published as *Lectures on the Philosophy of History* (1837).

<sup>18</sup> W E Hall, in A P Higgins (ed), *A Treatise on International Law*. (8<sup>th</sup> ed, 1924) 65, cited Anaya above n 4, 21.

<sup>19</sup> D Strang, 'Contested Sovereignty' in E Kofman and G Young (eds) *Globalization: Theory and Practice* (1996) 23.

<sup>20</sup> L F L Oppenheim, in R F Roxburgh (ed), *International Law* (3d ed, 1920) 134-35, cited Anaya above n 4, 35 fn 108.

<sup>21</sup> Gong, cited Strang above n 19, 32.

construction of a positivist fiction that argued indigenous peoples had *never* been seen as capable of possessing rights within international law and that indigenous peoples had no territorial rights which states or monarchs were bound to respect, ultimately prevailed over earlier notions which supported treaty making between indigenous peoples and European powers.<sup>22</sup> Wardship doctrines embedded in liberal racist ideologies premised on notions of indigenous peoples as 'primitive', lacking 'civilisation' or 'culture' according to eurocentric criteria for social organisation, became the means for legitimating continued imperialist expansion combined with social and cultural engineering of indigenous peoples to meet the needs of European colonialist society. In the twentieth century reconstruction of post-war world order, the 'wardship' doctrine enshrined in the Treaty of Versailles continued as one of the foundation cornerstones of the United Nations organisation. The founding charter of the United Nations organisation which Wallerstein argues was 'in many respects a restatement of the political philosophy of the modern world-system',<sup>23</sup> delineated 'civilised nations' as those who constitute the international order of nation-states, reinforcing the doctrines of wardship and of recognition both of which excluded indigenous nations from entry into the international order of equal nation-states.

### The UN and Bretton Woods institutions: twin plates of the multilateral world order

In the last two decades, multilateralism has become a matter of critical concern. The crisis of multilateralism includes the weakening of the United Nations as well as the transformation of the Bretton Woods institutions and their relationship with Third World actors. This section examines the contested interests reflected in the creation of the post-war international institutions as the roots of the current crisis of multilateralism and suggests that the root cause stems from the conflictual nature of its beginnings. From a liberal institutionalist viewpoint, the new international institutions were widely held to be the beginning of a framework for a new form of democratic world governance that for some was embodied in the 1945 Charter of the United Nations.

The United Nations origins in the power relations of the second world war, demonstrated in the Washington Declaration of 1942 in which 26 Allied countries pledged themselves to use all their resources against Italy, Germany and Japan and the Moscow Four-Nation declaration of 1943, can be identified as predeterminants of its role as a vehicle for competing agendas, contested political power and the legitimisation of hegemonies.<sup>24</sup> From its inception the UN organisation functioned to support the interests of the dominant distribution of world power.<sup>25</sup> Despite the rhetoric of a new international order of equal sovereign states that surrounded its evolution, the primary function of the institution created by the 1945 United Nations Charter was to facilitate in an organisation of nation-states membership of which was carefully proscribed. Hegelian definitions of what counts as states maintained the exclusion of indigenous peoples from participation within the new world order as with, initially, those in what became referred to as 'Third World' countries. While the United Nations Charter defines the world system in terms of the 'sovereign equality' and 'territorial integrity' of member states and of non-intervention in their domestic affairs with membership is ostensibly open to all states, the recognition required for membership was and is, highly political. Predicated on competing liberal ideals of the equal sovereignty of states and the sovereign rights of 'the people', the establishment of the United Nations interstate system was characterised by struggle over competing discourses of rights, sovereignty and self-determination. It was also a primary site of what was to become a global hegemony the reality of which was obscured by discourses of democracy.

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<sup>22</sup> Anaya above n 4, 21; Havemann above n 3, 13–17.

<sup>23</sup> I Wallerstein 'The New World Disorder' in A Paolini, A Jarvis and Reus-Smit (eds), *Between Sovereignty and Global Governance. The United Nations, the State and Civil Society* (1998) 172.

<sup>24</sup> Cf R W Cox, *Approaches to World Order* (1997); S Kothari, 'Where are the People? The United Nations, Global Economic Institutions and Global Governance' in Paolini, Jarvis and Reus-Smit (eds), *Between Sovereignty and Global Governance. The UN, the State and Civil Society* (1998); Wallerstein above n 23.

<sup>25</sup> A Robert and B Kingsbury *United Nations, Divided World* (1993) 6, point out that the term United Nations originally referred to the Allied countries themselves and was later appropriated for use by the new international organisation.

### Liberalism, human rights and global governance

At its inception in the closing period of the second world war, the UN Charter was seen idealistically by many as the founding charter of world government, as the basis for the establishment of peace between nations (particularly in the context of the resounding failure of the Treaty of Versailles), as the upholder of human rights and dignity, as the protector of the rights of people. In addition to the establishment of the basis for international security and peace among nations, other objectives given emphasis within the UN Charter includes are the promotion of equal rights and the self-determination of all peoples. Liberalist human rights discourses frequently cite the concepts of sovereignty, human rights and self-determination as forming the foundation of the new international order.<sup>26</sup> Others highlight that fact that it is only since the 1970s that human rights have been given high priority within the UN agenda.<sup>27</sup> As Farer and Gaer point out, that human rights were included at all in the Charter of the United Nations was due only to 'the effort of a few deeply committed delegates and the representatives of some 42 private organisations'.<sup>28</sup>

The drafting of what was to become the Declaration of Human Rights was equally contentious. The dichotomies of state sovereignty and human rights, and individual and communal rights that were hotly contended in the original drafting of the Bill of Rights saw some of its principles being removed to what were to become twin human rights Covenants.<sup>29</sup> The twenty-year span between the original drafting by ECOSOC of an International Bill of Rights and the 1966 voting in the UN General Assembly on the Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocol, the principles of both of which were originally formulated within the Declaration of Human Rights in 1948, reflects a long and arduous struggle over human rights, self-determination and state sovereignty, a struggle which involved states, non-governmental organisations and other groups in civil society. Although in principle the right of self-determination is theoretically applicable to any situation of the oppression of peoples through subjugation or exploitation, application of self-determination rights has major ramifications in terms of structural and institutional change which threatens the territorial integrity and thus, the political power of states and their control of resources.

The post-war liberation and decolonisation movements of the Third World countries saw self-determination emerge as a key strategy in what might be termed a Gramscian 'war of position'. The landmark resolution on decolonisation, the Declaration on the Granting of Independence to Colonial Territories and Countries (1960) was in many ways the culmination of those struggles. Embedded in the language of the Decolonisation Resolution however, were contradictions which enabled narrow interpretations of its meaning and the restriction of its application. Although 1960 was considered a landmark year in terms of enshrining internationally recognised rights to self-determination and independence for previously annexed territories and colonised countries, there was silence regarding those same rights for indigenous peoples who had been subjected to colonisation. While the adoption of the two international human rights instruments in 1966 opened up the possibility of support for other forms of self-determination within international law, it was a further nine years before the human rights of indigenous peoples received acknowledgment within the human rights agency of the UN.

It is true to say, as Anaya has done, that since the inception of the UN, the positivist, state-centred nature of international law has in certain respects been more and more influenced by humanistic precepts and moral objectives. The multilateral processes that shape international law have increasingly been impacted by non-state actors as well as by reformist tendencies. The international human rights movement has been one of the most significant factors in the shaping of international law particularly in the arena of diminishing the individual state dichotomy. Concepts of group rights and collective rights have increasingly been articulated in the arena of international human rights. Nevertheless, international law remains largely state-centred with an increasing tension between the rhetoric of individual and group rights.

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<sup>26</sup> Cf M Sellers (ed), *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (1996).

<sup>27</sup> See, eg, Wallerstein, above n 23.

<sup>28</sup> Farer and Gaer above n 25.

<sup>29</sup> Ibid.

The decolonisation process has indeed had a profound impact in the shaping of the multilateral processes of international law. However indigenous peoples of colonised territories were excluded from the decolonisation regime promoted and passed through international law in the post-second world war era. The decolonisation process did *not* in fact mean a reverse of the status quo prior to colonisation, it did *not* entail a reordering of the social processes that led to colonisation. In actuality, the international decolonisation system actively worked hard at excluding indigenous peoples from the decolonisation and self-government process. Definitions of whom and what counted as states excluded the indigenous peoples in colonised territories from the possibility of recognition and thus, from both the right to self-determination and access to the International Court of Justice (ICJ) and other UN instruments.

Since then there have been significant advances made in protecting the rights of indigenous peoples within international law. While far from perfect, International Labour Organization (ILO) Convention 169 which amends ILO Convention 107 seen as overtly assimilationist in nature, represents an important mechanism by which international concern for indigenous peoples has been enhanced. Other mechanisms that have arisen from the upsurge in indigenous peoples' own determined efforts internationally such as the Working Group on Indigenous Peoples, the UN Draft Declaration on the Rights of Indigenous Peoples and announced in August 2000, the Permanent Forum for Indigenous Peoples within ECOSOC. Nevertheless, the tensions between state sovereignty and indigenous peoples' efforts towards self-determination or self-governance continue to be a site of struggle as reflected in the fact that within the Permanent Forum for Indigenous Peoples states have the ability to veto.

Despite these tensions the Human Rights arm of the United Nations system is today the most important vehicle for the promotion and protection of the rights of indigenous peoples. The gradual but steady increase in the prominence given to indigenous peoples' rights has highlighted the flagrant disregard by states of their obligations as signatories to the Human Rights declaration and its Covenants. Throughout the continent of Asia indigenous peoples continue to be dispossessed, relocated and in many cases subject to genocide, as they stand in the path of 'progress and development'. In Tibet, thousands of Tibetans have been dispossessed from their traditional territories by enormous hydro developments currently being developed on the Yangtze River. The banning of the Dalai Lama in September 2000 from what has been trumpeted as a historic gathering of the world's religious and spiritual leaders on behalf of world peace raises yet further questions about the ethics of a politics of world governance in which politics and trade excludes from such a gathering one of the world's most recognised spiritual leaders.

In the Pacific, the commitment in real terms of state signatories to the Human Rights Covenants is brought into question in the current clash between the ECOSOC arm of the UN and the government of Australia. The Australian government's disregard of the long and horrific history of inhumane treatment of the Aboriginal peoples has been highlighted on the eve of both the Olympic Games and the granting of the indigenous peoples' Permanent Forum. Prompted by the appalling statistics of Aboriginal deaths in custody,<sup>30</sup> by the incarceration of an over-proportionate number of Aboriginal peoples often for unjustifiable reasons and by the negative response by the Australian government to questioning by ECOSOC, the response of the Australian government to criticisms by the human rights treaty bodies has been the announcement of a scaling back of Australia's involvement with the UN human rights system. This response by a modern liberal state to questions raised within the UN Human Rights Commission regarding its failure to meet its own human rights obligations highlights the political realities of a century in which liberal governments, despite their rhetoric, maintain a deliberate amnesia regarding their own human rights treatment of indigenous peoples in support of the perceived exigencies of trade and foreign relations. In the case of Australia, its much vaunted human rights leadership in East Timor followed its lengthy complicity in the human rights abuse of the Timorese indigenous people regarding which their own contractual arrangements with Indonesia produced a 25-year period of amnesia.

The Australian government's withdrawal from the UN echoes the United States model of disciplining the UN in retaliation for policies perceived to be in opposition to the economic interests of the United States, an issue discussed later in this chapter. For indigenous peoples, this deliberate flouting of international conventions which provide the most concrete protection within international law for the rights of indigenous peoples — justified by a nebulous reference to democracy — may provoke an even stronger assertion of their inherent

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<sup>30</sup> Highlighted recently by the death in custody of a 14-year-old youth whom had been imprisoned for a minor offence.

human rights to self-determination. By raising questions about the power relations associated with the concept of democracy and governance, the nature of democracy in the context of globalisation is also problematised.

The commemorations held in December 1988 throughout the western world for the fiftieth anniversary of the signing of the Declaration of Human Rights were all the more ironic given the public awareness of the blatant genocide of East Timorese peoples that had been continuing for 25 years. For indigenous activists, the recent murder in Columbia of three well-known and loved activists who had been engaged in assisting the indigenous U'wa people in Columbia to resist the aggressive onslaught by oil companies in their lands saw the fiftieth anniversary as extremely poignant, exacerbated by media disinterest in an act which, like East Timor, was the antithesis of the much-vaunted Declaration of Human Rights. In Aotearoa, the fiftieth anniversary commemorations coincided with the New Zealand government's decision to dispatch four bombers on a stand-by mission of assistance in the United States in its punitive bombing of Iraq, an endeavour ostensibly targeting Saddam Hussein's alleged chemical weapon factories but the reality of which is seen in the death of 5,000 children every year of its five-year program due to multiple causes. High on the list of these causes are deleted uranium poisoning from weapon fragments which litter the ground and poison the water, dysentery due to the raw sewage which as a result of lack of means of repair seeps from broken and destroyed plumbing facilities, and malnutrition due to a United States-driven sanctions regime. The New Zealand government's participation in this inhumane and unjust endeavour demonstrated the selective form of myopia that has historically accompanied liberal discourses of human rights, freedom and justice

### **The global economic order and the redefining of democracy**

The emergence of a global economy provides the material basis for a global civil society for which international law provides the constitutive framework. In terms of this global order, rather than it being a post-hegemonic, we are seeing the emergence of new forms of global hegemony. Arguably, the construction of the architecture of what Renato Ruggerio described as a 'new global economic order' has been driven by the interests of transnational or global capital. Allied to this has been a redefining of the nature of democracy.

As with other international agencies of the 'new world order' system, the struggle for political and economic dominance between competing interest groups determined the initial development of the Bretton Woods institutions that became the economic constitution of the post-war order. Facilitated by the economic strength of the United States' and Britain's indebtedness due to the war, United States' economic leverage had two significant results. Britain abandoned the preferential trading payments system that had been one of many protectionist strategies that attempted to mediate the effects of the worldwide depression of the 1930s and United States' interests dominated the final proposals for a new multilateral economic order launched at the Bretton Woods conference in 1944. In the same year that the Mont Pelerin Society was established, the defeat of proposals for an international trade organisation and the establishment instead of the General Agreement of Trade and Tariffs (GATT) in 1947 reinforced the dominance of United States' economic and trade policy agendas in the formation of what was seen as the new democratic world order. Also launched in 1947, the Marshall Plan for the economic reconstruction of war-torn western Europe provided for the enormous production capacity of the United States and its post-war conversion. Together with the agencies of the UN, these Cold War structures have been identified as one of the twin pillars of United States hegemony, the other being the liberalising international economic order.<sup>31</sup> The Bretton Woods institutions were seen as coming under the umbrella of the UN system and in principle at least, were accountable to the UN agencies. The embedded liberalism of these politico/economic arrangements constituted the structural underpinnings of the post-war international order. During the 1960s, the Bretton Woods institutions as other UN agencies, played a major role in the self-determination movements of countries which were initially excluded from the post-second world war world order.

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<sup>31</sup> S Gill, 'Historical Materialism, Gramsci and IPE', in C Murphy and R Tooze (eds) *New International Political Economy* (1991) 63.



### Contested interests and the reshaping of democracy

Anaya<sup>32</sup> makes the point that shifts in international norms occur primarily as a result of shifts in power within the UN General Assembly. Throughout its evolution as a conduit for the construction of a single-unit world system, the UN has been variously supported or undermined by competing political powers and interest groups as they have sought to define the shape of the changing world order. In his recently translated work Gilbert Rist<sup>33</sup> argues that the decolonisation of mandated territories served US interests in two ways, by the creation of new states to deepen the bulwark against communism and, access to new markets. United States-backed aid strategies carried out in the name of liberal democracy focused on 'development' and state-building in Western Europe, Asia and the Pacific as a bulwark against communism and radical movements.

The significant shift that ensued in the carefully constructed balance of power within the UN system was an unforeseen consequence. Until 1960 and the decolonisation of states especially in what became known as the Third World, the balance of power in the General Assembly enabled the United States to win support for its own strategies. Subsequent to decolonisation and the admittance of new states, changes within the international institutions led to a shift in international norms. In the UN General Assembly this shift was played out in the passing of resolutions which increasingly reflected Third World desires for economic development and autonomy. It was also reflected in the establishment of new international institutions which would facilitate Third World development and among which UNCTAD played a leading role. The UN Centre on Transnational Corporations, intended to mediate against the adverse effects of multinational endeavours in developing countries, was also a response to Third World attempts to reshape the direction of the world economy towards a more equitable formulation.

The two-pronged strategic response from the north overturned efforts to constrain the movements of transnational corporations and successfully recaptured the Bretton Woods institutions towards the interests of northern capital. At the national level this was played out in the form of structural adjustment programs and a rolling back of the state aimed at establishing free-market economic regimes that functioned to support the economic interests of the north. At the international level, the United States' strategy of defunding the UN succeeded in disempowering the system of UN agencies that had become bastions of southern influence. United States interventions within Central America succeeded in their aim of destabilising revolutionary movements.<sup>34</sup> Like other interventions carried out on the part of the United States, the discourse of 'democracy' obscured the reality of these interventions, a strategy which William Robinson identifies as an increase in new modalities of United States intervention and the linking of 'democracy promotion' to globalisation. According to Robinson, what US policymakers mean by 'democracy promotion' is the promotion instead of *polyarchy* — a concept developed by United States academic Robert Dahl which refers to the system by which a small group actually rules and mass participation in decision-making is confined to leadership choice in elections carefully managed by competing elites. According to Robinson, in this institutional definition the classic definition of democracy as power/rule by the people for the people has given way to a form limited to the political sphere in an institutional definition and which revolves around the process, method and procedures involved in the election of 'leaders'. Concomitant with this decline has been the conflation of polyarchy to the staple definition of democracy in both 'democratisation' and 'democracy promotion' discourses and literature.<sup>35</sup>

There are multiple consequences to the strategic reconfiguration of international norms. One effect is observable in the selective nature of human rights interventions. Human rights abuses, military engagements and foreign policy decisions are selectively responded to by states on the basis of economic interest, be it defined as political or strategic. Underneath every encounter of war, every humanitarian intervention by the United States and its allies, including the interventions in Kosovo, is an economically defined set of interests or agendas.

Arguably, the ratification of the Uruguay Round of the GATT and the establishment of the WTO signed and sealed the fate of the south. Principles such as international price management to assure fair prices for southern

<sup>32</sup> Above n 4.

<sup>33</sup> G Rist, *The History of Development. From Western Origins to Global Faith* (trans P Camiller, 1997).

<sup>34</sup> Cf R W Cox, 'Multilateralism and World Order' in R W Cox with T Sinclair *Approaches to World Order* (1997) 512.

<sup>35</sup> W I Robinson, *Promoting Polyarchy. Globalization, US Intervention and Hegemony* (1996).

commodities, preferential treatment for local investors, and other mechanisms for ensuring a more equitable distribution to the south were swept away. In their place a radical free-market regime of world trade and investment has emerged in which notions of state sovereignty have been reconstructed and in which the separation of politics and economics masks the reconfiguration of states as agents of global capital. By the beginning of the 1990s, economic discipline had been restored in the Third World by the imposition of policies which favoured the interests of the nebulous 'world economy'.<sup>36</sup>

The 'rolling back' of states saw them become accountable to a nebulous identity personified as the global economy and on whose behalf states were constrained to mystify this external accountability in the eyes and ears of their citizens through what Rist terms the new vocabulary of globalisation, interdependence, and competitiveness. The concept of nation-states exercising sovereignty on behalf of national interest and of the interests of the various groups residing within their borders has been successfully displaced by the locating of economic power within transnational corporations whose wealth exceeds that of many countries. The overriding of international regulations which enabled states to regulate the activities of multinational interests within their borders, by multilateral economic and trade agreements which protect and enhance the rights of investors over the rights of citizens, over environmental regulations, over labour agreements, over the most basic human rights to a decent living standard and a decent wage and most certainly over indigenous peoples' rights to their natural resources including the land which constitutes the basis of their very identity being, is highly problematic.

The outcomes of strategies to weaken the UN have been fourfold; they paved the way for United States-led demands of reform of the UN, for the undermining of the UN Security Council as in the case of the United States-led NATO Allies in the Bosnia war, they delinked aid to Third World countries from the Bretton Woods institutions and prepared the way for a 'business partnership' between the UN and some of the world's most powerful transnational corporations. The disciplinary underfunding of the UN in response to its appropriation by the south, together with the appointment of a liberalist Secretary-General not only prepared the way for the establishment of a business partnership between the UN and transnational corporations, it gave it the illusion of inevitability.

The signing of the Global Compact between the UN and business corporations was the culmination of four years of negotiations carried out largely between UNCTAD and selected transnational business interests through the agency of the International Chamber of Commerce. In January 1999, the co-chairing of a new international agency, the Business Humanitarian Forum, by the UN High Commissioner on Refugees and the president of Unocal, a major United States company then engaged in building a gas pipeline whose construction was punctuated by the torturing and death of local people by Burmese soldiers, highlighted the submerging of human rights on behalf of the interests of capital. In April 1999, a leaked document revealed that the UN Development Programme (UNDP) had accepted \$US50,000 from each of eleven giant transnational corporations, in return for which they were given privileged access to UNDP offices. According to the agency, this would provide a 'new and unique vehicle for market development activities'. The suspension of this program due to intense lobbying by churches, NGOs and other groups was followed by the launching in July 2000 of a larger, even more significant partnership involving 50 of the world's 'biggest and most controversial corporations'.<sup>37</sup>

### **Human rights versus capital rights: some issues for indigenous peoples in the global economic order**

The forms of economic globalisation which comprise the constitutive economic framework of the new global order are often interpreted by indigenous peoples as a continuation of the colonisation which has been perpetrated on them since the beginnings of capitalist expansion. The deepening of neoliberal global institutional arrangements such as through of the Uruguay Round of the GATT and the implementation of the WTO has further intensified the tension between the raft of human rights, including indigenous peoples' rights to self-determination, and the interests of capital. Despite the fact that, as Frederick Abbott reminds us, 'the core

<sup>36</sup> Ibid.

<sup>37</sup> *The Guardian*, 31 August 2000.

objective of the WTO is to improve world-wide standards of living',<sup>38</sup> economic expansion is the overriding determinant in negotiations regarding IPRs. Within the WTO, rights to economic expansion become the major determinant in negotiations carried out between competing interest groups.

The issue of property rights has become a site of extreme concern for indigenous peoples in the global politico/economic institutional framework. The collective nature of indigenous peoples' rights becomes problematised within international legal discourses of intellectual property. While economic globalisation has fostered the exploitation of indigenous intellectual and cultural knowledge by multinational pharmaceutical companies who collect and study plant materials which have been used by particular indigenous groups for often thousands of years for very specific uses, and patent the results of their research, the TRIPS agreement makes it virtually impossible for indigenous peoples to patent traditional indigenous medicinal plants. The fundamental question of collective ownership makes patenting rights highly problematic for indigenous peoples. While Article 2 of TRIPS does allow exclusions of patents on ethical and ecological grounds, most groups concerned with these issues are unaware of the profound implications that trade treaties have for their fundamental, ethical principles. It should be, but is not, obligatory that implications for life forms are publicised and consultation with indigenous and diverse groups undertaken before TRIPS implementation. More importantly, the patenting and commodification of biodiversity can be seen as the antithesis of indigenous peoples' conceptualisations and of the nature of their relationships to the land and other natural resources. A careful reading of the Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999) indicates that this fundamental point is poorly understood, as shown in the comment that indigenous and traditional peoples do not fully appreciate the economic value of their intellectual and cultural knowledge. The TRIPS agreement of the GATT stands in opposition to indigenous peoples' belief systems and to their traditional role of the keepers of biodiversity. The TRIPS agreement has implications for biodiversity, conservation and the environment. Significant issues that have been identified by Vandana Shiva include:

- changes in the ecology of species interactions and changes in the socio-cultural context of conservation
- spread of monocultures
- increased use of chemicals as biotechnology patents create an impetus for genetically engineered herbicide-tolerant crops
- new risks of biological pollution as patented genetically engineered organisms are released into the environment
- undermining of traditional communities and indigenous peoples' biodiversity and an undermining of their capacity to conserve biodiversity.

The intrinsic value of species which for indigenous peoples is affirmed for in the nature of their whakapapa relationships, imply a duty and responsibility not to use organisms as lifeless, valueless, structureless objects. Agreements such as TRIPS function to alienate local and indigenous rights as keepers of biodiversity with a stake in its replenishment and utilisation. The other side of this, as Thomas Cottier points out, is the rapid erosion and displacement of indigenous and traditional knowledge and lifestyles as a function of the process of specialisation, a process which, Cottier admits, TRIPS may be exacerbated.<sup>39</sup>

For many indigenous peoples, this redefining in instrumental terms of the intrinsic value of the land and natural resources with which indigenous peoples have deep spiritual connections, symbolises the theft of the deep spiritual beliefs and values which locate us within the universe and in relationship to each other in particular defined ways. Indigenous rights to their lands and territories become problematised within discourses of

<sup>38</sup> F M Abbott 'The Enduring Enigma of TRIPS: A Challenge for the World Economic System' (1998) 1–4 *Journal of International Economic Law* 512.

<sup>39</sup> T Cottier, 'The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law' (1998) 1–4 *Journal of Economic Trade Law* 555.

‘compensation’ which privilege development and exploitation of resources over the spiritual nature of indigenous peoples’ relationship to the land. This problematic is frequently exacerbated by the co-optation of indigenous leaders within neoliberal ideologies of individualism, competitiveness and consumerism. In Aotearoa/New Zealand, this is reflected in the construction of forms of contemporary tribal development which are antithetical to the deep cultural values and philosophies that traditionally underpinned Māori social and spiritual life. Discourses that reify commodification and exploitation as the pathway to self-determination for Māori function to further displace and fragment traditional social structures of *whanau* and *hapu*. An outcome is the undermining of the core spiritual values and *whakapapa*<sup>40</sup> relationships which connect indigenous peoples to the land and which are the core of cultural identity. These contradictions and tensions are highlighted in the Wai 262 claim<sup>41</sup> before the Waitangi Tribunal which, filed in 1991 and heard first in 1997, is still ongoing and add a further tension to the issues that Māori are engaged in struggling over.

The passing on 17 August 2000 of a unanimous resolution by the Sub-Commission on the Promotion and Protection of Human Rights, calling for a report by the Secretary-General of the UN on the human rights impact of the TRIPS agreement highlights the clash between human rights and the interests of capital that increasingly characterises the form and structure of the global order currently being created and of which international law is the constitutive basis. The Resolution notes in particular the ‘apparent conflicts between the intellectual property rights regime embodied in the TRIPS agreement, on the one hand, and international human rights law, on the other’. This conflictual aspect of international law is embedded in the global institutional structures which comprise the contemporary world order and unless redressed, can only aggravate the extreme degree of social, cultural, political and economic polarisation which exists at every level of human life.

### The twenty-first century crisis of global capitalism

The contemporary global economic order, its modes of production and its political and economic relationships are stingingly indicted in the *Human Development Report 1999* of UNDP. The doubling of the net worth of the world’s 200 richest people between 1994 and 1998 and the enormous increase in the numbers experiencing poverty, the concentration of power in mega-corporations through mergers, the control of 85 per cent of a \$31 billion global market by the top ten companies in pesticides, the fact that more than 80 per cent of patents granted in developing countries belong to residents of industrial countries, the loss of job and income security for workers, the marginalisation of cultural diversity and the theft of traditional knowledge are just some of the consequences of globalisation that the *Human Development Report 1999* spells out.

Launched on September 15 1999 the millennium report of the United Nations Environment Programme (UNEP) *Global Environment Outlook 2000* provides a detailed assessment of the environmental impact of the contemporary form of globalisation. Included in the report are positive developments that have occurred during the last decade such as the development of cleaner production technologies, protocols such as the Kyoto Protocol (1992) and the Montreal Protocol aimed at reducing greenhouse gas emissions and recovering the ozone layer, and increasing environmental awareness amongst society in general. Against these achievements the key finding of *GEO 2000* sits in stark relief. Detailing what it terms ‘the environmental crisis facing humanity’ the *GEO 2000* report unequivocally states:

The continued poverty of the majority of the planet’s inhabitants and the excessive consumption by the minority are the two major causes of environmental degradation. The present course is unsustainable and postponing action is no longer an option.

Despite a continued expansion of the world’s economy, one-quarter of the world’s population remains in severe poverty and ‘widespread pollution and disruption of ecosystems’ is occurring ‘often in countries far removed from the site of consumption’. While the issues vary in kind and intensity from region to region, according to this report a state of full-scale emergency exists in a number of fields. These include the diminution of fresh water in the world, land degradation, air pollution, the inevitability of global warming, the over exploitation of tropical forests and marine reserves, and the permanent loss of species. Deforestation and desertification at

<sup>40</sup> Translation ‘genealogical’.

<sup>41</sup> Commonly referred to as the indigenous flora and fauna claim.

national and regional levels are included as areas of concern. While some of the issues are now well-known, others such as the invasion of species by globalisation and the increased severity of natural disasters are identified as new threats.

Other current reports confirm the findings of the UNEP's *GEO 2000* report. The 1999 World Wide Fund for Nature (WWF) *Living Planet Report* itemises in detail the loss of natural forest cover and species as well as consumption, on a global and regional basis and the decline in the Living Planet Index (LPI).<sup>42</sup> The report shows a decline in LPI of 30 per cent from 1970 to 1995, implying that 'the world has lost 30 per cent of its natural wealth in the space of one generation'.<sup>43</sup> In the space of 15 years, the world's natural forest cover was reduced by approximately 10 per cent, a loss every year of nearly 150,000 square kilometres.<sup>44</sup> Between 1960 and 1996 global carbon dioxide emissions, 'the major cause of global climate change', more than doubled from 10 billion tonnes per year to almost 23 billion tonnes per year.<sup>45</sup> In the same period world grain consumption more than doubled with around 'one-third of the global grain harvest fed to animals to produce meat and dairy products'.<sup>46</sup>

Other global environmental problematics outlined in the *GEO 2000* report include the relationship between conflict, security and the environment. In both the second Gulf War and the Kosovo conflict, the environmental damage caused severe harm to ecosystems. In the case of the bombing of Kosovo by NATO, the destruction of chemical and petrochemical complexes caused extreme pollution of the Danube whose water system extends into Bulgaria and Romania and beyond. Increasing concerns are expressed that the degradation of the environment and shortages of resources 'may actually cause armed conflict'. According to the report:

Examples of environmental degradation capable of escalating into violence include severe water shortages, widespread desertification, health-threatening toxic contamination, and refugee flight from environmental wastelands. Even within nations, increasing demands for limited natural resources create domestic tensions, as well as intensifying the pressure between private and public interests. National security is now increasingly dependent on environmental security.

In December 1999, a statement issued jointly by the CEO of the United Kingdom Meteorological Office and the Under Secretary of the United States National Oceanic and Atmospheric Administration on the critical situation we are now facing, warned that 'because of our past and ongoing activities we must start to live with the likely consequences — more extreme weather, rising sea levels, changing precipitation patterns, ecological and agricultural dislocation, and the increased spread of human disease ... Ignoring climate change will surely be the most costly of all possible choices, for us and our children'.<sup>47</sup> Released in January 2000, the *State of the World* annual report of the Worldwatch Institute states that 'The overriding challenges facing our global civilisation as the new century begins are to stabilise climate and to stabilise population.' Without these measures, 'there is not an ecosystem on earth that we can save'.<sup>48</sup>

### Concluding remarks

My research over more than five years has led me to the conviction that collectively we have created a global order that is terminally ill. I can no longer subscribe to the view that fixing it is a matter of tweaking and twiddling with the existing model. It is embedded in ontologies and epistemologies that are counterproductive to

<sup>42</sup> The Living Planet Index is described as an index which measures the area of the world's forests and the populations of marine and freshwater species. It includes national and global data on human pressures on natural ecosystems arising from the consumption of natural resources and pollution.

<sup>43</sup> World Wide Fund, *Living Planet Report* (1999) 1.

<sup>44</sup> Ibid 4.

<sup>45</sup> Ibid 16.

<sup>46</sup> Ibid 10.

<sup>47</sup> 22 December 1999, cited *Global Resource Bank News* March 2000 <<http://www.grb.net>>.

<sup>48</sup> Ibid.

any form of sane and genuinely sustainable and peaceful world order. In the face of scientifically based reports which advise that at our current rate of expansion and production we have at most, 30 years of sustainable life left on this planet, we need to examine the ontologies which underpin our systems of knowledge. We need to reclaim, return to, re-acknowledge, re-discover the ontologies that have underpinned traditional indigenous thinking for millennia and which once were the foundation of earlier western thought. There is an urgent need to discard Newtonian concepts of a mechanistic universe which can be controlled by understanding the functioning of all its individual parts, to discard Cartesian notions of separation of mind and body, of the physical from the non-physical, of the material from the spiritual, of, if you will, politics from economics and international law from international relations and the creation of world order.

The re-examination of ontologies and the re-evaluation of the form of world order of which we are all co-creators, demands that we recognise and integrate into our everyday thinking and most certainly into our policy making, that which quantum physics discoveries of 20 years ago reminded those who had forgotten — that there is a deep and unbreakable interconnection between every aspect of every form of existence. That the nature of this interconnection means that it is not possible to identify and isolate fragments of existence, fragments of being, fragments of life forms without creating fundamental and permanent changes in the whole. That we are not, and never can be, masters of this universe and that the longer that we continue to act as though we are, the shorter our time as a species on this planet will be. It requires that the insanity of colonising and arming ourselves in space in order to control anyone and everyone on the ground and from elsewhere by the United States and any other vested interest groups, be immediately abandoned. It means rethinking the whole issue of commodification, of profit, of wealth and of security. It means revising our thinking about the entire gamut of political, social, economic and cultural relationships and discarding for all time relationships based on dominance and subordination. It means a new — or more accurately, a return to a much older — comprehension of the nature of the world and its structures and processes. And most fundamentally, of our role and responsibility as co-creators of the world and the universe in which we live. In my view the revision of the ontologies and epistemologies that underpin definitions of normativity is the most urgent challenge facing international law in the twenty-first century.

## **Comparative Lessons from National Treaty Regimes**





# Unfinished Business? The Evolving Role of Parliament in Executive Treaty-Making in New Zealand

Mai Chen\*

## Introduction

For most of its history New Zealand's approach to foreign treaties has reflected both the traditional Westminster system of separation of powers and a dualist approach to international law.<sup>1</sup> This approach, which regarded treaty-making as the province of the Executive and as having no automatic impact on domestic law, was similar to that taken in other common law countries such as Australia, the United Kingdom and Canada.

On 17 December 1997, the New Zealand Government announced the adoption of procedures to increase Parliament's involvement in international treaty-making. These new procedures were initially implemented for a trial period, but have recently been revised, consistent with the recommendations of the Foreign Affairs, Defence and Trade Select Committee (Foreign Affairs Committee) and adopted on a permanent basis. The new Parliamentary Treaty Examination process is incorporated in the New Zealand Standing Orders of the House of Representatives (Standing Orders) and requires the Government to present and refer treaties to the House of Representatives prior to ratification, together with a National Interest Analysis (NIA). It also provides for consideration of such treaties by the Foreign Affairs Committee, which is required to report back to the House. A full description of the evolution of the Parliamentary Treaty Examination process is set out in Appendix A.

The call for greater Parliamentary involvement in Executive treaty-making is not new. In his 1964 article 'New Zealand Treaty Practice: The Executive and the Legislature', Sir Kenneth Keith (as he now is) argued that New Zealand practice indicates there may be a constitutional convention that Parliament has the right to discuss the question of acceptance of important treaties.<sup>2</sup>

Calls for greater parliamentary involvement have become more insistent in the last decade, as a proliferation of multilateral and bilateral treaties, affecting every area of the economy, business and human rights, reflects an ever-growing globalisation. The proliferation of treaties also increasingly impacts on issues affecting Māori and their rights under the Treaty of Waitangi, as well as the appropriate role for indigenous people in foreign policy decisions as a partner to the Treaty.

The New Zealand Law Commission questioned in its report *The Treaty Making Process: Reform and the Role of Parliament* whether:<sup>3</sup>

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<sup>1</sup> A dualist approach to international law is based on the premise that international law and domestic law are two entirely distinct legal systems, and that international law has an intrinsically different character to domestic law. This means international treaties do not automatically become part of domestic law. J G Starke *Introduction to International Law* (7<sup>th</sup> ed, 1972) 77.

<sup>2</sup> K J Keith 'New Zealand Treaty Practice: The Executive and the Legislature' [1964] 1 NZULR 272, 290.

<sup>3</sup> *Law Commission Report No. 45*, (1997, Wellington) 3 (*Law Commission's Report No 45*). The article by M Gobbi, 'Enhancing Public Participation in the Treaty-making Process: An Assessment of New Zealand's Constitutional Response' [1998] *Tulane J of Intl and Comp Law* 57, also closely examines New Zealand's Parliamentary Treaty Review process and recent changes.

Given the increasing amount of treaty-making, and the interests of the democratic process, should New Zealand adapt its practices to allow Parliament and others more involvement in the treaty-making process?

The Law Commission Report stated that the debate on giving Parliament a greater role in treaty-making encompasses elements of globalisation, sovereignty, the separation of powers (between the Executive, Parliament and the Judiciary) and, in New Zealand, the importance of the Treaty of Waitangi.<sup>4</sup>

In recent times there have been moves, particularly in Australia, to increase Parliament's participation in the treaty-making process. Courts were less prepared to endorse the strict dualist approach and not take international obligations into account even if they were unincorporated into legislation. The greater impact of international treaties on domestic law via the common law made it increasingly untenable for treaty-making to take place in the absence of greater legislative oversight.

Similarly, in New Zealand, a series of Court of Appeal cases show that the courts have increasingly been giving substantive effect to international obligations not incorporated into statute. This has raised concerns about the erosion of dualism and an undermining of Parliament's sovereignty in law-making. On the other hand, if the courts fail to give effect to unincorporated treaty obligations, this makes a mockery of ratification and New Zealand's obligations under the Vienna Convention to implement treaties in good faith. Increased Parliamentary involvement in treaty making might add greater legitimacy to the courts giving effect to international obligations not expressly incorporated into domestic law.

The introduction of a Mixed Member Proportional Representation (MMP) electoral system has also exacerbated parliamentary pressure for a more influential role in Executive treaty-making. MMP has resulted in a greater separation of powers between the Executive branch of Government and Parliament. The tendency for MMP to result in minority and coalition governments means that the two branches of Government are no longer joined to the extent that they were under the old 'first past the post' system. The 'essential secret' of Cabinet Government that Bagehot spoke of still exists in form.<sup>5</sup> Cabinet is still 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part of the State'<sup>6</sup> as all Ministers remain Members of Parliament. However the ability of the Executive to get its own way in Parliament, or the substance of the essential secret, has been diminished.

MMP may thus dissipate power away from the Executive, and disperse it amongst backbenchers and opposition parties in Parliament. The Executive cannot necessarily guarantee the numbers to implement its policy decisions. The result is the renewed independence of Parliament, and a demand from Parliament for greater accountability from the Executive, including in treaty-making. A minority government may also risk being seen as not having negotiated a treaty in good faith if it cannot guarantee sufficient support in Parliament to enact the domestic legislation necessary for particular international law obligations and there is no mechanism for involving Parliament before a decision is taken to ratify a treaty.

### Key issues

This paper assesses the New Zealand reforms to increase Parliament's involvement in treaty examination and considers the following:

- Are the reforms adequate to ensure that Parliament has real and effective input, or does New Zealand need to go further?
- Specifically, while acknowledging that it is the Executive's role to govern and to enter into treaty negotiations and adopt treaties, can an argument be made that Parliament is more likely to have an effective

<sup>4</sup> *Law Commission's Report No. 45*, above n 3, 3.

<sup>5</sup> W Bagehot, *The English Constitution* (Fontana, Glasgow, 1977).

<sup>6</sup> *The English Constitution* above n 5, 68.

role in Executive treaty-making if the provisions concerning Parliamentary Treaty Examination process are incorporated into statute, as opposed to the current situation where they are incorporated in *Standing Orders* with guidelines in the *Cabinet Office Manual*?

- Should the Parliamentary Treaty Examination process further be amended to require the Executive to provide Parliament, affected parties, interest groups, and members of the public with more information on, and involvement in, treaty development and negotiations to overcome the 'democratic deficit' that has been a characteristic of New Zealand's treaty-making history?
- How do we ensure that there is adequate scrutiny of Executive treaty-making from a Treaty of Waitangi perspective, and appropriate opportunities for tangata whenua (indigenous people) to make their views known on the impact of adopting international agreements which may impact on Māori enjoyment of their rights under the Treaty of Waitangi?
- Should a specific Treaties Committee of Parliament be established to implement the Parliamentary Treaty Examination process, like the specialist Regulations Review Committee which considers complaints against regulations, or should review be left to the Foreign Affairs Committee or relevant subject select committees?
- What impact would further reform of this kind referred to in (b) to (e) above have on fundamental constitutional doctrines like the separation of powers, Parliamentary sovereignty, and the dualist theory of international law that New Zealand currently adheres to?
- Most importantly, what does the further evolution of the role of Parliament in Executive treaty-making do to the balance of power between the Executive branch of Government vis-à-vis the Parliamentary branch of Government?

### Summary of conclusions

The main conclusions in this paper are as follows:

- The current Parliamentary Treaty Examination process is inadequate because there is no requirement that the Government must present a treaty to the House for examination *before* or concurrently with introducing legislation implementing that treaty. Legislation implementing treaty obligations is best considered in the context of an examination of the treaty as a whole and the NIA. It is difficult for Parliament not to support the ratification of a treaty presented after legislation implementing the Treaty has already been passed by Parliament. It also undermines the purpose of affected parties making submissions to the Foreign Affairs Committee under the Parliamentary Treaty Examination process if legislation implementing the treaty has already been enacted. Cabinet Office guidelines issued in 1998 do provide that, in general, treaties should be presented to the House before any implementing legislation is introduced, but this process can be waived. There is also no requirement in the *Standing Orders* that treaties must be presented prior to introducing implementing legislation, even though it would appear appropriate to do so.
- Legislation should be passed incorporating the Parliamentary Treaty Examination process and mandating the presentation of a treaty *prior to or concurrently with* the introduction of legislation to implement the treaty, unless the Executive can establish urgency which requires implementing legislation to be passed first.
- The legislation should also include a requirement for the Government to provide information to Parliament and to affected parties on negotiations it is undertaking on treaties it intends to adopt. Otherwise it may be too late for those parties to influence the content of those treaties. Once treaties are presented to Parliament, negotiations have usually been concluded and the text of the treaty finalised.
- Any legislation incorporating the Parliamentary Treaty Examination process must provide that failure to comply with the procedures will not nullify any act of ratification by the Executive. Furthermore, the

procedures should only be enforceable in court by way of declaratory judgment. It would be a brave Government that would proceed to ratify a treaty when a declaratory judgment application is pending for failure to (adequately) satisfy the Government's procedural obligations to consult Parliament and affected or interested groups in the community. Exceptions for urgent treaties will need to be provided, if adequate justification can be established.

- If legislation is considered too problematic due to justiciability concerns, or as re-allocating too much power to Parliament vis-à-vis the Executive in treaty-making, then Standing Order 283 could be amended to provide that where a subject select committee considers a bill whose purpose is to implement the international obligations of a treaty New Zealand intends to ratify, then the Parliamentary Treaty Examination process in Standing Order 384 is triggered such that the treaty, along with the NIA, must be presented to Parliament at the same time.
- The unicameral nature of New Zealand's Parliament, along with the current performance of the Foreign Affairs Committee in implementing the Parliamentary Treaty Examination process, supports the conclusion that a specific Treaties Committee of Parliament should be established. This would help ensure that there is sufficient time, resources and expertise to carry these processes out effectively. Furthermore, the Committee should be given the role of keeping under review the involvement of Parliament in Executive treaty-making. Proposals could then be put up from time to time for that role to evolve, where necessary, to keep up with the increasing importance of international treaty-making to New Zealand.
- A new requirement should be added to the NIA to include a statement setting out the impact of the treaty's implications for the Treaty of Waitangi, if any, and any relevant consultation with tangata whenua that has been taken, as appropriate. Consideration should also be given to involving the Māori Affairs Committee of Parliament to ensure that Māori concerns, as a Treaty partner, are adequately considered prior to final decisions on ratification.

### Current practice

It is important not to come to premature judgments about how the new Parliamentary Treaty Examination process is operating. The sessional orders adopting the temporary Parliamentary Treaty Examination process were adopted on 28 May 1998, and the incorporation of the procedures with modifications into the *Standing Orders* only occurred in September last year. But there are signs that the Parliamentary Treaty Examination process is not working as effectively as it could.

The Foreign Affairs Committee is yet to call for any public submissions, nor has it undertaken any inquiries on international treaties. There has been little consultation with affected parties. There has only been one debate on an international treaty, which the former Chair of the Foreign Affairs Committee labelled a 'filler', because there was no other business before the House.

The 1999 Review of the Parliamentary Treaty Examination process, conducted in August, found that the Foreign Affairs Committee made only 14 reports on treaties, and some reports dealt with more than one treaty. Very few matters were brought to the attention of the House, and often no comment at all was made on international treaties by the Foreign Affairs Committee.

Most reports were *pro forma* due to transitional matters. For example, situations where the implementing legislation had already been passed by the House or was before the House at the same time as the treaty was being considered. Now that the transitional phase is being completed, treaties will hopefully be presented to the House before the implementing legislation. This should see more meaningful involvement by Parliament in the process, as opposed to treaty ratification being a *fait accompli* before a treaty is even presented for Parliamentary examination.

Since the date of that 1999 review the Committee has issued a number of fuller reports, including reports on the 1907 Public Settlement of Disputes Convention and the 1989 amendments to the International Maritime Satellite Organisation. Where necessary, the treaties have been referred back to Cabinet who have or will produce a Government response to be tabled in the House. This appears to evidence that the Foreign Affairs Committee is inquiring more fully into treaties that are tabled in 2000. One substantial report was the Report of the Foreign Affairs Committee and accompanying NIA on the Rome Statute of the International Criminal Court.<sup>7</sup> This report is noteworthy because there had been some prior indication that there would be public submissions on the statute,<sup>8</sup> which did not occur. The NIA did note, however, the involvement of Crown agencies, the input of a number of non-governmental organisations during the negotiations preceding the Rome Conference, and a meeting held with key interest groups prior to presenting the Treaty to the House.<sup>9</sup> This may suggest an increased role for the public under the new Parliamentary Treaty Examination process.

The lack of parliamentary involvement at this stage may also result from a reluctance by Parliament, perhaps due to insufficient expertise and opportunity in Parliament's processes, to take on a greater role. In its Review, the Foreign Affairs Committee reported that when, by accident, a select committee report on a treaty reached the top of the Order Paper and an opportunity existed to debate it, members were reluctant to do so as they were not prepared.<sup>10</sup>

There are a range of major treaties coming up for presentation to the House, which may see increased scrutiny by Parliament of Executive treaty-making. These include the Kyoto Protocol to the UN Framework Convention on Climate Change 1997 which obliges New Zealand to reduce greenhouse gas emissions to 1990 levels; the Agreement between New Zealand and Singapore on a Closer Economic Partnership (Singapore Free Trade Treaty) which has now been finalised and initialled; and the recently adopted Optional Protocols relating to the UN Convention on the Rights of the Child 1989 which New Zealand has already ratified — the Optional Protocol on the Sexual Exploitation of Children, and the Optional Protocol on Children in Armed Conflict.

Recent debate over the proposed Singapore Free Trade Agreement may reveal a 'sea-change' in the involvement of Parliament in the treaty-making process. The disagreement over the inclusion of a reference to the Treaty of Waitangi in this treaty is noted below. Significantly, New Zealand's Deputy Prime Minister has expressed the view that although the Executive retains the constitutional authority to sign or ratify treaties on behalf of Parliament and the people of New Zealand, 'it would be extraordinary if a vote of Parliament ... was ignored by the executive'.<sup>11</sup> The Hon Jim Anderton further stated that as the minority partner in the coalition Government, his party, the Alliance, would not necessarily support the ratification of the Agreement. Given the position of the minority coalition Government partner, and the Greens, upon which the minority coalition Government also relies to pass legislation in the House, the Prime Minister has proposed that 'there is room to develop the role of Parliament in examining and scrutinising treaties and so it is likely there will be a motion of some kind on the Select Committee report'.<sup>12</sup> The Prime Minister said that there would be a vote on the Report of the Foreign Affairs Committee which 'would be symbolic but full of meaning'.<sup>13</sup> Whether this will result in a greater

<sup>7</sup> In contrast, its report and NIA on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women is comparably brief, although the Protocol provides for direct communications akin to the Human Rights Committee process. Another two treaties to attract reports are the Illicit Traffic in Drugs Convention (reported on by the Justice and Law Reform Committee) and the Montreal Protocol on the Ozone Layer (reported on by the Transport and Environment Committee). The Illicit Traffic in Drugs report was not really concerned with the Agreement, while the Montreal Protocol was relatively brief.

<sup>8</sup> Press release of the New Zealand Government, 28 March 2000.

<sup>9</sup> NIA on the Statute of the International Criminal Court, 10.

<sup>10</sup> Report of the Foreign Affairs, Defence and Trade Committee *Review of the International Treaty Examination Process* (1999) AJHR I.4E, 6 [Review of the International Treaty Examination Process].

<sup>11</sup> *The Dominion*, 23 August 2000, 2.

<sup>12</sup> *News Room Report*, 21 August 2000.

<sup>13</sup> *The Dominion*, 22 August 2000, 2.

sharing of the Executive's treaty-making power with the Parliament remains to be seen as the debate over the Singapore Free Trade Agreement unfolds in New Zealand.

### Determining the adequacy of the parliamentary treaty examination process

The determination of whether the Parliamentary Treaty Examination process is adequate depends on the goals against which it is measured. It can be argued that the goals New Zealand's procedures need to be measured against are four-fold, namely to improve:

- Parliamentary scrutiny;
- Transparency;
- Consultation in the treaty-making process; and
- Community awareness of treaties.

These goals reflect, in part, the reasons for the creation of the formal Parliamentary Treaty Examination process New Zealand now has under its *Standing Orders*.

### Increasing importance of international law

In 1996 the Law Commission published a *New Zealand Guide to International Law and its Sources* which stated that 'about a quarter of New Zealand public Acts appear to raise issues connected with international law'.<sup>14</sup> New Zealand continues to enter a large number of bilateral and multilateral treaties each year, as indicated by the following table:<sup>15</sup>

	Bilateral	Multilateral
1996–1997	20	15
1997–1998	19	15
1998–1999	20	17
1999–2000	21	15

International treaties are also becoming more important politically. New Zealanders have become increasingly vocal in their opposition to certain international treaties. Māori have also been increasingly agitated about their exclusion from the treaty-making process, given the ramifications of some treaties for their enjoyment of rights under the Treaty of Waitangi.<sup>16</sup> It is arguable that the Government places itself in the invidious position of not taking the voters with it if it does not allow greater participation in treaty-making by Parliament and the public (via submissions to the Foreign Affairs Committee) when New Zealand would benefit from such treaties, especially when they concern problems requiring a global solution, such as climate change.

An important recent example was the proposed Multilateral Agreement on Investment (MAI). Public opposition to the MAI, both in New Zealand and internationally, was rigorous and a focal point for opposition parties such as the Alliance, who are now in Government. Public displeasure at what was seen as the Executive signing away important aspects of New Zealand's sovereignty increased the demand for a greater Parliamentary role in Executive decision making.

<sup>14</sup> *Law Commission's Report No. 34* (1996, Wellington), 2.

<sup>15</sup> The figures for the period 1996 to 1999 are taken from the corresponding annual reports produced by the Ministry of Foreign Affairs and Trade and presented to the House of Representatives pursuant to section 39 of the Public Finance Act 1989. The figures for 1999–2000 are derived from information provided by the same Ministry on 17 August 2000.

<sup>16</sup> These issues are addressed in greater detail below.

### Māori and Treaty of Waitangi concerns

There is currently no mechanism in the Parliamentary Treaty Examination process and the *Standing Orders* for Māori concerns and Treaty of Waitangi issues arising from treaty adoption to be taken into account. This is quite apart from issues concerning an appropriate role for Māori in foreign policy, given the principle of partnership underlying the Treaty of Waitangi they signed with the Crown.

If an international treaty is to be the subject of implementing legislation, then that legislation will be the subject of vetting for compliance with the principles of the Treaty of Waitangi. The *Cabinet Office Manual* provides that all papers to the Cabinet Legislation Committee on draft bills must indicate whether the bill complies with the principles of the Treaty of Waitangi, and if not, the reasons why the bill does not comply.<sup>17</sup> However, this is a different matter from consideration of the international treaty itself, for compliance with Treaty principles.

Consideration should be given to adding a new subparagraph (j) to *Standing Order* 385(1) to provide that a NIA must address the following matters:<sup>18</sup>

... (j) a statement setting out the impact of the treaty's implications for the Treaty of Waitangi, if any, and any relevant consultation with Tangata Whenua that has been taken, as appropriate.

Consideration should also be given to according the Māori Affairs Committee of Parliament a role with respect to treaty examination from a Māori and Treaty of Waitangi perspective.

Māori have expressed concerns over a loss of sovereignty and a need to protect taonga, intellectual and property rights, and cultural values. Indeed, some Māori would argue that the impact of international agreements being negotiated, on matters such as trade and copyright, may impact on their 'full, undisturbed and exclusive' authority under Article 2 of the Treaty of Waitangi over 'taonga' (or treasures). These taonga include indigenous flora and fauna, the use of te reo (the Māori language), as well as Māori words and symbols. This is arguably a breach of the Treaty of Waitangi, and there is currently a complaint before the Waitangi Tribunal, which has jurisdiction to investigate such breaches under the Treaty of Waitangi Act 1975.<sup>19</sup>

In September 1997, the Waitangi Tribunal began hearing the Intellectual Property Claim (Flora and Fauna Claim) lodged by six iwi in 1991. The claim relates to 'Protection, Conservation, Management, Treatment, Propagation, Sale, Dispersal, Utilisation and Restriction of the use of and transmission of the knowledge of New Zealand Indigenous Flora and Fauna and the genetic resource contained therein.' The iwi claim that the Crown has breached its duties under the Treaty of Waitangi through the ratification of international instruments such as the World Trade Organisation Agreement on Trade-related Aspects of Intellectual Property — both in terms of its substantive content and the procedure by which New Zealand became bound by it.<sup>20</sup> It also claims that by failing to ratify, adapt or adequately consider other international instruments, such as the Mataatua Declaration of the Cultural and Intellectual Property Rights of Indigenous Peoples 1992, the Government has breached the Treaty of Waitangi.<sup>21</sup>

In this context, the inclusion of a Treaty of Waitangi clause in the proposed Free Trade Agreement with Singapore is significant. The clause reserves the ability of the New Zealand Government to fulfil its Treaty of

<sup>17</sup> See Chapter 6 on 'Legislation Programme and Bills'.

<sup>18</sup> Note that this recommendation is similar to that made by the Law Commission in its Report No. 45 that treaty impact statements should set out the consultations which have been undertaken or are proposed to be undertaken with Māori, and whether the treaty has any effect upon rights provided by the Treaty of Waitangi. Ministry of Foreign Affairs and Trade officials have recently been and will continue to work together to develop a strategy to ensure appropriate consultation with Māori on treaty issues of relevance to Māori. The possibility of amending the NIA in the way suggested above is being considered (letter from MFAT to Mai Chen, 1 September 2000).

<sup>19</sup> Statement of Claim of H Murray, D Wihongi and Others to the Waitangi Tribunal (Wai 262).

<sup>20</sup> Ibid para 14.1-15.10.

<sup>21</sup> Ibid para 18.1-18.2.

Waitangi commitments and take the necessary actions to close the gaps between Māori and other New Zealanders. It is similar to the Treaty of Waitangi clause used in the GATT Schedule. Its inclusion in the Singapore Free Trade Agreement is encountering opposition from the two main opposition parties, ACT and National. Further, Singaporean negotiators are reported to be uneasy about this aspect of the deal, although the Singapore Government has now adopted the Agreement.<sup>22</sup>

### The impact of the introduction of MMP

The new Mixed Member Proportional Representation (MMP) electoral system has tended to result in minority coalition governments which make it more difficult for the Executive to have its way in Parliament. This has given Parliament increased leverage over the Executive in treaty-making. If the Executive wants legislation passed to implement treaties, the *quid pro quo* is that Parliament wants to have more say in treaty-making.

The reference above to the positioning of the various parties within and outside of Government on the Singaporean Free Trade Agreement is an example of the leverage that can be brought to bear on the current coalition minority Government in New Zealand, by the parties whose support the major coalition partner needs to remain in Government, and to pass legislation. It appears that the propensity for minority coalition Governments under MMP will exacerbate Parliamentary pressure for a more influential role in Executive treaty-making.

### The courts' approach to international obligations and the impact on Parliament's role

The courts' approach to international obligations not expressly incorporated into statute is important to an analysis of the adequacy of New Zealand's Parliamentary Treaty Examination process. If the courts give substantive effect to international obligations not incorporated into statute, as they seem inclined to do, then the result undermines to some extent Parliament's sovereignty in law making — and with it both the separation of powers doctrine, and the dualist theory of international law. On the other hand, if the courts fail to give effect to unincorporated Treaty obligations this makes a mockery of ratification and New Zealand's obligations under the Vienna Convention to implement treaties in good faith. However, increased Parliamentary involvement in treaty-making might add greater legitimacy to the courts giving effect to international obligations not expressly incorporated into domestic law.

The following analysis compares the leading Australian High Court case of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*,<sup>23</sup> which is considered the high-water mark of Australian High Court decision making on the effect of unincorporated treaties, with a series of recent New Zealand Court of Appeal decisions. Are the New Zealand courts giving more effect than the Australian courts to international obligations not expressly incorporated into statute?

#### The *Teoh* decision

In summary, the majority in *Teoh* held that although treaties as such were not part of the law, Australia's ratification of the Convention on the Rights of a Child comprised a positive statement which founded a legitimate expectation that administrative decision-makers would act in conformity with the Convention. This does not compel a decision-maker to act in a particular way. Rather, it gives rise to a procedural fairness requirement to give notice to the persons affected if the decision-maker proposes to make a decision inconsistent with the legitimate expectation. Before finally determining the outcome, the decision maker should give the person an adequate opportunity to present a case against such a course of action.

Mason C J and Deane J phrased the key issue as follows:

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<sup>22</sup> Reported in *The Dominion*, 16 August 2000, 2.

<sup>23</sup> (1995) 183 CLR 273.



The critical questions to be resolved are whether the provisions of the Convention [on the Rights of the Child] are relevant to the exercise of the statutory discretion [under the Migration Act 1958 (Cth)] and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that their decision-maker will exercise that discretion in conformity with the terms of the Convention.<sup>24</sup>

Their Honours phrased the issue in this way having expressly affirmed the rule that Convention provisions do not form part of Australian law unless validly incorporated into its municipal law by statute.<sup>25</sup> They also affirmed the equally orthodox 'canon of construction' that 'a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law'.<sup>26</sup> However, they expressly stated that in the present case, 'we are not concerned with the resolution of an ambiguity in the statute'.<sup>27</sup>

Having determined that Article 3 of the Convention was relevant to the exercise of the statutory discretion,<sup>28</sup> their Honours cited the New Zealand case of *Tavita v Minister of Immigration* (see below),<sup>29</sup> in holding that:

... ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by Courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. *That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration"*. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of a Convention or should personally entertain the expectations; it is enough that the expectation is reasonable in a sense that there are adequate materials to support it.<sup>30</sup>

Their Honours then went on to define the content of this legitimate expectation. They expressly rejected the approach of the Court below that procedural fairness required the initiation of appropriate inquiries as to the future welfare of the children. To the contrary:

The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. *That is the difference between a legitimate expectation and a binding rule of law*. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door.<sup>31</sup>

Instead, their Honours defined the legitimate expectation as follow:

... if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, *procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course*. So, here, if the delegate proposed to

<sup>24</sup> *Minister for Immigration v Teoh*, above n 23, 288.

<sup>25</sup> *Ibid* 286-287.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* 288.

<sup>28</sup> *Ibid* 288-289.

<sup>29</sup> [1994] 2 NZLR 257.

<sup>30</sup> *Minister of Immigration v Teoh*, above n 23, 291. [Emphasis added.]

<sup>31</sup> *Ibid*.

give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.<sup>32</sup>

In this case, the best interests of the children had not been regarded as a primary consideration and no hearing right on this course of action had been given to Teoh. To the contrary, the Panel treated the good character requirement as the primary consideration. The Court thus found in favour of Teoh.

Toohy J, in his concurring judgment, agreed that ratification of the Convention:<sup>33</sup>

... results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the person affected an opportunity to argue against such a course.

This did not oblige the decision-maker to make further inquiries, 'but ... had [the decision maker] done so she might have been in a better position to meet the legitimate expectation to which the Convention gave rise'.<sup>34</sup>

Gaudron J concurred, finding as follows:

... it is reasonable to assume that, in a case such as the present, the best interests of the children would be taken into account as a primary consideration and as a matter of course. That being so, procedural fairness required that, if the delegate were considering proceeding on some other basis, she should inform Mr Teoh in that regard and give him an opportunity to persuade her otherwise. It did not, however, require her to initiate inquiries ...<sup>35</sup>

Joint statements by the Minister for Foreign Affairs and the Attorney-General dated 10 May 1995 and 25 February 1997 respectively, assert that entry into an international instrument does not entitle Australians to an expectation that Government decision-makers will act in accordance with it, unless its provisions have been enacted into an Australian domestic law. Legislation first introduced into Parliament in 1995, was reintroduced as the Administrative Decisions (Effect of International Instruments) Bill 1997. This Bill is still active on the Order Paper but has not yet been passed.

### Comment on *Teoh*

The *Teoh* decision has been criticised on two main grounds. The first is that ratification of a Convention cannot comprise an undertaking by the Executive to its citizens or residents. Rather, it is an undertaking to the *international* community. This is the view put firmly by McHugh J in his dissenting judgment.<sup>36</sup> An academic commentator, Taggart, describes *Teoh* as 'a large leap'. He precedes this observation as follows:

Up until now the case law on legitimate expectations has required an express promise, undertaking representation or published policy statement to found an expectation which procedural fairness will protect by way of requiring a hearing before the expectation can be disappointed.

Taggart also points out that neither Teoh nor his family 'relied on, or even knew of the terms of the Convention. Indeed, the Convention was raised for the first time only in arguments before the Full Court'.<sup>37</sup>

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<sup>32</sup> Ibid 291-292. [Emphasis added.]

<sup>33</sup> Ibid 302.

<sup>34</sup> Ibid 303.

<sup>35</sup> Ibid 305. McHugh J delivered the sole dissenting judgment.

<sup>36</sup> Ibid 385.

<sup>37</sup> Taggart, *Legitimate Expectation and Treaties in the High Court of Australia* (1996) 112 LQR 50, 51. [*Legitimate Expectation and Treaties*]

On the other hand, a leading text argues generally that neither knowledge of the representation or reliance upon it ought to be required in every case to found a legitimate expectation.<sup>38</sup> Further, in other respects the High Court's application of the doctrine is perfectly orthodox. Thus, the High Court goes no further than granting a procedural right (as against a substantive benefit), and the Court is clearly aware of the standard rule that a legitimate expectation can be revoked. Despite some doubt as to the legal effect of the subsequent statements made by the Australian Government and noted above,<sup>39</sup> the Court took care to acknowledge this doctrine when it stated that ratification is an adequate foundation for a legitimate expectation, 'absent statutory or executive indications to the contrary'.<sup>40</sup>

The more important criticism for present purposes is that *Teoh* does in practice incorporate the Convention into Australian law. Taggart puts it as follows:

Hence the majority invoked procedural fairness by stretching legitimate expectation doctrine to do by procedural means what they were unwilling to do by the substantive means of mandatory relevant considerations, to practically require decision-makers to apply the Convention principles. To say, as the majority do, that the expectation to apply the Convention principle sourced in the unincorporated Treaty is not "a direct source of individual rights and obligations under the law" is to deny reality and the practical effect of the decision on decision-makers. It is disingenuous, in my view, for the majority to skirt the orthodox rule by means of procedural fairness.<sup>41</sup>

These conclusions are based on Taggart's earlier observations that 'it seems highly unlikely that the decision-maker will make a rod for its own back by rejecting the Convention principle, thereby necessitating a hearing on the issue'. If granted a hearing, the person affected will inevitably argue that the decision-maker really should apply the Convention principle. 'This seems to be process without a point, and at some cost.'<sup>42</sup>

At one level, it is hard to refute Taggart's conclusions. Yet there is a key difference between the incorporation of mandatory relevant considerations, and the finding that a legitimate expectation has arisen. This is that it is possible, according to orthodox doctrine, for the Executive to revoke the legitimate expectation which has given rise to these procedural rights. The High Court of Australia can thus be seen to have opened the door to incorporating Convention obligations in a way which goes beyond a mere canon of interpretation or permissive relevant considerations, but which still stops short of incorporating Convention obligations as mandatory relevant considerations.

### Decisions of the New Zealand Court of Appeal

The New Zealand Court of Appeal has not followed the High Court in *Teoh*. It has also been careful to frame its decisions within conventional and orthodox limitations. Thus it has frequently said that treaties are not, simply because of executive acceptance, part of the law and has characterised its decisions as doing no more than applying the presumption that legislation is to be interpreted, as far as possible, in accordance with New Zealand's international obligations.<sup>43</sup> Where the terms of the statute are clear, they must be given effect to by

<sup>38</sup> De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet and Maxwell, London 1995) para 8-058-8-060.

<sup>39</sup> Noted in Bouwhuis, 'International Law by the Backdoor?' (1998) 72 ALJ 795, 796.

<sup>40</sup> *Minister for Immigration v Teoh*, above n 23, 291.

<sup>41</sup> *Legitimate Expectation and Treaties*, above n 37, 53.

<sup>42</sup> *Ibid* 52.

<sup>43</sup> See, eg, *Gross v Boda* [1995] 1 NZLR 569; *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641; *Commissioner of Inland Revenue v JFP Energy Inc* [1990] 3 NZLR 536; *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269; *Tangiora v Wellington District Legal Services Committee* (1996) 3 HRNZ 267; *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385.

the courts whether or not they carry out New Zealand's international obligations. Most of the cases concern situations where the terms of the statute are not clear.

That said, the Court's approach in certain decisions discussed below has proved that this conventional framework can be a highly flexible one. Arguably the Court has, on occasion, applied the framework in a way which comes close to the direct incorporation of international obligations as binding mandatory relevant considerations — and, indeed, as comprising binding rules of law which limit the scope of a broad statutory discretion. The Court appears particularly willing to adopt this approach in the realm of international human rights law — albeit in the process of giving effect to what 'must have been' Parliament's true intent.

The decision in *Van Gorkom v Attorney-General*<sup>44</sup> is an early indication of the Court's willingness to interpret statute in accordance with international obligations which had not been expressly incorporated. In that case, the Court considered a challenge against conditions laid down by the Minister of Education under the Education (Salaries and Staffing) Regulations 1957. These conditions differentiated between married male and married female teachers. In deciding that this discrimination was unlawful, Cooke J (as he then was) referred to New Zealand's international obligations under the Universal Declaration of Human Rights in assessing whether the conditions were *ultra vires*.<sup>45</sup>

His Honour concluded that the power to set out conditions for the payment of removal expenses should not, without compelling reason, be taken to allow the introduction of a policy conflicting with the spirit of the international standards proclaimed by the Declaration. This was despite the Declaration not being a Convention nor specifically incorporated into New Zealand statute.

However, it would probably be going too far to say that His Honour incorporated the international instrument directly into New Zealand law as a mandatory relevant consideration. Rather, the Declaration was referred to as a means of interpreting the true intent of the Legislature. His Honour had already found, on conventional grounds of statutory interpretation, that the discrimination at issue was 'not within the four corners of the sub-delegated authority'.<sup>46</sup> In this context, reference to the Declaration was 'not essential' and nor did certain very general statements contained in it form part of New Zealand's domestic law.<sup>47</sup> Rather, they represented 'a legislative policy which might influence the Courts in the interpretation of statute law'.<sup>48</sup>

In *Ashby v Minister of Immigration*,<sup>49</sup> the Court affirmed and applied the conventional limits to its role in applying international law in the context of interpreting the scope of a wide statutory discretion. However, it left the door open to a less cautious approach in appropriate circumstances in future.

In that case, the Court considered whether obligations arising under the International Convention on the Elimination of All Forms of Racial Discrimination 1965<sup>50</sup> (CERD) were mandatory relevant considerations to which the Minister of Immigration must have regard when exercising the discretion under section 14 of the *Immigration Act 1964* (now repealed). Section 14 gave the Minister the power to issue temporary entry permits to members of the South African rugby team. Subsection (1) read as follows:

Any person to whom this Part of this Act applies not being a prohibited immigrant, who lands in New Zealand without a permit but proves to the satisfaction of the Minister that he desires to enter New Zealand as a visitor only for the purposes of business, employment, study, training, instruction, pleasure or health may be granted a temporary permit in the prescribed form. A permit under this section may be

<sup>44</sup> [1977] 1 NZLR 535.

<sup>45</sup> Ibid 542.

<sup>46</sup> Ibid 541.

<sup>47</sup> Ibid 542-543.

<sup>48</sup> Ibid 543, quoting from *Halsbury's Laws of England*.

<sup>49</sup> [1981] 1 NZLR 222.

<sup>50</sup> NZTS 1973 No. 22, entered into force for New Zealand 22 December 1972.

granted for a period not exceeding six months, or in special circumstances, for such longer period as in any case the Minister may, in his discretion, determine.

The Court held unanimously that:

- (a) The Convention cannot override the *Immigration Act* by depriving the Minister of authority to grant permits to the South African rugby team; and
- (b) The Minister was not bound to consider the Convention in deciding whether or not to grant a temporary permit.

As to (a) above, the Court was not clear that the Convention applied to sporting contacts with visiting teams from South Africa at all.

As to (b), Cooke J advanced the following test:<sup>51</sup>

... it is only when a statute expressly or by implication identifies a consideration as one to which regard *must* be had that the Courts can interfere for failure to take it into account. The mere fact that the consideration is one that could properly or reasonably be taken into account is not enough.

Immigration is a subject linked with foreign policy. In that sense it falls within a sphere where the Courts are very slow to intervene. Nevertheless, even in statutes concerned with immigration and policy in that regard, *I would not exclude the possibility that a certain factor might be of such overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow it to be ignored* [emphasis added].

Cooke J noted that, while the Gleneagles Agreement might meet this test, 'the 1965 [Racial Discrimination] Convention ... makes no reference to sporting contacts at all' and he concluded in the following terms:<sup>52</sup>

To hold that, before exercising an apparently perfectly general statutory discretion in the field of immigration, the Minister was bound by implication as a matter of domestic statute law to consider a Convention of doubtful bearing on the subject would be, in my opinion, to go beyond the legitimate realm of statutory interpretation.

The clear implication was that, in a future case in which Convention obligations clearly applied, the Court might well be persuaded that they comprised mandatory relevant considerations — as a matter of statutory interpretation and in the absence of express incorporation.

Richardson J's approach was entirely orthodox. He began from the premise that:<sup>53</sup>

Even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject-matter and the policy of the legislation to see that their decisions are consistent with our international obligations.

However, if the terms of the statute are clear, they must be given effect in our courts whether or not they carry out New Zealand's international obligations. His Honour concluded that this was such a case.<sup>54</sup> The terms of section 14 of the *Immigration Act* clearly did not intend for the Minister's decision to be fettered by the provisions of CERD. In respect of the appellant's second argument, Richardson J held that the breadth of the

<sup>51</sup> *Ashby v Minister of Immigration*, above n 49, 225-226.

<sup>52</sup> *Ibid* 226.

<sup>53</sup> *Ibid* 229.

<sup>54</sup> *Ibid* 229.

discretion in section 14 precluded him from holding that the Minister must have taken express account of the obligation under CERD.<sup>55</sup>

*Tavita v Minister of Immigration*<sup>56</sup> is another decision which contains hints as to what the Court might be prepared to do in future, but which on its facts did not exceed conventional bounds. In that case, the Court of Appeal considered a decision by the Minister of Immigration to refuse an appeal under section 63 of the *Immigration Act 1987* to cancel a removal warrant, granted under section 54 of the same Act, on humanitarian grounds. The judicial review proceedings brought on Mr Tavita's behalf, which sought the setting aside of the removal order and a reconsideration of the appeal, relied on the International Covenant on Civil and Political Rights 1966,<sup>57</sup> including the First Optional Protocol, and the Convention on the Rights of the Child 1989.<sup>58</sup>

Section 63 (now repealed and substituted) conferred a broad discretion, and read in relevant part as follows:

63. Appeal to Minister to cancel warrant on humanitarian grounds—

...

- (3) On any appeal made within the period prescribed by subsection (1) of this section, the Minister may cancel the removal warrant, or may reduce the period during which the removal warrant would otherwise remain in force following the appellant's removal from New Zealand, if the Minister is satisfied that—
- (a) Because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the appellant to be removed from New Zealand, or for the removal warrant to remain in force for the full period of 5 years following the appellant's removal from New Zealand; and
  - (b) It would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand or (as the case may require) to reduce the period during which the removal warrant would otherwise remain in force following the appellant's removal from New Zealand.

The main issue in the appeal was whether, against the background of the powers available under the *Immigration Act 1987*, the Minister and the Immigration Service should have regard to New Zealand's international obligations concerning the appellant's child and family in considering whether to enforce the removal order. Counsel for the Minister conceded that at no stage had the Minister or the Immigration Service taken either the Covenant or the Convention into account. They submitted that they were not obliged to, and were in any event entitled to ignore these international instruments.

The Court decided to adjourn the appeal *sine die* and to order that the stay on the warrant for removal remain in force to enable the appellant to make a further application for a residence permit in the light of circumstances which had arisen since the last application. In particular, these circumstances comprised the birth of his daughter (who automatically acquired New Zealand citizenship), and other factors in relation to the family situation. The narrow basis of the decision was, therefore, that the appellant should have the right to resubmit his application for a residence permit.

However, it can be clearly inferred from the judgment of Cooke P, as he then was, that a range of international obligations could in certain circumstances comprise mandatory relevant considerations to be taken into account in the making of this and similar decisions. Thus, noting the Crown concession that this case had never been

<sup>55</sup> Ibid 231. Somers J also rejected the appellant's first argument, holding that 'the convention in my view is not part of domestic law and the discretionary power conferred by section 14(1) cannot in my view be read down in the manner suggested on behalf of the appellants' (at 232). In respect of the second argument, Somers J was prepared to find without deciding that the Minister was required to consider the effect the proposed tour may have had upon New Zealand's international obligations to discourage apartheid, and had done so in the facts.

<sup>56</sup> *Tavita v Minister of Immigration*, above n 29.

<sup>57</sup> NZTS 1978 No. 19, entered into force for New Zealand 28 March 1979.

<sup>58</sup> NZTS 1993 No. 3, entered into force for New Zealand 6 May 1993. Note that this Convention was not in force when the relevant decision was taken.

considered from the point of view required by the Covenant and the Convention, Cooke P stated that consideration from that point of view could produce a different result.<sup>59</sup> Further, referring to Counsel's argument that the Minister and the Department were entitled to ignore these international instruments, Cooke P made the following observations at page 266:

*That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must be at least hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution [emphasis added].*

The reasons why a final decision was unnecessary have been noted above. However, his Honour appeared to be leaving open the possibility that in a future decision, international obligations might comprise mandatory relevant considerations. He continued as follows:

If and when the matter does fall for decision, an aspect to be borne in mind may be ... that since New Zealand's accession to the Optional Protocol *the United Nations Human Rights Committee is in a sense part of this country's judicial structure*, in that individuals subject to New Zealand jurisdiction have direct rights or recourse to it. *A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism.* Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them [emphasis added].

Cooke P went on to note that, while this case is one 'of possibly far-reaching implications', on the other hand it could also be seen as dependent on its own facts: the Minister or Associate Minister had had no opportunity to consider the application in the light of the rights of the child. He notes finally that:

Universal human rights and international obligations are involved. It may be thought that the appropriate Minister would welcome the opportunity of reviewing the case in the light of an up to date investigation and assessment. ... [T]he opportunity of reconsideration should be given.

This appears to be a clear direction that, when undertaking this reconsideration, the Minister should have regard to the 'universal human rights and international obligations ... involved' as a mandatory relevant consideration.

*Puli'uvea v Removal Review Authority*<sup>60</sup> was another immigration decision. It is a useful illustration of how, drawing upon orthodox principles of statutory interpretation, the Court of Appeal has incorporated international obligations into statute as mandatory relevant considerations.

In that case, the appellants sought judicial review of a decision of the Removal Review Authority to remove the appellants from New Zealand under section 63B of the *Immigration Act 1987*.<sup>61</sup> Section 63B(1) and (2) (now repealed) provided as follows:

63B. Appeal to Removal Review Authority on humanitarian grounds—

- (1) Any person on whom a removal order is served on or after the date of commencement of the Immigration Amendment Act 1991 may, within 42 days after the date of service of the order, appeal to the Removal Review Authority for an order—
  - (a) Cancelling the removal order; or
  - (b) Reducing the period during which the removal order would otherwise remain in force,—

<sup>59</sup> *Tavita v Minister of Immigration*, above n 29, 265.

<sup>60</sup> (1996) 2 HRNZ 510.

<sup>61</sup> The challenges were to two decisions: the decision of the Removal Review Authority not to cancel a removal order, and the decision to carry out the original removal order.

on exceptional humanitarian grounds.

- (2) The Removal Review Authority may cancel the removal order in respect of any person, or may reduce the period during which it would otherwise remain in force, only if it is satisfied that—
  - (a) Because of exceptional circumstances of a humanitarian nature, it would be unjust or unduly harsh for the person to be removed from New Zealand, or, as the case may be, for the removal order to remain in force for the full period of 5 years following the person's removal from New Zealand; and
  - (b) It would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand or, as the case may be, to reduce the period during which the removal order would otherwise remain in force following the person's removal from New Zealand.

One of the grounds of the appeal was that the Removal Review Authority had failed to take into account in its decision the obligations of the New Zealand Government under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

The Court of Appeal dismissed the appeal: on the facts, the Appeal Authority had taken into account all relevant considerations. Of interest for present purposes is that the Court considered obligations under the Covenant and the Convention to be mandatory relevant considerations, and that any decision inconsistent with those obligations was likely to be invalid. However, these conclusions appear to result from the application of non-controversial rules of statutory interpretation. The Court set out at length the relevant provisions of the Covenant and of the Convention, and then made the following observation:<sup>62</sup>

We assume for the purposes of this argument that section 63B [of the Immigration Act] can be read consistently with the relevant provisions of the Covenant and Convention. That assumption would be supported by two considerations. The first is a general one: *that the Court should strive to interpret legislation consistently with the treaty obligations of New Zealand*. The second is more particular ... The predecessor provision, enacted in 1977 as section 20A of the Immigration Act 1964, *was introduced to help implement relevant provisions of the Covenant* which the Government was about to ratify [emphasis added].

The Court then went on to consider whether the Removal Review Authority had complied with the relevant international obligations contained in the Covenant and in the Convention. As in *Tavita*, the Court referred extensively to decisions of the European Court of Human Rights on corresponding provisions in the European Convention on Human Rights. The Court concluded on the facts that the interests of the family were not seen as meeting the standard set in section 63B. The Court then continued as follows:

Nor, in our view and bearing in mind the limits of judicial review, does the decision of the Authority appear obviously to involve a violation of the obligations of New Zealand as set out in the two international texts.

The Court then said that in the overall circumstances of the case it did not have to reach a final decision on the last point, noting that any doubts about whether the Authority did comply with the requirements of the Convention and the Covenant were removed by a number of factual considerations which the Court described.<sup>63</sup>

*New Zealand Air Line Pilots' Association v Attorney-General* (NZALPA)<sup>64</sup> can be seen as an uncontroversial application of orthodox principles of statutory interpretation. The main issue was whether the powers of a District Court Judge to issue a search warrant under section 198 of the *Summary Proceedings Act 1957*, and the powers of the Transport Accident Investigation Commission to prepare a report under the *Transport Accident Investigation Commission Act 1990*, were limited by the provisions of paragraph 5.12 of Annex 13 to the

<sup>62</sup> *Puli'uvea v RRA*, above n 60, 516-517.

<sup>63</sup> *Puli'uvea v RRA*, above n 60, 518-519.

<sup>64</sup> [1997] 3 NZLR 269.



Chicago Convention on International Civil Aviation 1944.<sup>65</sup> The Court of Appeal held that these powers were not so constricted, in a decision which was highly specific on its facts and which made a number of statements generally supportive of the importance of international instruments in determining the scope of a statutory discretion.

An early and key finding was that paragraph 5.12 did not impose on contracting states an absolute rule of full binding force. Citing with approval the judgment of Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario*,<sup>66</sup> Keith J held that the stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law.<sup>67</sup> The 1990 Act clearly contemplated 'positive action to incorporate the relevant international text into New Zealand law',<sup>68</sup> while several provisions of the Chicago Convention expressly contemplate or require the making of national laws. Deciding, therefore, that the Chicago Convention did not as a whole form part of the law of New Zealand,<sup>69</sup> the Court concluded from a detailed analysis of the *Civil Aviation Act 1990* and of the *Transport Accident Investigation Commission Act*, in the context of the legislative history, that Parliament had simply failed to manifest an intention to make paragraph 5.12 part of the law of New Zealand.<sup>70</sup>

The Court then went on to make the following statement which is of particular significant in this context:

That is not however the end of the matter since, although not part of the law of New Zealand, *the annex and in particular paragraph 5.12 might place a limiting gloss on, or state a consideration relevant to, the exercise of the power of a judicial officer to issue a search warrant* under section 198 of the Summary Proceedings Act 1957 [emphasis added].<sup>71</sup>

However, the Court continued as follows:

We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations, e.g. *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at page 551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text.<sup>72</sup>

The Court then cited a line of New Zealand cases supporting this proposition.<sup>73</sup>

Noting that the application of the presumption depends on both the international text and the related national statute, the Court held that in this case, to give effect to paragraph 5.12 'might place a limiting gloss on, or state a consideration relevant to, the exercise of the power'.<sup>74</sup> The Court pointed to the following characteristics of paragraph 5.12 in support of this conclusion:

- its very limited binding force both in general and (because of the New Zealand statement of difference) in this particular situation;

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<sup>65</sup> 15 UNTS, 295, entered into force for New Zealand 4 April 1947.

<sup>66</sup> [1937] AC 326, 347.

<sup>67</sup> *NZALPA v AG* above n 64, 281.

<sup>68</sup> *Ibid* 284.

<sup>69</sup> *Ibid* 285.

<sup>70</sup> *Ibid* 288.

<sup>71</sup> *Ibid* 289.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Gross v Boda*, above n 43, *Governor of Pitcairn and Associated Islands v Sutton*, above n 43, *New Zealand Māori Council v Attorney-General*, above n 43, and *Commissioner of Inland Revenue v JFP Energy Inc*, above n 43.

<sup>74</sup> *NZALPA v AG* above n 64, 289.

- its relative unimportance (compared say with the rules of the air adopted in terms of article 12 of the Chicago Convention or with a fundamental human rights treaty);
- its indeterminate character in that it anticipates competing demands in national legal systems of confidentiality and access for law enforcement purposes;
- the recognition in annex 13 that police and related investigations may be running in parallel with the investigation regulated by the annex and related national legislation.<sup>75</sup>

Further, the statutory provision in issue (section 198 of the *Summary Proceedings Act*) already contained several safeguards. Accordingly, the Court concluded that paragraph 5.12 places no limit on the power to issue a search warrant, although it left open the question as to its relevance to any decision about the admissibility of evidence.<sup>76</sup>

The final decision considered here is *Sellers v Maritime Safety Inspector*.<sup>77</sup> At issue was the extent to which the Director of Maritime Safety was bound, by New Zealand's relevant international law of the sea obligations, in exercising a very broadly phrased statutory discretion. There is room to argue that Keith J stretched conventional rules of interpretation in giving that discretion the international law content that he did. The case was concerned with the issue by the Director of Maritime Safety of guidelines for the exercise of his powers under section 21 of the Maritime Transport Act 1994. Section 21 provides as follows:

21. Pleasure craft departing for overseas –
- (1) No master of a pleasure craft shall permit that pleasure craft to depart from any port in New Zealand for any place outside New Zealand unless—
    - (a) The Director has been notified in writing of the proposed voyage and the full name of the person who is in command of the pleasure craft; and
    - (b) *The Director is satisfied that the pleasure craft and its safety equipment are adequate for the voyage*; and
    - (c) The Director is satisfied that the pleasure craft is adequately crewed for the voyage; and
    - (d) The pleasure craft and the master comply with any relevant maritime rules.
  - (2) No pleasure craft shall be entitled to a certificate of clearance to depart from any port in New Zealand under the Customs and Excise Act 1996 unless subsection (1) of this section has been satisfied [emphasis added].

The appellant, Sellers, was the owner and master of a cutter registered in the Port of Valletta and had been convicted for permitting, as master, the cutter to leave Opuia for an overseas port without obtaining clearance under section 21. In particular, he had refused to carry the radio and emergency locator beacon equipment required as a minimum by the director in the guidelines issued for the exercise of his powers under section 21 (and in particular section 21(1)(b)). He based his defence, and the appeal, on the principle of the freedom of the high seas. The Court conducted an exhaustive survey of applicable international law and of relevant decisions of a range of national courts, eventually concluding as follows:<sup>78</sup>

... a port state has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas.

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid 292.

<sup>77</sup> [1999] 2 NZLR 44.

<sup>78</sup> *Sellers v Maritime Safety Inspector*, above n 77, 57.

The Court continued that it was in this context:<sup>79</sup>

... that the Maritime Transport Act, in particular section 21, is to be understood and interpreted. New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea, and, if possible, consistently with that law ...

The Court then noted, also, the statement of principle from the judgment of Sir Robert Phillimore in *R v Keyn*:<sup>80</sup>

... it is an established principle as to the construction of a statute that it should be construed, if the words will permit, so as to be in accordance with the principles of international law.

The Court applied this principle to section 21, noting further that Parliament, in the Act itself, 'recognises the primacy or at least the central significance of international law'. However, the Court also noted that the Act stops short of stating that the Maritime Safety Authority, which issued the guidelines under section 21, is expressly and generally bound by relevant international law. This is in contrast to other provisions in the Act which, for example, state that maritime rules promulgated by the Minister must not be inconsistent with international standards (section 39). The Court concluded, on a proper reading of section 21, that the powers of the Director to make determinations in respect of the adequacy of the ship, equipment and crew must be exercised in accordance with the relevant rules of international law (page 60). Consequently, section 21 was read subject to the 'gloss' arising from the limits imposed by international law. The Court stated at page 62 that:

We consider that [this] gloss ... is consistent with the wording of section 21(1)(b) and (c) when that provision is read, as it must be, in its wider context. To repeat, for centuries national law in this area has been essentially governed by and *derived from international law* with the consequence that national law is to be read, if at all possible, consistently with the related international law. *That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change* [emphasis added].

Accordingly, the Director was held to have set minimum requirements for the grant of clearance under section 21 which were not permitted by international law, and the appeal against conviction was allowed. Although phrased in terms of conventional and uncontroversial principles of statutory interpretation, this decision could be interpreted on its facts as going further than any of the other Court of Appeal cases discussed — many of which, as we have seen, did not actually need to reach a decision on the status of international law obligations. The discretion under section 21(1)(b) is extremely broad. In effect, international law of the sea obligations were held to define the scope of that discretion — a status well above that even of mandatory relevant considerations. The decision could thus be viewed as a fulfilment of the prediction in *Ashby* that there might, in a future decision, be factors of such overwhelming or manifest importance that Parliament could not possibly have meant them to be breached. The decision does, however, need to be interpreted in the context that maritime cases, such as *Sellers*, depend on principles of the law of the sea which were developed in large part before New Zealand existed and that 'national law in this area has been essentially governed by and derived from international law ...'.<sup>81</sup>

### Conclusion on courts' approach to international obligations

It appears that the New Zealand and Australian courts have shown a willingness to advance beyond conventional limits in incorporating international obligations into domestic law, albeit cautiously, incrementally, and in quite different ways. The Australian High Court was prepared to discover a legitimate expectation to a procedural right, created by the act of ratification. This legitimate expectation may however have already been extinguished by the attempted revocation by the Australian Government which followed shortly on the heels of that decision.

<sup>79</sup> Ibid.

<sup>80</sup> (1876) 2 Ex D 63, 85.

<sup>81</sup> *Sellers v Maritime Safety Inspector*, above n 77, 62.

In New Zealand, the Court of Appeal has been careful to describe what it has been doing in the familiar and conventional language of applying a presumption of statutory interpretation. However, it has on occasion done so in a way which shows just how flexible that principle can be — to the extent of defining, in *Sellers*, a broad statutory discretion by reference to relevant international law obligations.

Arguably, therefore, there has been some loss of control by Parliaments in both countries over the implementation of international law obligations in the domestic system, although Parliament can always pass laws conflicting with those international obligations or refuse to enact legislation necessary for implementing a treaty. The courts' approach erodes, to the corresponding extent, the dualist theory which underlies international treaty-making. Consequently, the case is strengthened for a formalised role for parliamentary involvement in the treaty-making process to maintain control and/or influence over the obligations that the Executive signs up to, and, therefore, the range of obligations that can be applied under the legal principles laid down by the courts.

### Are the reforms to date adequate?

As the Foreign Affairs Committee stated in its review of the Parliamentary Treaty Examination process in 1999, New Zealand has indeed entered a new domain, providing a role for Parliament to be consulted when the Executive undertakes New Zealand treaty action. However, this paper argues that the evolution of Parliament's role in Executive treaty-making is not complete, and there is yet unfinished business.

This paper is not advocating some form of constitutional revolution, whereby Parliament should be given powers to stop the Executive from ratifying a treaty the Government proposes New Zealand should adopt. That would change the existing doctrine of separation of powers that underpins the respective roles for the Executive and Parliament, and for that matter, the courts, vis-à-vis the international treaty process. The first two stages of treaty-making, being negotiation and acceptance of the treaty, must remain the role of the Executive, with the third stage of the process, the implementation of the treaty, reserved for Parliament. There can be some sharing of this role with the courts giving effect to unincorporated treaty obligations. However, that makes it even more imperative to ensure that the Parliamentary Treaty Examination process which New Zealand adopts truly gives Parliament an effective ability to influence the Executive treaty-making process, rather than force the Parliament to endorse a *fait accompli*.

The major concern with the current *Standing Orders* on Parliament's role in international treaty review is that the Government is only required to present treaties *prior to ratification* and there is no further requirement to present treaties before introducing implementing legislation. In the past, the usual process in New Zealand has been to adopt a two-stage approach whereby treaties are first signed, and then a review undertaken of any changes needed to New Zealand's law and practice to implement the treaty's obligations. Only when New Zealand's 'house was in order', so to speak, did the Government then ratify the treaty. Thus, by the time the Government presented a treaty to Parliament, all of the necessary law and policy changes had already taken place, leaving Parliament with little choice but to support the treaty's adoption.

It is true that Parliament's power to refuse to pass the legislation needed to implement a treaty's obligations is a far greater power to 'influence' Executive treaty-making, than any Parliamentary Treaty Examination process set out in the *Standing Orders*.<sup>82</sup> However, any examination of potential legislation by a subject select committee is necessarily focused on the specific bill at hand. There may be little discussion of the specific treaty it seeks to implement. Indeed, it may not even be apparent on the face of the Bill that it is designed to implement a treaty.

For example, although the *Human Rights Commission Act 1977* was enacted to implement specific articles in the two human rights covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, there was little discussion of the Covenants as a whole

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<sup>82</sup> As David McGee, Clerk of the House, stated in his submission to the Standing Orders Committee in 1996, page 31, Parliament's ability to determine whether or not to pass legislation implementing a treaty is involvement and control in the treaty-making process of the highest order; *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* (1996) AJHR I 18B.

when the 1977 Bill was being considered by the relevant select committee. This was also the case with the two Optional Protocols to the latter Covenant and also with the Convention on the Rights of the Child, where, rather than passing the legislation needed to implement the Convention's obligations, reservations were made in order to cover existing New Zealand law and practice, which in the absence of a reservation could have placed us in breach of our obligations.

If legislation implementing a treaty is introduced before the treaty is presented to Parliament, there will be no accompanying NIA, and a subject select committee will not have the benefit of the international law expertise of the Foreign Affairs Committee. The examination Parliament undertakes of a bill may not be the same as the examination it undertakes when determining whether New Zealand should ratify an international treaty. Furthermore, the Government may decide that no legislation is needed to implement the obligations of a treaty it wishes to ratify, in which case a treaty may come to the notice of Parliament for the first time when it is presented by the Government just prior to ratification. If Parliament is of a contrary view, that legislation is indeed required, then it may be more difficult to convince the Government to delay ratification until such legislation is enacted.

Subsequent to the adoption of the 1998 Sessional Orders trialling a Parliamentary Treaty Review process, a new Cabinet Office Circular was issued on 'Treaty-Making Process: Presentation of Treaties to the House'. This applies to treaties on which a Cabinet decision to ratify, accede to, accept or approve has been taken after 17 December 1997, in circumstances where the Government is required to lodge a formal instrument of ratification, accession, acceptance or approval.<sup>83</sup> The Circular provides that:

Once [treaty] negotiations have been concluded, Cabinet approval must be obtained at each of the following stages: ...

- (c) Approval for legislation to bring domestic law into compliance with the treaty before binding treaty action may be taken, where that is required. In these cases, *approval for the binding treaty action should be sought concurrently with approval of the legislation*. ... Under this process, treaties will be presented to the House *before* any implementing legislation has been introduced. In *exception to that process*, there are a number of cases of treaties which have been signed but are waiting for implementing legislation to be passed before they are ratified. In these cases, Cabinet approval for ratification should be sought as soon as possible and the treaty presented to the House for consideration alongside the implementing legislation. ... Departments should endeavour to present treaties to the House in as timely a manner as possible ...

Legislation necessary to bring domestic law into compliance with the treaty will not be introduced into the House until *after the treaty has been presented* to the House and the relevant time period has expired [emphasis added].

As a consequence of this Cabinet Office Circular, the process concerning international treaties in domestic law should now be:

- Presentation of a treaty the Government wishes to ratify to Parliament for examination;
- The introduction and passage of any legislation needed to render New Zealand law consistent with the treaty's obligations;
- Followed by ratification of the treaty.

However, Cabinet Office Circulars are not law, and breaching a Cabinet Office Circular is not unlawful. It is difficult to find a situation where a treaty was presented to Parliament before necessary implementing legislation was passed. Furthermore, although the Cabinet Office Circular states that the general process should be that treaties are presented to the House *before* any implementing legislation has been introduced, it acknowledges

<sup>83</sup> Cabinet Office Circular CO(98)4, 'Treaty-Making Process: Presentation of Treaties to the House', 6 July 1998 [Treaty-Making Process].

that “in exception to that process” there are a number of treaties where ratification awaits implementing legislation to be passed first. In these cases, it states that Cabinet approval for ratification *should* be sought as soon as possible and the treaty presented to the House for consideration alongside the implementing legislation.

The ‘exception to that process’ appears to refer to a transitional provision for treaties that was already before the House prior to the adoption of the Parliamentary Treaty Examination process in 1997. However, the concern is that such important procedures, which mean the difference between allowing Parliament to have an effective influence in the treaty-making process as opposed to being confronted with a *fait accompli*, are only provided for in a Cabinet Office Circular and can be waived.

That the Executive may find it more convenient to present the treaty *after* legislation to implement that treaty has been passed may explain why there is nothing in the *Standing Orders* that would require the Government to present the treaty first, even though there is arguably nothing inappropriate in stipulating such timing requirements in the *Standing Orders*. The Executive may consider it a duplication of effort. Opponents may have two opportunities to oppose ratification of a treaty and not one. Having already examined the treaty, Parliament may have a better understanding of what legislation is designed to achieve when a bill(s) implementing a treaty is/are subsequently introduced. Nevertheless, the sequencing of treaty presentation prior to consideration of legislation implementing a treaty is important for ensuring that Parliament can undertake effective scrutiny of treaties. It is also important to ensure that there is some point in affected parties making submissions to the Foreign Affairs Committee under the treaty examination process.

### The need for legislation

As far back as 1964, Sir Kenneth Keith wrote that New Zealand’s treaty practice indicated that there may be a constitutional convention that Parliament has the right to discuss the question of acceptance of important treaties. The issue then surrounded which treaties were ‘important’ and who decided that question.<sup>84</sup> The Clerk of the House also stated in his submission to the Foreign Affairs Committee Review of International Treaty Examination Procedures that:<sup>85</sup>

... it may be that the assurance can be regarded, or soon may be regarded, as in the nature of a constitutional convention, binding on the Government not to take treaty action (except in an emergency) until the House has had a reasonable opportunity to consider the treaty).

The more important question is whether it is appropriate that such important processes to allow Parliament to comment on the treaty-making process should be based solely on an emerging constitutional convention and be incorporated in a Cabinet Office Circular and the *Standing Orders*, and not enacted in statute. Conventions are binding rules of behaviour accepted as obligatory by those concerned in the working of the constitution.<sup>86</sup> Insofar as a convention defines duties or obligations they remain morally and politically, but not legally, binding. Care will have to be taken in drafting statutory provisions which require parliamentary consideration of treaties before the Executive can ratify a convention or introduce legislation to implement that convention’s obligations. Considerable care must also be taken to ensure that any duties placed upon the Executive to consult with Parliament and affected or interested groups cannot result in acts of ratification being null and void, if certain processes are not (adequately) followed. However, given the increasing importance of treaties, and that some treaties now no longer provide for denunciation or revocation after adoption, it is surely appropriate to develop legislative processes allowing Parliament and affected parties timely input and influence on Executive

<sup>84</sup> Treaty-Making Process above n 83, 290.

<sup>85</sup> Submission by the Clerk of the House of Representatives to the Foreign Affairs, Defence and Trade Committee *Review of the International Treaty Examination Process*, May 1999, 4, endorsed by the Foreign Affairs Committee above n 10, 3.

<sup>86</sup> Sir Kenneth Wheare, cited in G Marshall, *Constitutional Convention* (1986) at page 7.

treaty-making, before proposed legislation implementing the treaty is passed. This view is supported by other commentators. Gobbi and Barsi stated that:<sup>87</sup>

Legislation putting these procedures [notification, consultation, committee, treaty impact statements and tabling procedures] may be required to ensure that the executive abides by them. In and of itself, a 15 day sitting rule is of limited value if the Government does not have to devote any parliamentary time to debate the treaties it tables or to motions regarding their approval, as experience in the United Kingdom has shown.

The Law Commission states in Report No 45 that the legislation issue partly arises because Parliament increasingly requires consultation when legislating and that to be effective, any statutory obligation for consultation should occur at an early stage in the treaty-making process. However, the Law Commission considered it unnecessary to legislate processes allowing Parliament's review of treaties unless and until it appears that the suggested changes to *Standing Orders* are insufficient.<sup>88</sup> In contrast, the Clerk of the House stated in his submission to the Standing Orders Committee in 1996 that:

The [Australian] Committee recommended that further study be undertaken of the suggestions made to it that legislation should be enacted requiring Parliamentary approval of treaties. To some extent in Australia questions of the constitutional power of the legislature to limit the Executive's treaty-making power are involved. These questions have no counterpart in New Zealand.

The Clerk of the House went on to state that the requirement for Parliamentary ratification of a treaty must be imposed by legislation. He argued that the legislation should be minimalist, providing a framework that prevents the Government ratifying a treaty (except urgent treaties) without prior Parliamentary approval and providing that Parliamentary approval include a resolution of the House as well as legislation.<sup>89</sup> Increasing the involvement of Parliament in treaty-making has also been the subject of many legislative initiatives. Private Member's Bills from the Alliance, ACT and Green political parties all provide that the Government cannot ratify a treaty without prior Parliamentary approvals.<sup>90</sup> Similarly, a Private Members Bill entitled the Multilateral Agreement on Investment (Parliamentary Approval) Bill 1998 sought to require debate and approval from Parliament before the Multilateral Agreement on Investment could be ratified.<sup>91</sup>

All of these Bills, as well as the legislation recommended by the Clerk of the House, would impinge upon the Crown's exercise of prerogative powers in foreign affairs. In contrast, the legislation proposed in this paper would stop short of giving Parliament power to limit the Executive's treaty-making ability. The legislation would incorporate the current provisions in the *Standing Orders*, together with the procedures in the 1998 Cabinet Office Circular. Consideration should also be given to the 'broader perspective' recommended by the Law Commission Report 'if legislation is thought necessary'. The Law Commission suggested that the legislation should also include a direction as to desirable drafting practices for implementing legislation including at a minimum, the noting of the statute's international origins. Failure by the Executive to carry out the statutory procedural requirements will not render null and void any ratification of a treaty by the Government, and provision to this end should be included in the statute. However, an application for a declaratory judgement should be able to be brought to compel the Government to follow the process. Because of

<sup>87</sup> Gobbi and Barsi, 'New Zealand's Treaty-making Process: Understanding the pressures and proposals for reform (draft No. 3)' (Strategic Assessment Group, Ministry of Justice, Wellington, 1997) 32; Templeman, 'Treaty-making in the British Parliament' (1991) 67 *Chicago-Kent Law Review* 461.

<sup>88</sup> See *Law Commission Report Number 45*, above n 3, 74-75.

<sup>89</sup> Submission of the Clerk of the House to the Standing Orders Committee, *Report of the Standing Orders Committee*, above n 82, 34.

<sup>90</sup> The Alliance Private Member's Bill is entitled the New Zealand International Legal Obligations Bill; the ACT party's Private Member's Bill is entitled Treaties (Parliamentary Approval and Treaties Information) Bill; and the Green Party's Private Member's Bill is entitled the International Treaties Bill.

<sup>91</sup> None of these Member's Bills have been drawn out of the ballot.

section 17(1) of the *Crown Proceedings Act 1950*, injunctions cannot be brought against the Crown. However, the Crown's usual practice is to give an undertaking not to act in circumstances where an injunction would, on normal principles, have issued. This accords with section 27(3) of the *New Zealand Bill of Rights Act 1990* which provides:

- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals. *There is also some authority in favour of the possibility of obtaining an "interim declaration" against the Crown*<sup>92</sup> [emphasis added].

It would thus be a brave government that forged ahead to ratify a convention when a declaratory judgment application is pending before the court to determine if it rightly followed the Parliamentary Treaty Examination process. A government would probably only be willing to risk the opprobrium of potentially acting illegally if it could justify the ratification because the treaty was urgent. It is not proposed, however, that any further mechanisms need to be included in the legislation to allow Parliament effective input into the treaty-making process. The reason is because Members of Parliament still have at their disposal all of the other parliamentary mechanisms to exact accountability from the Executive, such as asking Ministers parliamentary questions and requesting a debate on a matter.

If there is agreement that international treaties are only going to become more important to New Zealand and its citizens, and it is acknowledged that parliamentary involvement and consultation with affected parties improves Executive decision-making, then surely legislation incorporating, at a minimum, the Parliamentary Treaty Examination process in the *Standing Orders* and the Cabinet procedures to only introduce legislation to implement a treaty *after* the treaty has been presented to Parliament needs to be seriously considered.

#### Non-legislative option: amending Standing Order 283

If legislation is not considered appropriate for the Parliamentary Treaty Examination process, then a second best option may be for New Zealand to amend *Standing Order 283*. The amendment could provide that where a subject select committee considers a bill whose purpose is to implement international obligations of a treaty New Zealand intends to ratify, the provisions in *Standing Order 384* will be triggered. The Government will then be required to present the international treaty it intends to ratify to the House for on-referral to the subject select committee, along with the NIA. In such a case, the treaty would be akin to one referred by the Foreign Affairs Committee to 'any other select committee' under *Standing Order 386(1)*. That way, the subject select committee would have the benefit of the NIA, and a clear understanding of the treaty that the legislation is intended to implement when it considers the legislation.

#### Overcoming the democratic deficit

The Law Commission recommended in its Report Number 45 that:<sup>93</sup>

The value of notification and consultation with Parliament and interested and affected groups at the negotiating stage of the treaty-making process be recognised, with the purpose of developing and formalising such practices.

Generally, this refers to the pre-signing stage, and is consistent with the pressures for further reform of Australia's procedures for greater parliamentary involvement in treaty-making. In its report *Trick or Treaty*,<sup>94</sup> a comprehensive review of powers exercised by the Commonwealth Government in making and implementing treaties, the Senate Legal and Constitutional References Committee (Senate Committee) recommended

<sup>92</sup> *Simpson v AG* [1996] 2 ERNZ 253, a decision of the full court of the Employment Court.

<sup>93</sup> *Law Commission Report No. 45*, above n 3, 3.

<sup>94</sup> Senate Legal and Constitutional References Committee 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties' (November 1995). [Trick or Treaty]



increasing Government efforts to identify and consult with groups which may be affected by a treaty. The key groups identified included trade unions, industry and environmental groups, as well as many other non-governmental organisations.<sup>95</sup> A 'whole of government' approach was advocated to ensure that all relevant Government departments and interest groups are consulted during the development of a treaty. For example, the Senate Committee recommended that the Department of Foreign Affairs and Trade prepare a publication providing information on the treaty under consideration by the Government and make it available gratis to all public libraries. This recommendation was later accepted by the Australian Government.<sup>96</sup> The Australian Government is also reviewing the value of treaty-specific consultation and formal meetings with representatives of interested organisations as well as the nature and form of information which should be provided to private sector groups on treaty issues.<sup>97</sup>

In a recent paper on 'Building the Constitution', a New Zealand international lawyer has commented on the Parliamentary Treaty Examination process as follows:

But the changes do not directly address the prior and arguably more important aspect of what has been referred to as the democratic deficit in treaty-making — involvement in the negotiating phase. Much of the concern expressed in recent years about the treaty-making process has related to the basis of New Zealand's participation in major international negotiations in such areas as trade, investment and intellectual property. In essence the concern has been that the consultation process during the negotiations was insufficient to ensure that the New Zealand negotiating position would achieve adequate protection of rights established under the Treaty of Waitangi or other interests to which sections of the community attach importance.<sup>98</sup>

*Standing Order* 385(1)(h) currently provides that the NIA must include 'a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty'. Thus, if inadequate consultation has been undertaken, or is proposed, this could be reflected in the Foreign Affairs Committee's report back to the House on a treaty. This may be enough to increase the pressure on the Executive to develop and formalise processes to give affected groups such as environmental, Māori and industry groups greater information about agenda setting and negotiation issues.

The Foreign Affairs Committee could also encourage the Government to develop processes to involve affected or interested parties in the community in negotiations. This would include an opportunity to contribute to the development of a negotiating brief, and to participate and be kept informed about negotiations on a treaty. Once again, however, if these matters are considered to be critically important, they should be included in legislation. For example, the Government has already announced it will ratify the Kyoto Protocol, which is still the subject of negotiations on quite a large range of issues. Unresolved issues include: which rules and institutions will govern international trading of greenhouse gas emissions amongst developed countries; rules and institutions governing joint implementation and the so-called clean development mechanisms have yet to be developed in detail; the criteria used to judge compliance and any penalties for non-compliance are still to be clearly articulated; and binding agreement by the major developing countries to limit their emissions at some specified point in the future has yet to be obtained.<sup>99</sup> Given the significant impact implementation of Kyoto Protocol obligations will have on the industrial, transport and agricultural sectors, as well as ordinary New Zealanders, including obligations coming out of decisions taken on the unresolved issues listed above, it seems appropriate for the Government to keep affected parties and the public informed about unresolved issues, and to consult affected parties and the public on their views on these issues, before the negotiations are finalised.

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<sup>95</sup> Trick or Treaty, above n 94, 185.

<sup>96</sup> The Government Response to the Senate Legal and Constitutional References Committee Report 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties'.

<sup>97</sup> Ibid.

<sup>98</sup> B Mansfield 'The Constraints of Treaties and International Law', (Building the Constitution Conference, Wellington, 7-8 April) 3.

<sup>99</sup> P Davies 'Global Warming and the Kyoto Protocol' (1998) 47(2) *International and Comparative Law Quarterly* 446.

### Treaties committee

It can be argued that the Parliamentary Treaty Examination process may be undermined, or fail to meet its full potential, if there is not a special committee with the requisite time, resource and expertise to review treaties, and to ensure adequate consultation with the public. The Foreign Affairs Committee is already very busy. That may be partly why the Parliamentary Treaty Examination process has been under-utilised in the first three years of its operation.

The New Zealand Law Commission recommended that consideration be given to the establishment of a treaty committee of Parliament. Such a committee would have committed time and personnel and would develop expertise and interest in treaties, treaty processes and treaty law. The Law Commission was concerned that the other roles or functions of the Foreign Affairs Committee might eclipse its treaty focus. Similar problems arise in an even more acute form with the other subject select committees. A designated treaty focused committee would also have time to think more broadly about the role Parliament should play in treaty-making. For example, such a committee could also look at the treaties which New Zealand has neither ratified nor signed, but should consider adopting.<sup>100</sup>

The Ministry of Justice has been a strong supporter of a specific treaty committee. A specialised committee, in its view, could keep Parliament informed of the Executive's treaty-making activities and involve the public by allowing it an opportunity to be heard and to be kept informed. A specialised committee could also promote consistency of scrutiny standards and criteria.<sup>101</sup> Such a committee would have an overview of the Government's approach to international law and treaties, and could co-ordinate the review of treaties by Parliament. Contrary arguments have been made by the Clerk of the House, who recommended that treaties would be best referred to the appropriate subject select committees for consideration. The Foreign Affairs Committee would be at the centre of the treaty-approving process by allocating treaties to individual committees for scrutiny and keeping the overall process under review. It would then be the role of that chosen subject select committee to brief the House as to progress.<sup>102</sup>

There clearly are benefits in subject select committees reviewing relevant Treaties if they have adequate time and resources. New Zealand does have a small Parliament, and it already has an extensive select committee system. We must be careful about a counsel of perfection. But given that New Zealand only has a unicameral Parliament and international treaties are going to have an increasingly important impact on domestic issues in New Zealand and upon its citizens, a select committee needs to be established with the time and expertise to develop and evolve Parliament's role in Executive treaty-making. It appears to be simply too big a job to give to the Foreign Affairs Committee, which already has a full workload. The concern is that the achievement of an effective role for Parliament in Executive decision making will not occur without more time, resource and expertise than the current subject select committees have to give to the matter, including the Foreign Affairs Committee. This appears to be confirmed by the limited progress the Foreign Affairs Committee has made to date in utilising the Parliamentary Treaty Examination process, discussed earlier in the paper.

### Conclusions and recommendations

New Zealand has made good progress towards a Parliamentary Treaty Examination process that better shares power between the Executive and Parliamentary branches of Government, without disturbing fundamental doctrines of Parliamentary sovereignty, separation of powers, and the dualist theory of international law. Such a process also enhances and improves scrutiny and transparency of Executive treaty-making, consultation and community awareness of treaties. Nevertheless, if the Parliamentary Treaty Examination process is to allow Parliament effective substantive input, as opposed to being mere window-dressing, it is important that the following further changes be considered to the process:

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<sup>100</sup> *Law Commission Report* No. 45, above n 3, 62.

<sup>101</sup> *Ibid* 61-63.

<sup>102</sup> *Report of the Standing Orders Committee*, above n 82, 32.

- Legislation that incorporates the Parliamentary Treaty Examination process set out in the *Standing Orders*, amended in the way set out below. The procedures in the 1998 Cabinet Office circular concerning treaty-making should also be incorporated, along with directions as to desirable drafting practices for legislation implementing international obligations, at a minimum, the noting of the statute's international origin. The legislation should also require the Government to provide information to Parliament and affected and interested groups on negotiations it is undertaking on treaties it intends to adopt. The legislation will not include powers to allow Parliament to stop the Government ratifying any treaty, and should include a provision stating that failure to carry out the procedures will not render null and void any ratification of a treaty by the Government. Enforcement should be by application for a declaratory judgment only.
- The NIA, whether incorporated in the new legislation or remaining in *Standing Orders*, should be amended to include a requirement to provide a statement setting out the impact of the treaty's implications for the Treaty of Waitangi, if any, and any relevant consultation with tangata whenua that has been undertaken, or is proposed to be undertaken.
- The establishment of a special Treaties Committee to carry out the Parliamentary Treaty Examination process, and to keep under review the involvement of Parliament in Executive treaty-making to ensure that it keeps up with the increasing importance of international treaty-making to New Zealand.

Without such measures, the concern is that Executive treaty-making will result in unnecessary antagonism from both Pakeha and Māori New Zealanders to international law when such treaties are sometimes beneficial and increasingly essential to solve the growing number of global issues facing the world.

## Appendix A:

### Background to the Parliamentary Treaty Examination Process

1. In 1996, the then Standing Orders Committee of Parliament considered a submission by the Clerk of the House, Mr David McGee as he then was, which was noted in the *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders*.<sup>103</sup> McGee's submission, 'Treaties in the House of Representatives',<sup>104</sup> recommended a greater role for Parliament in the ratification and implementation of treaties, drawing on recommendations made in a report by an Australian Senate Committee<sup>105</sup> and on material assembled in a 1996 report by the Law Commission.<sup>106</sup>

McGee's submission stated:<sup>107</sup>

At present the House of Representatives has no role at all in the making of treaties and has only a limited, and then usually *ex post facto* role in respect of their incorporation or implementation as part of New Zealand's domestic law. Instead, the Government (in the exercise of the Crown's prerogative powers), without any need for approval from or even consultation with the House, may enter into treaties. Furthermore, and increasingly, treaty obligations are being incorporated into New Zealand law indirectly by the courts. Parliament is being bypassed in respect of a large amount of what is effectively law-making activity.

McGee recommended that:

1. Before the Government ratifies any treaty, it should be necessary for the House to approve the making of that treaty.
2. Prior Parliamentary approval to ratify a treaty may be given by simple resolution of the House.
3. For the purpose of considering whether to approve a treaty, the treaty should be tabled in the House in draft.
4. After being tabled, the draft treaty would be referred to the appropriate subject select committee for consideration.
5. A time limit within which the Committee must report the draft treaty back to the House would be imposed (say, 15 sitting days).
6. Any legislation to implement a treaty should, in its Title, its preamble or in a purpose clause, make it explicit that it is being promoted for the purpose of committing New Zealand to ratify the treaty.
7. The Foreign Affairs and Defence Committee should be at the centre of the treaty approving process by allocating treaties to enter individual committees for scrutiny and keeping the overall process under review.

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<sup>103</sup> (1996) AJHR I.18B.

<sup>104</sup> David McGee, 'Treaties in the House of Representatives', paper prepared for the Standing Orders Committee by the Clerk of the House of Representatives, June 1996, *Report of the Standing Orders Committee*, above n 82, Annex G. [Treaties in the House of Representatives]

<sup>105</sup> Trick or Treaty? above n 94.

<sup>106</sup> *Law Commission Report No 34*, above n 14.

<sup>107</sup> Treaties in the House of Representatives, above n 104, 26.

8. In the case of a treaty certified by the Government to be of an urgent nature the treaty could be entered into and then tabled in the House at the first opportunity. The House would have fifteen sitting days to examine the treaty and determine whether to disallow it.
9. The House should only be able to approve or reject a draft treaty (although the select committee could in its report recommend amendments or reservations if it saw fit).
10. If the Government decides to enter a reservation to a treaty after the treaty has been entered into, that reservation should be presented for Parliamentary approval before being entered. Similarly any amendment to the treaty proposed to be made by the parties to it should be approved by the House before New Zealand ratifies the amendment.
11. The requirement of mandatory Parliamentary approval be backed by legislation but the process by which this is obtained be set out in the *Standing Orders*.

In response to the Clerk's submissions and recommendations, the Standing Orders Committee stated that it 'broadly supports the intent of the proposals'.<sup>108</sup> The Committee referred the matter to then Minister of Foreign Affairs, the Rt Hon Don McKinnon, for his comment. The Committee stated that it had not had time to consider the matter in detail, but expected the new Parliament to address the matter.

On 5 March 1997, the Rt Hon Mike Moore invited the Law Commission to comment on a memorandum entitled 'Foreign Policy, Trade and Other Treaties'. The memorandum suggested that the advent of MMP meant the current treaty process should be changed to reflect the new multi-party political environment. Submissions were requested from all Government departments that operated within the Foreign Affairs Committee's terms of reference.<sup>109</sup>

This was followed in turn by the Report of the Foreign Affairs Committee in its 'Inquiry into Parliament's Role in the International Treaty Process'.<sup>110</sup> The Committee noted that interested parties had also been working on issues relating to Parliament's role in the treaty process. This included the Ministry of Justice which stated in its Post-election Briefing Paper (October 1996) that:

Greater participation [by Parliament] in the treaty-making process may therefore be warranted, especially as treaties are less and less concerned with issues relevant to relations between states and more and more about relations between individuals and states.

After an interesting analysis of the key issues, the Foreign Affairs Committee recommended that the proposals put forward in the memorandum of Mr Moore and submissions of the Clerk of the House be applied to all treaties which are subject to ratification, accession, acceptance or approval. It made six recommendations as follows:

Consequently, [the Foreign Affairs Committee] believes that the Government should amend the treaty process by adopting the following steps:

1. That for, a trial period of 12 months, all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) should be tabled in the House prior to ratification, accession, acceptance or approval and be subject to the following procedure.

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<sup>108</sup> *Report of the Standing Orders Committee*, above n 103, 3.

<sup>109</sup> Submissions were received from the Ministry of Defence, the New Zealand Defence Force and the New Zealand Customs Service. Submissions were also requested and received from the Clerk of the House and the Law Commission.

<sup>110</sup> Report of the Foreign Affairs, Defence and Trade Committee, *Inquiry into Parliament's Role in the International Treaty Process*, (1997) AJHR I.4E. [*Inquiry into Parliament's Role*]

2. A document along the lines of a 'NIA' would be prepared for each treaty and tabled in the House at the same time.
3. Both the treaty and accompanying 'NIA' would be referred to the Foreign Affairs, Defence and Trade Committee upon tabling. This Committee could retain the treaty documents for itself, or refer them to a more appropriate select committee, for inquiry and report back to the House, if the relevant committee considers an inquiry necessary, within 15 sitting days of tabling in the House.
4. If requested by members, the House should provide an opportunity for members to debate any select committee reports on treaties in the House (in addition to the existing opportunities and the proposal in recommendation 1).
5. The Government will not ratify, accede to, accept or approve any treaty until after a select committee reports on its inquiry into a treaty or 15 sitting days elapses from the date the treaty is tabled, whichever occurs first.
6. In the event that the Government needs to take urgent action in the national interest in ratifying, acceding to, accepting or approving a treaty, and it is not possible to table it beforehand, it will be tabled as soon as possible after such action has been taken together with an explanation to the House.<sup>111</sup>

The Foreign Affairs Committee concluded that this advancement in Parliament's role in the international treaty process was designed to reflect both a transition to MMP, and the reforms adopted overseas.<sup>112</sup> The Foreign Affairs Committee noted that neither Westminster nor Canberra were considering reform of the treaty process within the context of the unicameral and MMP environment of the New Zealand Parliament. Indeed, the bicameral system of the British and Australian Parliaments already permits further Parliamentary involvement than is afforded when the issues are only considered by unicameral or single Houses. Reform of the British treaty process may have been more influenced by the treaty processes of the European Community, and the Australian treaty process had to contend with additional difficulties related to the exercise of the foreign affairs power of the Commonwealth Government and the separation of powers with Australian states via the federal system. Consequently, the Committee concluded that it was desirable to amend the present treaty process in New Zealand in a way that is both cognisant of the experience of other Parliaments that have undertaken reform in this area, and which also maintains the benefits of our present Parliamentary system.<sup>113</sup> The Foreign Affairs Committee also included an outline of a possible Explanatory Memorandum or NIA in respect of treaty action.<sup>114</sup>

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<sup>111</sup> *Inquiry into Parliament's Role*, above n 110, 8-9.

<sup>112</sup> *Ibid* 9

<sup>113</sup> *Ibid*.

<sup>114</sup> These included:

- reasons for New Zealand becoming party to a treaty;
- any advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand;
- any obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to a treaty;
- any economic, social, cultural, and environmental effects of the treaty entering into force for New Zealand, and the treaty not entering into force for New Zealand;
- the costs to New Zealand of compliance with the treaty;

The Government responded positively to the Foreign Affairs inquiry in the following way:

**Recommendation to the Government:** Consequently, we believe that the Government should amend the treaty process by adopting the following steps:

1. That, for a trial period of 12 months, all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) should be tabled in the House prior to ratification, accession, acceptance or approval and be subject to the following procedure:

*Response:*

The Government has decided that for a trial period of the remainder of this Parliamentary term, all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) will be tabled in the House, prior to ratification, accession, acceptance or approval. The Government has also decided that the Minister of Foreign Affairs and Trade may table major bilateral treaties of particular significance, which would not otherwise be subject to this recommendation, on a case by case basis and after consultation with the relevant portfolio Minister.

Recommendation

2. A document along the lines of a "National Interest Analysis" would be prepared for each treaty and tabled in the House at the same time.

*Response:*

The Government has decided that tabled treaties will be accompanied by a National Interest Analysis prepared by the Department having the main policy interest in the treaty after consultation with the Legal Division of the Ministry of Foreign Affairs and Trade:

Recommendation

3. Both the treaty and accompanying "National Interest Analysis" would be referred to the Foreign Affairs, Defence and Trade Committee upon tabling. This committee could retain the treaty documents for itself, or refer them to a more appropriate select committee, for inquiry and report back to the House, if the relevant committee considers an inquiry necessary, within 15 sitting days of tabling in the House. The Government accepts the recommendation that the Foreign Affairs, Defence and Trade Select Committee (or another appropriate Select Committee) will have an opportunity to inquire into the treaty if it wishes and report back to the House.

Recommendation

4. If requested by members, the House should provide an opportunity for members to debate any Select Committee reports on treaties in the House (in addition to the existing opportunities and the proposal in recommendation 1).

*Response:*

The Government accepts the recommendation that the House should have the opportunity to debate any Select Committee reports on treaties. (The reference to "recommendation 1" in this recommendation

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- the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects;
  - measures which could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures, including legislation;
  - a straight link setting out the consultation which have been undertaken or are proposed with the community and interested parties in respect of the treaty; and
  - whether the treaty provides for withdrawal or denunciation.
-

refers to the Select Committee's separate recommendation to the House and the Standing Orders Committee that in addition to existing opportunities, three hours should be set aside to debate treaties and related foreign policy issues at the beginning and end of each Parliamentary year.)

This is a matter which can be attended to by the Standing Order Committee in the course of its current review.

#### Recommendation

5. The Government will not ratify, accede to, accept or approve any treaty until after a Select Committee reports on its inquiry into a treaty or 15 sitting days elapses from the date the treaty is tabled, whichever occurs first.

#### Response:

Except in the case of urgent treaties, the Government has decided that a treaty will not be ratified, acceded to, accepted or approved by the Government until after the Select Committee has reported back, or until 35 calendar days have elapsed after the tabling of the treaty (or 45 calendar days as the case may be), whichever occurs first. Following any Select Committee report, Cabinet may consider a proposal on the report from the Minister of Foreign Affairs and Trade before the treaty is ratified, acceded to, accepted or approved.

#### Recommendation

6. In the event that the Government needs to take urgent action in the national interest in ratifying, acceding to, accepting or approving a treaty, and it is not possible to table it beforehand, it will be tabled as soon as possible after such action has been taken together with an explanation to the House.

#### Response:

The Government agrees with this recommendation.

Around the same period, the Law Commission released its report on *The Treaty-making Process: Reform and the Role of Parliament*.<sup>115</sup> The Report made the following recommendations:

1 — That the value of notification and consultation with Parliament and interested or affected groups at the negotiating stage of the treaty-making process be recognised, with the purpose of developing and formalising such practices.

1A — That consideration be given to the establishment of a Treaty Committee of Parliament.

2 — That consideration be given to the introduction of a practice of the timely tabling of treaties so that the members of the House of Representatives can determine whether they wish to consider the Government's proposed action.

2A — That consideration be given to the preparation of a treaty impact statement for all treaties to which New Zealand proposes to become a party.

3 — That, so far as practicable, legislation implementing treaties or other international instruments give direct effect to the texts (that is, use the original wording of the treaties), and that when that is not possible, the legislation indicate in some convenient way its treaty or other international origins.

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<sup>115</sup> *Law Commission Report No 45*, above n 2. The Law Commission had first prepared and circulated a draft report in 1993. Entitled '*The Making, Acceptance and Implementation of Treaties: Three Issues for Consideration*', it was written by the then President of the Law Commission, Sir Kenneth Keith. The *Law Commission Report No. 45* built on the original draft report and a 1997 submission to the Foreign Affairs Select Committee on its Proposed Inquiry into the Role of Parliament in the Implementation of Treaties [*Law Commission Report No. 45*, above n 3, ix.].



The Government's response was that the Law Commission's recommendations had been taken into account in preparing its response to the Foreign Affairs Select Committee. The President of the Law Commission wrote that:<sup>116</sup>

As to recommendation 1, the Government recognises the merit of making available on the Internet a list of treaties under negotiation, the practice adopted in Australia where there is available from the DFAT website a list of multilateral treaty action under negotiation or consideration by the Australian government. This covers a six month period and provides contact officer details after each entry, as a starting point for further information. The practice is to 'facilitate Parliamentary and community involvement in the Australian treaty-making process' in accordance with a Government policy announced on 2 May 1996.

Recommendation 1A was met with the response that multilateral treaties once tabled are referred to the Foreign Affairs, Defence and Trade Select Committee. That committee can then report back to the house upon a treaty within a specified time period. The Law Commission maintains its view that the benefit of an experienced and specialised Parliamentary treaty committee would be warranted.

As to Recommendation 2A, the Government response to the Standing Orders Committee to accompany tabled treaties with a National Interest Analysis is welcome, although the Commission's paragraph 183 goes further. [This concerns consultation with Māori and the effect on rights provided by the Treaty of Waitangi.]

Recommendation 3 was the subject of paragraphs 199-201 of the Law Commission's Report, stating that the Commission would prefer the establishment of a formal procedure by which New Zealand's domestic legislation notes its international origins.

Parliament implemented the recommendations of the Foreign Affairs Committee by incorporating the Parliamentary Treaty Examination process into the Sessional Orders adopted by the House on 28 May 1998:

*Government notices of motion* — The Honourable Simon Upton for Honourable Wyatt Creech moved, and the Question was proposed, That the House adopt the following procedures:

- A These procedures are to make the arrangements necessary to give effect to the Government's response (A.5) to the recommendations made in the Foreign Affairs, Defence and Trade Committee's report on its Inquiry into Parliament's Role in the International Treaty Process (I.4A). The Government there stated that it considered the committee's recommendations to be broadly acceptable and agreed to them with some modifications.
- B The Government has stated that all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) will be presented to the House prior to ratification, accession, acceptance or approval. It has also decided that the Minister of Foreign Affairs and Trade may present major bilateral treaties of particular significance, which would not otherwise be subject to presentation, on a case by case basis and after consultation with the relevant portfolio Minister.
- C The Government has also stated that it has decided that, except in the case of urgent treaties, a treaty will not be ratified, acceded to, accepted or approved by the Government until after the select committee has reported back to the House or until 35 calendar days have elapsed after the presentation of the treaty (or 45 calendar days in the case of treaties presented after 15 December in any calendar year and before the first day on which the House sits in the following year), whichever occurs first.

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<sup>116</sup> WD Baragwanath, *The Treaty-making Process: New Zealand* (Address to International Law Association, Victoria University, Wellington, 7 August 1998).

Therefore, for a trial period, the *Standing Orders* are to be read subject to the following procedures for international treaties that are subject to ratification, accession, acceptance or approval, or are otherwise presented to the House for select committee examination.

#### 1 Presentation and referral of international treaties

- (1) The following treaties will be presented to the House –
  - (a) any treaty that is to be subject to ratification, accession, acceptance or approval by New Zealand,
  - (b) any treaty that has been subject to such action on an urgent basis in the national interest, and
  - (c) any major bilateral treaty of particular significance, not otherwise covered by subparagraph (a), that the Minister of Foreign Affairs and Trade decides to present to the House.
- (2) A National Interest Analysis for the treaty, which addresses all the matters listed below, will be presented at the same time as the treaty.
- (3) Both the treaty and the National Interest Analysis stand referred to the Foreign Affairs, Defence and Trade Committee.

#### 2 National Interest Analysis

A National Interest Analysis must address the following matters —

- (a) the reasons for New Zealand becoming party to the treaty,
- (b) the advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand,
- (c) the obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty,
- (d) the economic, social, cultural and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand,
- (e) the costs to New Zealand of compliance with the treaty,
- (f) the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects,
- (g) the measures which could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures, including legislation,
- (h) a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty, and
- (i) whether the treaty provides for withdrawal or denunciation.

#### 3 Examination of international treaties

- (1) The Foreign Affairs, Defence and Trade Committee may itself examine a treaty referred to it or refer the task of examining the treaty to any select committee.
- (2) If the Foreign Affairs, Defence and Trade Committee is not due to meet within seven days of the presentation of a treaty, and the subject area of the treaty is clearly within the terms of reference of another select committee, the chairperson may refer the treaty to that committee for examination and report to the House.

#### 4 Select committee report on an examination into an international treaty

- (1) The committee must report to the House on any treaty that has been referred to it.
- (2) In examining a treaty and the accompanying National Interest Analysis, the committee considers whether the treaty ought to be drawn to the attention of the House –
  - (a) on any of the grounds covered by the National Interest Analysis, or
  - (b) for any other reason.
- (3) The committee must include the National Interest Analysis as an appendix to its report.

#### 5 Review of trial period of new treaty process

Either during the trial period or as soon as possible after the trial period ends, the Foreign Affairs, Defence and Trade Committee will review the operation of these procedures and report the results of its inquiry to the House.

#### 6 Application of new treaty process

These procedures apply to treaties where the Cabinet decision to ratify, accede to, accept or approve has been taken after 17 December 1997, and the Government is required to lodge a formal instrument of ratification, accession, acceptance or approval.

The Right Honourable Jonathan Hunt moved the following amendment:

That the following paragraph be added:

#### 7 Debate on treaties and related foreign policy

- 1 Each calendar year the House will debate for up to two hours treaties and related foreign policy issues.
- 2 The debate will take place on a motion moved by the Minister of Foreign Affairs and Trade and will be set down as a Government Order of the day for consideration on a day agreed by the Business Committee and advised seven days in advance.
- 3 At the end of the time allowed for the debate the question lapses.

Debate interrupted.

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On the Question, That the amendment be agreed to, the votes were recorded as follows:

AYES, 52

(Labour, 33; Alliance, 12; ACT New Zealand, 7)

NOEs, 63

(New Zealand National, 44; New Zealand First, 17; United New Zealand, 1; Independent, 1)

So it passed in the Negative.

Motion agreed to.<sup>117</sup> [Emphasis added.]

On 4 March 1999 the Foreign Affairs Committee resolved to conduct a review of the international treaty examination procedures implemented by sessional orders in 1998. This was in response to a Sessional Order requiring that the new process be reviewed during or after the trial period, and that the results be reported to the House. In its report 'Review of the International Treaty Examination Process'<sup>118</sup> the Foreign Affairs Committee stated that it was mindful that the new process had only been in effect for a little over a year, and had not been widely applied by select committees. Of the sixteen treaty inquiries conducted at that time, most had been given *pro forma* reports. However, the Committee considered the review a valuable opportunity to highlight areas needing improvement. Submissions were limited to those who had participated in the treaty process so far, or who had contributed to the original inquiry.

The Foreign Affairs Committee said that the review provided it with an opportunity to reconfirm the value it placed on maintaining an appropriate role for Parliament in New Zealand's international treaty process. It recommended that the Standing Orders Committee approve the incorporation of the procedures, with the necessary modifications, into the *Standing Orders* from the beginning of the next parliamentary term. The report also provided an opportunity for the Foreign Affairs Committee to point to the probable emergence of a rule in the nature of a constitutional convention, arising from the Government's assurance to the House, that, except in the case of urgent treaties, it would not become party to a treaty that is subject to the procedures until the House has been consulted. The Committee recommended that the House consider a suitable resolution to record the Government's agreement to the new process. The Foreign Affairs Committee recommended in its 1999 Review that:

<sup>117</sup> Journals of the House of Representatives (28 May 1998).

<sup>118</sup> *Review of the International Treaty Examination Process*, above n 10.

#### Recommendations to the House

That the House, by resolution, record the Government's decision that, except in the case of urgent treaties, it will not become party to a treaty subject to ratification, accession, acceptance or approval until the treaty has been presented to the House and a Select Committee has reported back to the House on the treaty or until the lapse of a set period of time (in which respect we are recommending to the Government a change to 15 sitting days).

That the next Parliament be recommended to keep the international treaty examination process under review, and to consider whether any further enhancement of Parliament's role, including in relation to the timeframes, may be necessary or desirable.

#### Recommendation to the Standing Orders Committee

That the Standing Orders Committee consider the draft *Standing Orders* attached as appendix 1 (which are drawn directly from the existing Sessional Orders) with a view to incorporating them, with any necessary amendments and additions, into *Standing Orders* for the 46<sup>th</sup> Parliament.

That the Standing Orders Committee consider whether amendments and additions might be made to the draft *Standing Orders* in respect of the following matters, or held over for the next Parliament to consider:

- That there be further elaboration of the procedures applying to treaties dealt with urgently by the Government, specifically to ensure that the NIA in that case sets out the reasons for urgency;
- That the expected rare cases where the Government proposes to denounce or withdraw from a treaty be provided for in the procedures (with an appropriate NIA in each case).

That, in addition to existing opportunities, three hours be set aside to debate treaties and related international relations issues at the beginning and end of each Parliamentary year.

#### Recommendations to the Government

That it follow the format for national interest analyses set out in the Sessional Orders and draft *Standing Orders*.

That the timeframe for Select Committee consideration be amended to reflect the original recommendation of the Foreign Affairs, Defence and Trade Committee. The 35 calendar day timeframe (45 over the summer adjournment) should be replaced with one of 15 sitting days (irrespective of any adjournment period that may apply);

That it consider indicating in all cases, in conjunction with the national interest analysis, how soon it requires, or expects, to become party to a treaty after the set period of time for consideration by the House and Select Committee, and consider sympathetically the need of Select Committees for any extensions of time.

Apparently the inclusion of the new Parliamentary Treaty Examination process in *Standing Orders* was the outcome anticipated when the Foreign Affairs Committee completed its original inquiry into the international treaty process.

Following the Foreign Affairs Committee Review, the Government announced on 28 February 2000 the implementation of the Parliamentary Treaty Examination process on a permanent basis, with the amendments recommended by the Foreign Affairs Committee Review. Note, however, that Parliament had already incorporated the Parliamentary Treaty Examination process in September 1999. The 28 February 2000 statement therefore appears to be meaningless.

A new 'International Treaties' section has now been included in *New Zealand's Standing Orders*, which provides as follows:

#### INTERNATIONAL TREATIES

##### 384 Presentation and referral of treaties

##### (1) The Government will present the following international treaties to the House –

- (a) any treaty that is to be subject to ratification, accession, acceptance or approval by New Zealand;
- (b) any treaty that has been subject to ratification, accession, acceptance or approval on an urgent basis in the national interest:

- (c) any treaty that has been subject to ratification, accession, acceptance or approval and that is to be subject to withdrawal or denunciation by New Zealand;
  - (d) any major bilateral treaty of particular significance, not otherwise covered by subparagraph (a), that the Minister of Foreign Affairs and Trade decides to present to the House.
- (2) A national interest analysis for the treaty, which addresses all the matters set out in *Standing Order* 385, will be presented at the same time as the treaty.
  - (3) Both the treaty and the national interest analysis stand referred to the Foreign Affairs, Defence and Trade Committee.

#### 385 National interest analysis

A national interest analysis must address the following matters –

- (a) the reasons for New Zealand becoming party to the treaty;
  - (b) the advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand;
  - (c) the obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to the treaty;
  - (d) the economic, social, cultural and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand;
  - (e) the costs to New Zealand of compliance with the treaty;
  - (f) the possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects;
  - (g) the measures which could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures including legislation;
  - (h) a statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty;
  - (i) whether the treaty provides for withdrawal or denunciation.
- (2) In the case of a treaty that has been subject to ratification, accession, acceptance or approval on an urgent basis in the national interest, the national interest analysis must also explain the reasons for the urgent action taken.
  - (3) In the case of a treaty that has been subject to ratification, accession, acceptance or approval and that is to be subject to withdrawal or denunciation by New Zealand, the national interest analysis must address the matters set out in paragraph (1) to the full extent applicable to that proposed action.

#### 386 Select Committee consideration of treaties

- (1) The Foreign Affairs, Defence and Trade Committee may itself examine a treaty referred to it or refer the task of examining the treaty to any other select committee.
- (2) If the Foreign Affairs, Defence and Trade Committee is not due to meet within seven days of the presentation of a treaty, and the subject area of the treaty is clearly within the terms of reference of another select committee, the chairperson may refer the treaty to that committee for examination and report to the House.

#### 387 Reports by Select Committees on treaties

- (1) A Select Committee must report to the House on any treaty that has been referred to it.
- (2) In examining a treaty and the accompanying national interest analysis, the committee considers whether the treaty ought to be drawn to the attention of the House –
  - (a) on any of the grounds covered by the national interest analysis, or
  - (b) for any other reason.
- (3) The committee must include the national interest analysis as an appendix to its report.



## **Keynote Address**





# International Law and Responsible Engagement

Daryl Williams\*

## Introduction

It is a pleasure for me to address the first joint conference of the Australian and New Zealand Society of International Law and the American Society of International Law. This is the second occasion on which I have addressed the Australian and New Zealand Society.<sup>1</sup>

This is an occasion on which I am able to stress the continuing importance of international law to so many areas of government. Indeed, a quick look at the issues you have already considered in various panels at this conference illustrates the wide range and ever increasing list of matters which are dealt with by international law. In this context, it perhaps would be remiss of me not to mention one of the mantras of the millennium — that is ‘globalisation’. It is perhaps stating the obvious to say that the world is becoming increasingly complex and intertwined. Goods and services flow freely across borders and we can communicate with ever increasing ease from one side of the world to the other. Regrettably, you cannot travel from one side of Australia to the other as fast as I would like to be able to. In such a world, the role and work of governments is increasingly complex. As international law responds to the challenges of globalisation, states are faced with a plethora of international rights, duties and obligations relating to a range of issues including protection of the environment, human rights and international trade and competition law, just to mention a few. A number of issues which the Commonwealth government has had to address during its current term in office highlight the complex role of international law in the day-to-day work of government.

## International obligations

Let me make it clear from the outset that Australia takes its international rights and obligations seriously. This is not always apparent from the way the government’s position is portrayed in the media. At one extreme, there are those who claim that Australia’s engagement with international law means that Australia is ceding sovereignty and control over important domestic issues. Some who express this view would prefer an Australia which is disengaged from the international community and its international obligations and responsibilities. At the other end of the spectrum are those who would seek to diminish the role for states in international law. They would give a greater say to international bodies and others not accountable to the Australian people. Instead of states, we would be faced with some overarching form of international government. Those of you from the United States would be familiar with this divide of views. Neither extreme is appropriate. However, they do highlight the challenges international law presents for states.

## The role of the state

So what is a state, or more accurately, the government of a state, to do? If we reject the isolationist response, and if we reject the view that states are irrelevant, what role is left for states in this increasingly intricate international arena?

States are and should remain the key actors in the evolution of international law. It is up to states to show responsible engagement with the international legal system. Given the increasing complexity and challenges of international law for states, I will today examine the concept of responsible engagement in three areas. The first is at the national level and involves exploring the increasing role of international law in domestic law. This will demonstrate the range of international legal issues which our courts analyse in their domestic decision making. The second area is the public international plane with a focus on the role of states in international dispute settlement. The increasing range of options for international dispute settlement calls for sophisticated choices

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\* Australian Attorney-General.

<sup>1</sup> The substance of this earlier address is to be found in D Williams, ‘Treaties and the Parliamentary Process’ (1996) 7 *Public Law Review* 199.

from states and responsible engagement with the international legal system. The third involves a step back from the role of states as such, and from the strict domain of public international law. This will involve consideration of the increasing complexities posed in areas of private international law. The complexities in this area call for the responsible engagement, not only of governments, but also the broader legal community and in particular the legal profession.

### International law in domestic law

One of the best examples of the complex role international law plays in domestic law is the United Kingdom's recent experience with the Pinochet litigation. As most of you would be aware, Spain had requested the extradition of General Pinochet, the former head of state of Chile, from the United Kingdom for alleged crimes of torture against Spanish citizens in Chile during his term in power.

The litigation raised a number of complex issues. Could General Pinochet claim immunity as a former head of state? Were the alleged acts that were the subject of the extradition warrant, 'official acts' that would attract immunity? Could General Pinochet be extradited for alleged acts of torture committed before the Torture Convention was implemented into United Kingdom law?

The House of Lords held that a former head of state cannot claim immunity in relation to acts of torture which were committed during his reign. As such it would have been possible for General Pinochet to be extradited from the United Kingdom and tried in Spain.<sup>2</sup>

General Pinochet was in fact released on medical grounds which indicated he was unfit to stand trial. He then returned to Chile where proceedings are currently under way against him. I understand that a Chilean appeal court in early June held that General Pinochet did not have immunity. However it is likely that this decision will be appealed.

Not only were the United Kingdom proceedings in the Pinochet case complex from an international law perspective, they were also procedurally complex. The first decision, that of a magistrate, did in fact commit General Pinochet for extradition. This decision was then quashed by a Divisional Court in the Queen's Bench Division.<sup>3</sup> Next, the case came before the House of Lords — not once, but twice. The first decision of the House of Lords held three to two that General Pinochet could not claim immunity as a former head of state.<sup>4</sup> The House of Lords then took the unprecedented step of hearing the same appeal again, with seven Law Lords, once it was revealed that Lord Hoffmann, one of the judges in the first appeal, and one of my examiners at Oxford, had formerly had a relationship with Amnesty International, who had intervened in the proceedings.<sup>5</sup> The second decision of the House of Lords again held, this time six to one, that General Pinochet could not claim immunity.<sup>6</sup> Clearly, the Pinochet case is significant in a number of respects — not all of which it would be appropriate to canvas today.

One striking aspect of the case was that in both decisions from the House of Lords, the Law Lords in the minority in both instances, expressed strong dissents. For example, in the second House of Lords decision, the majority held that state parties to the Torture Convention could not have intended that former heads of state would be able to claim immunity for official acts of torture. To find otherwise would be contrary to the object and purpose of the Torture Convention. However, Lord Goff based his dissent on the fact that the Torture Convention, unlike some other international agreements, made no express reference to the prosecution of heads of state. Nor did it make reference to whether or not heads of state could claim immunity.

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<sup>2</sup> However, he could only be tried in relation to acts of torture committed after the date on which the Torture Convention was implemented in United Kingdom law.

<sup>3</sup> *In re an Application for a Writ of Habeas Corpus ad Subjicendum re: Augusto Pinochet Ugarte* (1999) 38 ILM 68.

<sup>4</sup> *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others; ex parte Pinochet Ugarte* [1998] 3 WLR 1456.

<sup>5</sup> *In re Pinochet* [1999] 2 WLR 272.

<sup>6</sup> *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others; ex parte Pinochet Ugarte* (No. 3) [1999] 2 WLR 827.

The contrast between the majority and minority views highlighted the fact that the relationship between international law and domestic law is not a simple one. The Law Lords' different approaches to the interpretation of an international Convention, and as such the legislation implementing it, shows that the relationship between international law and domestic law is both dynamic and contested. Also, the differences of view are perhaps not so surprising given that the language of treaties is frequently the language of diplomatic compromise. Treaties are not always expressed in clear or decisive terms. Professor Shearer, who I am pleased to see here today, in commenting on the majority and minority views in the second House of Lords decision has said:

It must be admitted that both points of view have force. The lack of clarity in the [Torture] Convention itself no doubt has its explanation in the need to achieve consensus in international negotiations between numerous parties through avoidance of direct provisions that might be seen as confronting by some.<sup>7</sup>

In cases where there is some latitude in the language of a treaty, states which ratify and implement such treaties will have some discretion as to how they implement them. Similarly, judges called on to interpret a treaty, or the legislation implementing it, may also be faced with difficult questions about the meaning and intent of states parties to the treaty. It is this type of situation that calls for responsible engagement by both states and domestic courts with the international legal system.

Clearly, it is not only the Law Lords of the United Kingdom who must engage critically with international law. The United States Supreme Court and the Courts of Appeal in the various United States circuits are also faced with the challenge of interpreting international conventions. So too are the judges of the High Court of New Zealand, a recent example being the judgment of the New Zealand Court of Appeal in *Sellers v Maritime Safety Inspection*.<sup>8</sup> However, it is the decisions of Australian courts which raise international legal issues with which I am most familiar.

### Australian courts and international legal issues

In September last year, the Full Federal Court in Australia held in a majority decision that customary international law does not form part of the domestic law of Australia, unless it has been incorporated into our domestic law. That decision was in the two cases heard together, *Nulyarimma v Thompson* and *Buzacott v Hill*.<sup>9</sup> The decision focused on whether the international crime of genocide was part of Australian domestic law. Justices Wilcox and Whitlam held that genocide is not part of Australian law. Justice Merkel held that genocide is a common law offence in Australia, but dismissed the case on other grounds.

The fact that this was a split decision shows again that the relationship between international and domestic legal systems is a complex one. Indeed, this decision is currently the subject of a special leave application before the High Court of Australia.

### Teoh

In Australia, the basic principle that international law does not have effect domestically unless it is incorporated into domestic law was set out by then Chief Justice Mason and Justice Deane in the High Court's decision in *Teoh's* case.<sup>10</sup>

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<sup>7</sup> I Shearer, 'Extraditing Heads of State: The Pinochet Case' (1999) 10 *Public Law Review* 179, 183.

<sup>8</sup> [1999] NZCA 44. This case was cited recently by counsel for Japan in the hearing of the jurisdictional phase of the proceedings by Australia and New Zealand against Japan in the Southern Bluefin Tuna case.

<sup>9</sup> [1999] FCA 1192

<sup>10</sup> *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 286–287:

'It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute ... This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within

As the Australian participants in this conference would be well aware, the *Teoh* decision did more than simply set out the basic principle that international treaties must be incorporated into Australia's domestic law to form part of Australian law. The High Court found that by entering into a treaty the Australian government creates a 'legitimate expectation' in administrative law that the executive government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law.

The government believes the High Court's decision in *Teoh* gave treaties an effect in Australian law which they did not previously have. The government is firmly of the view that this development is not consistent with the proper role of parliament in implementing treaties in Australian law.

The High Court made it clear that a legitimate expectation cannot arise where there is either a statutory or executive indication to the contrary. On 25 February 1997, the Minister for Foreign Affairs and I made a joint statement which set aside any such expectations arising out of entry into treaties. This was a clear expression by the executive of a contrary intention of the sort referred to by the majority in the High Court in *Teoh*. It followed the approach taken by successive governments — Labor and Coalition.

At that time, we also announced that legislation would be introduced into the parliament to displace the legitimate expectation in administrative law which would otherwise arise out of entry into treaties. The Administrative Decisions (Effect of International Instruments) Bill 1997 fulfilled that undertaking. However, it lapsed with the calling of the election. An identical Bill was introduced into the House of Representatives last year, and has been passed by that House. It is now before the Senate. But there are a lot of things currently before the Senate.

The Bill reflects the government's commitment to confirming the proper role of the parliament to enact legislation to give effect to treaties. The Bill, if passed, will not affect the way in which treaties may otherwise have relevance in Australian law. For example, international law will still be used as an aid to the interpretation of statutes or as an aid in the development of the common law.<sup>11</sup>

### Treaty reforms

In addition to the role of Australian courts in dealing with international law, many of you would be aware of the reforms the government introduced to ensure the involvement of the public and parliament in the treaty process. Since the 1996 reforms, all treaties are required to be tabled in both houses of parliament for at least 15 sitting days prior to action being taken to bring the treaty into force. Each treaty text must be accompanied by a national interest analysis which sets out the advantages and disadvantages to Australia of entering into the treaty. Treaty texts and these analyses tabled in parliament are also referred automatically to the Joint Standing Committee on Treaties. And for the benefit of our United States counterparts, a joint committee is a committee of both houses of parliament. Within 15 sitting days from the date on which the treaty was tabled, this committee reports to the parliament on the proposed treaty action.

It remains the executive's prerogative to enter into treaties and parliament is not called on to approve them. This preserves the constitutional balance between the powers of parliament and the executive. These reforms were

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the providence of the Executive in the exercise of its prerogative power whereas the making and the alteration of the last fall within the providence of Parliament, not the Executive ... So a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.'

See also A Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20; and G Brennan, 'The Role of Domestic Law in International Relations' (1999) 10 *Public Law Review* 185.

<sup>11</sup> As noted by Justice Brennan in the *Mabo* judgment, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42:

'... international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'

reviewed in August last year.<sup>12</sup> This review confirmed the singular success of the 1996 Treaty Reforms which now have bipartisan support in the parliament.

As Justice Kirby noted in his keynote address to the conference on Monday, the international issues arise in a wide range of the court's day-to-day decisions, such as immigration, extradition, intellectual property, employment and maritime law. We can even add to that, family law. The wide range of areas which international law deals with is also reflected in the diversity of treaties which come before the Joint Standing Committee on Treaties. Since 1996, the committee has issued 34 reports concerning some 185 treaty actions.<sup>13</sup> No doubt this trend will continue. As such, there will remain a continuing need to ensure that at the national level, states continue to show responsible engagement with their international obligations.

### **International dispute settlement**

Meanwhile, the increasing level of interaction between states on the international plane inevitably gives rise to disagreements between them. Similarly, the sophistication of international law has opened up ever increasing and more specialised options for dispute settlement.

The International Court of Justice, and its forerunner, the Permanent Court, have traditionally played a significant role in adjudicating disputes between states. No doubt they will continue to do so. However, states are also submitting disputes to specialised dispute resolution mechanisms which are designed to deal with subject-matter specific disputes.

Like any responsible litigant, a state does not take the step of recourse to judicial dispute settlement lightly. Usually a state will only do so as a matter of last resort, after other means of dispute settlement such as negotiation, mediation, or conciliation have been ineffective in resolving the outstanding issues between the parties. Like many litigants involved in cases before domestic courts, states are well aware of the costs involved in international litigation, in terms of both time and resources. Usually, states are also aware that although they may be in dispute over a particular issue, they still have a broader bilateral relationship to maintain.

### ***Southern Bluefin Tuna Case***

One of Australia and New Zealand's most recent experiences of international dispute settlement is with the procedures in Part XV of the United Nations Law of the Sea Convention. In July last year, Australia and New Zealand commenced proceedings against Japan under the convention. The proceedings are over Japan's failure to conserve and failure to cooperate in the conservation of southern bluefin tuna.

Southern bluefin tuna is a valuable, highly migratory species. In 1998 and again in 1999, Japan conducted unilateral experimental fishing for southern bluefin tuna over and above its last agreed national quota. Australia and New Zealand submitted the dispute to an arbitral tribunal set up under Annex VII of the convention. Where a state party to the convention has not previously nominated a preferred option for compulsory and binding settlement of law of the sea disputes, an Annex VII Tribunal becomes the state's option by default. Pending the constitution of the arbitral tribunal, Australia and New Zealand also submitted a request for provisional measures to the International Tribunal for the Law of the Sea.

The tribunal heard Australia and New Zealand's request for provisional measures in August last year. I had the honour of opening Australia and New Zealand's case before the Tribunal. It was the first time I can recall appearing before 22 judges at once. Let me say that it was a very distinguished bench but it was certainly a very long one. Australia and New Zealand appointed Judge ad hoc Shearer to the tribunal.

The preparation of the Australian and New Zealand case was a true trans-Tasman team effort, with the Office of International Law in my Department and the Australian and New Zealand Foreign Affairs Departments working

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<sup>12</sup> Commonwealth of Australia, *Review of the Treaty-Making Process* (1999).

<sup>13</sup> Report 24 of August 1999 covers a two day seminar held by the Joint Standing Committee on Treaties on 'The Role of Parliament in Treaty Making'.

up our submissions. The request for provisional measures was served on Japan on 15 July, it was filed with the Tribunal on 30 July and the hearing commenced on 18 August 1999. Japan had engaged the United States firm Cleary Gottlieb Steen and Hamilton to run their case.

The Tribunal handed down its decision on 27 August.<sup>14</sup> That is a model for some domestic courts! Essentially, the Tribunal granted the bulk of the provisional measures sought by Australia and New Zealand.<sup>15</sup> The provisional measures phase of the *Southern Bluefin Tuna Case* was significant in terms of new methods of dispute resolution. It was only the second case to come before the International Tribunal for the Law of the Sea. However, it was also significant in terms of conserving high seas fisheries resources.

The *Southern Bluefin Tuna Case* did not end with the provisional measures phase. After the Tribunal's decision, Australia, New Zealand and Japan then established a tribunal under Annex VII of the convention. Unlike the International Tribunal for the Law of the Sea, the Annex VII Tribunal is not a standing Tribunal, rather it is an ad hoc Tribunal. The parties had to come to some agreement on a number of issues, such as who would be the arbitrators, the venue for the arbitration, who would act as a Registrar or Secretariat, and whether there should be rules of procedure. This is in itself not an easy task.

Japan raised preliminary objections over the jurisdiction of the Annex VII Tribunal and the admissibility of the Australia/New Zealand claims. Therefore the proceedings are being conducted in two phases. The first and current phase deals with those issues of jurisdiction and admissibility, and the second, if reached, will deal with the merits. The first phase of the hearing on jurisdiction was last month. It was held in Washington DC and the International Centre for the Settlement of Investment Disputes acted as the Tribunal Secretariat. After extensive argument on whether or not the dispute is one concerning the 'interpretation or application of UNCLOS',<sup>16</sup> the arbitrators have retired to consider their decision, which we await with interest.

### WTO dispute settlements

The procedures for dispute settlement under the convention are not the only international dispute mechanisms in which Australia has recently engaged. As a member of the World Trade Organisation, Australia, like the United States, has been involved in various cases in the WTO dispute settlement mechanisms, including Panel and Appellate Body decisions. Indeed, some of our WTO experiences, such as the recently settled Howe leather dispute and the disagreement over lamb imports, have seen Australia and the United States on opposite sides.<sup>17</sup> New Zealand also has a disagreement with the United States over lamb imports.

Given the increasing complexity of the rules governing the multilateral trading system, it is practically inevitable that more and more states will disagree about the application and interpretation of those rules. Indeed, for some states, the WTO dispute settlement mechanisms are not the only forum for resolving trade disputes.

<sup>14</sup> International Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Requests for Provisional Measures, 27 August 1999, reported in (1999) 38 ILM 1624. The transcript from the proceedings is available at <<http://www.un.org/Depts/los/index.htm>>.

<sup>15</sup> The Tribunal's decision included orders that Australia, Japan and New Zealand: shall each refrain from conducting an experimental fishing program involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation; and that they shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties.

<sup>16</sup> Pursuant to United Nations Convention on the Law of the Sea (UNCLOS) Article 288(1), Annex VII Tribunals have jurisdiction over disputes concerning the interpretation or application of UNCLOS. The transcript of the hearings on jurisdiction is available at the International Centre for Settlement of Investment Disputes website, <<http://www.worldbank.org/icsid/>>.

<sup>17</sup> Australia — Subsidies Provided to Producers and Exporters of Automotive Leather — Report of the Panel, 25.05.99, WT/DS126/R; United States — Safeguard Measure of Import of Lamb Meat from Australia — Request for the Establishment of a Panel by Australia, 15.10.99, WT/DS/178/5.

The United States, for example, has the option of dealing with regional trade disputes under the North America Free Trade Agreement.

### **International Criminal Court**

Another significant international development in recent times, as noted by the Minister for Foreign Affairs yesterday, has been the extensive negotiations and conclusion of the Rome Statue for the International Criminal Court. While this is not another avenue for state-to-state dispute settlement, it is an important recognition by states of the need to ensure that international obligations are met. Australia has been a strong supporter of the International Criminal Court.

Not only has Australia been involved in the development of international criminal law, so too have been a number of Australian judges. Justice Sir Ninian Stephen and Justice David Hunt have both served as judges on the International Criminal Tribunal for the former Yugoslavia.

Although there are increasing options for states to pursue the judicial settlement of international disputes, judicial settlement is, of course, only one option for states. As I noted earlier, it is certainly not an option which states pursue lightly. Besides the mechanisms in many treaties for compulsory judicial settlement of state-to-state disputes, other treaties set up reporting mechanisms to monitor a state's compliance with treaty obligations. This will often involve a committee considering reports submitted by states.

### **The role of United Nations committees**

These mechanisms are distinctly different from that of compulsory judicial settlement. I am thinking in particular of the reporting mechanisms set up under the various UN human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of all forms of Racial Discrimination (CERD). It is the government's view that such UN Committees must keep within their proper mandate. The recent approach of the CERD Committee in considering Australia's reports under the Convention,<sup>18</sup> highlights this. The government was seriously disappointed with the Committee's comments. In particular the Committee's failure to engage with the extensive material put before it by the government.

Contrary to some media reports, the government's position is not motivated by an inability to accept well-founded, well-reasoned criticism. Rather, our view is that the Committee failed to deliver well-founded criticism, strayed well beyond its mandate and made recommendations of a political nature. This is not what responsible governments such as Australia expect from the UN system. As a responsible government with a strong history of involvement with and support for the UN, we engage with the UN treaty committees in good faith, submitting detailed reports and sending strong delegations to appear before the committees. We expect the same responsible engagement from the UN treaty committees.

### **Treaty review**

The committee's approach highlighted a number of concerns which have given rise to the government's announcement of a whole-of-government review of Australia's interaction with the UN treaty committee system. The mere announcement of that review created some excitement. But a review, by itself, is something to be welcomed, not feared.

As the Minister for Foreign Affairs also indicated yesterday, the review is not about withdrawing from treaty obligations. It is important here to distinguish between acceptance by states of the standards set by the UN treaties and a states engagement with the committees established under them. While we do not see withdrawal

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<sup>18</sup> Committee on the Elimination of Racial Discrimination, 54<sup>th</sup> Session, Decision 2(54) on Australia, 18.03.99, A/54/18, para.21(2); Committee on the Elimination of Racial Discrimination, 55<sup>th</sup> Session, Decision 2(55) on Australia, 16.08.99, A/54/18, para.23(2); Committee on the Elimination of Racial Discrimination, 56<sup>th</sup> Session, Concluding Observations by the Committee on the Elimination of Racial Discrimination, 23.03.00, CERD/C/56/Misc.42/Rev3.

from treaties as an option, the government firmly believes that there are real problems with the treaty committee system which need to be addressed. We are committed to examining the way we interact with UN treaty committees to ensure that such interaction is constructive and worthwhile. In particular we are concerned to focus on:

- the need for committees and individual members to work within their mandate;
- the need to ensure that fair and appropriate recognition is given to the input of democratically elected governments and that the views of non-government organisations are not given primacy over the input of governments; and
- the need for greater coordination between committees.

In examining these problems we do not turn our back on the UN. Indeed, Australia has been actively pursuing treaty body reform for many years. This is an attempt to improve the operation, accountability and effectiveness of the UN committees. Australia has not been alone in pursuing this type of reform. Other like-minded states such as New Zealand, Canada and Norway have also sought to improve the committee system. Australia remains committed to a constructive process of reform.

### Private international law

Let me step back from the realm of public international law and states' engagement with dispute settlement and treaty monitoring mechanisms for a moment to briefly consider what is happening in another area of international law, namely, private international law. It is not only states which have to navigate their way through an increasing maze of international issues. Multinational corporations that operate their business across a number of jurisdictions are increasingly faced with multiple legal regimes with which they must comply. As Chief Justice Gleeson noted in his last state of the judiciary address:

Much litigation, especially commercial litigation, now has an international element, because of the nationality of one or more of the parties, or the place of residence of witnesses, or the location of the subject matter of the disputes.<sup>19</sup>

Now this, in turn, leads to complex developments in conflict of law rules, particularly the principles of *forum non conveniens* and recent developments in relation to anti-suit injunctions. That international element is highlighted also in strictly domestic decisions of Australian courts. Witness the increasing use of the domestic jurisprudence and practice of an ever-expanding range of countries which is being made by both counsel and courts in Australia. Whether the issue in the case is one of constitutional law, common law, or equity, or particular areas like patents,<sup>20</sup> we are stopping to see what other states have decided in relation to similar issues. No doubt ready access to the judicial decisions of the courts of other countries has something to do with it. Nevertheless, I suspect that while the decisions of different jurisdictions will continue to inform and influence each other, state's judicial borders will remain strong.

### Treaties with other states

Some of the complex international aspects of domestic litigation and conflict of law issues are in fact being addressed at the state-to-state level, both bilaterally and multilaterally. Bilaterally, Australia has entered treaties with other states, dealing with judicial assistance in civil and commercial matters.<sup>21</sup> These treaties aim to

<sup>19</sup> M Gleeson, 'The State of the Judiciary' (edited version of the Chief Justice's speech given at the Australian Legal Convention, Canberra, 10 October 1999), (2000) 74 *Australian Law Journal* 147.

<sup>20</sup> See eg, the judgment of the New Zealand Court of Appeal in *Pharmaceutical Management Agency Limited v The Commission of Patents and Ors* [1999] NZCA 330 [28].

<sup>21</sup> See eg, Agreement on Judicial Assistance in Civil and Commercial Matters and Co-operation in Arbitration between Australia and the Kingdom of Thailand, done at Canberra on 2 October 1997; and Treaty on Judicial Assistance in Civil



facilitate the service of process and taking of evidence in civil and commercial legal proceedings in both countries. For instance, these treaties provide a mechanism to allow a court of one contracting party to take evidence on behalf of a court in the other contracting party. In some cases this may be done directly between the two courts, via video link.<sup>22</sup>

Multilaterally, Australia has been participating in the recent negotiations under the auspices of the Hague conference on private international law to develop a new multilateral convention on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. This new draft convention deals with two issues. First, the jurisdiction of courts in civil proceedings. Second, the recognition and enforcement of foreign judgments. In terms of jurisdictional issues, the convention would deal with the difficulties that arise out of conflicts in jurisdiction between courts in different states. At the moment, the special commission, which was established in 1992 to develop the convention has opted for a mixed approach. That is, there would be a list of permitted grounds of jurisdiction, a list of prohibited grounds of jurisdiction and a 'grey' list of grounds of jurisdiction on which a court may choose to rely, depending on the domestic laws of that particular state. A judgment resulting from the exercise of a ground of jurisdiction in the grey list would not be entitled to recognition in another contracting state. Existing litigation relating to disputes across international boundaries is subject to uncertainty as to jurisdiction and unpredictability in relation to the enforcement of judgments. Clearly the response at a state-to-state level, through the development of this new multilateral convention, would go some of the way to overcoming these uncertainties.

I note with interest that the Hague conference held a meeting in Ottawa this year to consider the impact that the internet, and in particular the growth in electronic commerce, may have on existing private international law rules. Business and consumers are rightly concerned about the continued relevance of existing rules that govern which law applies to resolve their disputes, which courts have jurisdiction to determine those disputes and their ability to enforce remedies across international boundaries.

The speed and reach of the internet creates unique problems for those concerned with the rules regulating jurisdiction and applicable law in torts and intellectual property disputes. The Hague conference has decided that the jurisdiction rules in the proposed judgments convention must apply in these areas with appropriate modifications. Obtaining world-wide agreement on those modifications is one of the real challenges for the conference in developing a successful convention. Like any multilateral negotiation, the road is long and often turns in unexpected directions. How the negotiations for this convention will progress remains to be seen. Australia will remain actively engaged in the negotiations. No doubt both litigants and the legal profession will follow those negotiations with interest.

## Conclusion

It is evident from the three areas I have discussed this morning that international law continues to create complex challenges for states. There are no easy answers to these challenges. However, states as the primary actors by definition do have, and will continue to have, the leading role in the development and implementation of international law. As good international citizens, states must show responsible engagement with the international legal system. It is not only states which must understand and engage with international law. Lawyers must do so also, even if only for the running of a successful domestic practice in a global era. I trust this conference has provided an opportunity both for new understanding, and for a new or renewed engagement with international law.

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and Commercial Matters between Australia and the Republic of Korea, done at Canberra on 17 September 1999.

<sup>22</sup> See Article 24 of the Treaty with Korea.



# **Theories of International Law for the 21<sup>st</sup> Century: A Conversation**

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AUSTRALIAN AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW  
AMERICAN SOCIETY OF INTERNATIONAL LAW  
2000 PROCEEDINGS



## A New Focus for Theory

Karen Knop\*

The fact that much of the most noticed new work in international law shares a focus is, strangely, a fact about this work that seems to have gone unnoticed. The common focus of these various projects is the localisation of international law through interpretation and implementation, particularly by domestic courts. The projects differ in aim and outlook, which perhaps explains why each has been taken on its own. But all revolve around some theory, old or new, of the relationship between the international and the local. By considering them together, it is possible to see this as an emerging focus for theorising about international law at the beginning of the twenty-first century and to relate it to other important theoretical work, including by the chair and members of this panel. In doing so, I will briefly suggest both why I think the focus on the interaction between international and domestic is a promising one and what sort of inquiry I think it demands.

### An emerging focus

In the last five years or so, international lawyers have become increasingly interested in the potential of domestic courts as enforcers of international law. Tom Franck has co-edited a volume of papers entitled *International Law Decisions in National Courts*.<sup>1</sup> Other books include *Enforcing International Human Rights in Domestic Courts* edited by Benedetto Conforti and Francesco Francioni<sup>2</sup> and *Using Human Rights Law in English Courts* by Murray Hunt,<sup>3</sup> and a comparative study edited by Craig Scott on torture as tort<sup>4</sup> will soon be out. The Institute of International Law,<sup>5</sup> International Law Association,<sup>6</sup> American Society of International Law<sup>7</sup> and the British Branch of the International Law Association<sup>8</sup> have all undertaken studies of international law in domestic courts. Whereas the aim of this scholarship is often to use the domestic courts to extend the reach of international law, a group of revisionist scholars in the United States, including Curtis Bradley, Jack Goldsmith<sup>9</sup> and John Yoo,<sup>10</sup> has been publishing prominently on American foreign affairs law with quite the

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<sup>1</sup> T M Franck and G H Fox (eds), *International Law Decisions in National Courts* (1996).

<sup>2</sup> B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997).

<sup>3</sup> M Hunt, *Using Human Rights Law in English Courts* (1998).

<sup>4</sup> C Scott, (ed), *Torture As Tort: Comparative Perspectives On The Development Of Transnational Human Rights Litigation* (2000).

<sup>5</sup> 'The Activities of National Judges and the International Relations of Their States' (1993) 65-I *Year Book of the Institute of International Law* 327; terminating in the resolution 'The Activities of National Judges and the International Relations of Their States' (1994) 65-II *Year Book of the Institute of International Law* 318.

<sup>6</sup> For the work of the International Law Association's Committee on International Law in National Courts, see ILA, *Report of the 66th Conference* (1994) 326 (first report and discussion); ILA, *Report of the 67th Conference* (1996) 30 (resolution); 570 (second report and discussion); and ILA, *Report of the 68th Conference* (1998) 28 (resolution); 659 (third report and discussion).

<sup>7</sup> The American Society of International Law has sponsored a project on the application of international environmental law in domestic courts. For the preliminary results, see (1998) 7 *Review of European Community and International Environmental Law* (Issue 1 on 'Judicial Application of International Environmental Law'). The American Society of International Law has also recently established an outreach program for the judiciary. T M Franck, 'Notes from the President' (July-August 1999) *ASIL Newsletter* 1; T M Franck, 'Notes from the President' (September-October 1999) *ASIL Newsletter* 1.

<sup>8</sup> The Human Rights Committee of the British Branch of the International Law Association is currently studying the use of domestic courts in civil suits concerning serious human rights violations abroad.

<sup>9</sup> Eg, C A Bradley and J L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern

opposite aim. Their ambition is to restrict the power of United States courts to apply international law directly by reinterpreting the leading cases on the status of treaties and custom in domestic law. This challenge has caused the American internationalist establishment to defend and fortify what has long been the standard interpretation of the constitution and the case-law.<sup>11</sup>

If the theories of international law at work thus far seem familiar, the fresh consideration of the relationship between international and domestic has also served as the point of departure for new theories of international law. For Anne-Marie Slaughter, the observation that global networking among judges has led to greater use of international and comparative law in domestic courts has become the foundation for a new theory of transjudicialism.<sup>12</sup> Benedict Kingsbury's study of the problem of how to formulate a general definition of 'indigenous peoples' without doing violence to particular groups in particular contexts has pointed him to the international relations theory of constructivism as a useful import for international law in this regard.<sup>13</sup> In his analysis of the Rwanda war crimes tribunal, José Alvarez has relied on the insights of critical race theory to argue that war crimes prosecutions should be hybrids of the international and the domestic.<sup>14</sup>

Clearly, these different authors see the localisation of international law differently and intend it to meet different objectives. But the very fact of this difference highlights what I see as the promise of their common focus. And this is the possibility that domestic interpretation might help to form and legitimate international law for a world that is increasingly interdependent, yet increasingly diverse.

### A disciplinary neglect

International lawyers traditionally have not paid much attention to the local life of international law, to the ways that it takes on meaning in a particular time and place. The concern has been with the processes of disembedding by which international law is formed, with the doctrine of sources and its justifications, but not with this reembedding of international law. The domestic application of international law is assumed to be straightforward or, where it goes awry, provincial or partisan. Although human rights lawyers often talk about 'bringing international human rights home', this is seldom informed by a very reflective view of how international norms are translated into domestic ones. Radical critiques of international law have also tended to centre on the creation of international law, identifying deep problems of exclusion and inequality in the process and outcome. Thus Third World, feminist, indigenous and other critiques have targeted the assumptions of consent and neutrality in the doctrine of sources: that all agree to international law, or that it abstracts from and therefore stands above the particularities of each. Only rarely have such critics looked to the domestic interpretation of international law as a way to begin to address the challenge of diversity.

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Position' (1997) 110 *Harvard Law Review* 815.

<sup>10</sup> Eg, J C Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding' (1999) 99 *Columbia Law Review* 1955.

<sup>11</sup> See, eg, H Hongju Koh, 'Is International Law Really State Law?' (1998) 111 *Harvard Law Review* 1824; M S Flaherty, 'History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"' (1999) 99 *Columbia Law Review* 2095.

<sup>12</sup> Eg, A-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99, reprinted in Franck and Fox, above n 1 at 37; A-M Slaughter, 'The Real New World Order' (September/October 1997) 76:5 *Foreign Affairs* 183; A-M. Slaughter, 'Governing the Global Economy Through Government Networks' in M Byers (ed), *The Role of Law in International Politics* (2000). Responses to this work include P Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435; J Alvarez, (2000) 94 *American Society of International Law Proceedings*.

<sup>13</sup> B Kingsbury, ' "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law* 414. This article received the 1999 Francis Deák Prize for meritorious contribution to international legal scholarship published by a younger author in the *American Journal of International Law* (1999) 93 *American Journal of International Law* 469.

<sup>14</sup> J E Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365.

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There is, however, an important strand of critical scholarship that stresses the artificiality of the very structure of the international and the domestic, and the association of this dichotomy with others such as centre/periphery, civilised/uncivilised, sophisticated/primitive, good/bad. Among the members of this panel, David Kennedy, in a ground-breaking article on new approaches to comparative law, has discussed how international law's aspiration to transcend the cultures of all states, to achieve cultural neutrality, is tied to its cantonisation of culture within state borders.<sup>15</sup> More recently, Anne Orford has shown that the international discourse of intervention relies on narratives ingrained in the popular imagination of the West to cast the international community as masculine action hero and the state targeted for intervention as helpless feminine victim.<sup>16</sup>

Much of the power of these critiques, and related critiques by Tony Anghie, Nathaniel Berman, Annelise Riles and others, lies in their analysis of how those who participate in international law project their own imagined vision of the world through international law and how this worldview lends a dangerously false inevitability to international law argument and action. Whereas this analysis involves a certain stasis of the discourse and reliance on its quality of imposition, the new focus on the localisation of international law invites investigation into the interaction between the international and the domestic. What meaning is produced in this interaction? By way of example, I need only look to the discussion of the *Pinochet Case* by Karen Engle, who was to have been on this panel. Whereas commentators tended to see in *Pinochet* either the welcome oiling up of international law's enforcement machinery or the unwelcome hand of colonialism, Karen introduced the idea that a *Pinochet* trial in Spain, which was then still a possibility, might not just be about Chile's past, but also about Spain's and the relationship between the two.<sup>17</sup> As the *Pinochet* example illustrates, most international lawyers, traditionalists and critics alike, have as yet left unexamined the assumption that the domestic interpretation of international law is uniform; whether uniformly good or uniformly bad. A few, like Ed Morgan,<sup>18</sup> have shown that it is instead indeterminate. What this suggests is that the process of translation from international to domestic is not a mechanical determination of bindingness. It involves choices about how the international is expressed locally and why. Over the course of the conference, this point has been well illustrated by Justice Kirby's stirring opening address, in which he described his work in the 'engineroom' of international law,<sup>19</sup> and by the allusions in yesterday's panel on national treaty regimes to the controversial Australian and New Zealand case-law on the application of international law.<sup>20</sup> Indeed, it is this space for judgment, and therefore for contention, that the American foreign affairs law revisionists explicitly fear.<sup>21</sup> And, as judges in many countries increasingly look to non-binding international law, particularly in constitutional cases, international lawyers of other stripes have also come to worry.<sup>22</sup>

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<sup>15</sup> D Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' [1997] *Utah Law Review* 545.

<sup>16</sup> A Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679.

<sup>17</sup> K Engle, Presentation, Panel on 'Transnational Public Interest Law Litigation: Rights or Solutions?' Harvard Law School, 23 April 1999 (visited 6 June 2000) <[http://www.law.harvard.edu/Admissions/Graduate\\_Programs/chayes/right.html](http://www.law.harvard.edu/Admissions/Graduate_Programs/chayes/right.html)>.

<sup>18</sup> See, eg, E Morgan, 'In the Penal Colony: Internationalism and the Canadian Constitution' (1999) 49 *University of Toronto Law Journal* 447.

<sup>19</sup> M Kirby, 'International Law: Down in the Engineroom' (Keynote address by Justice Michael Kirby, of the High Court of Australia to ANZSIL/ASIL 2000 Conference 'International Legal Challenges for the 21st Century', Sydney, 26 June 2000).

<sup>20</sup> 'Comparative Lessons from National Treaty Regimes' (Panel at ANZSIL/ASIL 2000 Conference 'International Legal Challenges for the 21st Century', Canberra, 28 June 2000.)

<sup>21</sup> See eg, C A Bradley, 'A New American Foreign Affairs Law?' (1999) 70 *University of Colorado Law Review* 1089, 1102–1104; C A Bradley and J L Goldsmith, 'Pinochet and International Human Rights Litigation' (1999) 97 *Michigan Law Review* 2129, 2140–2146, 2175–2179.

<sup>22</sup> See, eg, Alston, above n 12.

### Thinking about translation

But the uncertainty inherent in the process of cultural translation from international to domestic law is potentially fruitful rather than threatening. 'It is the "inter" — the cutting edge of translation and negotiation,' Homi Bhabha has written, that opens a space in which 'we will find those words with which we can speak of Ourselves and Others.'<sup>23</sup> Once we recognise the creativity involved in the domestic application of international law, we can begin to examine its importance as a way to craft a meaning for international legal norms that will resonate both internationally and domestically. This promise may well have been what prompted Benedict Kingsbury to pursue the relationship between international and local as a way to define the term 'indigenous peoples' and José Alvarez to do the same institutionally in drawing out the lessons of the Rwanda war crimes tribunal. Seen in this light, what is needed is some way of understanding and evaluating the process of translation. Benedict Kingsbury's constructivism is primarily an analytical device, while José Alvarez's use of critical race theory goes to the question of legitimacy. We need to develop both.

In a recent article,<sup>24</sup> I have argued that one way to uncover the nature and potential of the domestic application of international law is to note the *problematique* it shares with comparative law: how and why we use the norms of other communities to judge our own. For despite the enduring campaign of international lawyers to make international law familiar, it is, as its critics have shown, also foreign. The discipline of comparative law offers a resource for beginning to think about how to give international law form and legitimacy in a specific society because comparativists, unlike internationalists, are attentive to the nature of translation, its significance and justification. In bringing comparative law to bear on international law, I have benefited from the work of others, again including some of my co-panellists. Tom Franck has long had a parallel interest in comparative law, and I recently came across his book *Comparative Constitutional Process*, which surveys the treatment of English common law in post-colonial African and Asian states.<sup>25</sup> Over the past few years, David Kennedy and Karen Engle have been central to a new and exciting critical alliance between the disciplines of international and comparative law.<sup>26</sup> My project, I think, differs from, say, David Kennedy's or Karen Engle's, in that it is interested less in critiquing the dominant, primarily scholarly discourse of the two disciplines and more in grasping the complexity of local judgment in a globalising world. As such, it is the comparative *problematique* and the most creative comparative law thinking about this *problematique*, as opposed to the most established, that I propose we draw on. These resources and more will be needed to begin to explore the promise that the new century's normative dynamics may hold for a simultaneously integrating and diversifying world.

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<sup>23</sup> H K Bhabha, 'The Commitment to Theory' (Summer 1988) 5 *New Formations* 5, 22.

<sup>24</sup> K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501.

<sup>25</sup> T M Franck, *Comparative Constitutional Process: Cases and Materials. Fundamental Rights in the Common Law Nations* (1968).

<sup>26</sup> Karen Engle and several of her colleagues at the University of Utah College of Law organised a 1996 conference on 'New Approaches to Comparative Law', which brought together internationalists and comparativists. The conference papers appeared in (1997) *Utah Law Review*. For David Kennedy's contribution, see above n 15.



# The Power of International Law: From Sovereign to Subject

Anne Orford\*

## Power and international law

The broad theoretical question that most interests me at present is the relationship between power and international law. The question of this relationship is one that has been firmly on the theoretical agenda of our discipline since at least the nineteenth century. International lawyers in general are practised in articulating a nuanced account of the power of law. This is in part due to our training in responding to the attacks of domestic positivists such as the nineteenth-century English legal philosopher John Austin, whose well-worn argument is that international society lacks an overarching sovereign, and thus lacks the power to create law.<sup>1</sup> Since the inter-war period, international lawyers have also been concerned to respond to realist international relations scholars, for whom it did not seem at all clear that international law had the capacity to constrain abuses of power by powerful states or to create order out of the anarchic state of international relations.<sup>2</sup> International legal texts thus often open with an account of the nature of international law and a concern with the question: 'how can legal order be created among sovereign states?'

The answer to that question often derives from a positivist focus on the consent of states to the laws governing international society, or from a process-based belief that the design of realistic international organisations cannot ignore how power is actually distributed. Either way, international lawyers do not usually conceive of international law as embodying or enacting sovereign power. Indeed, the question 'is international law really law', a question that haunts international legal theory, is a manifestation of the sense that international law lacks this sovereign force. Yet while international lawyers recognise that international law does not emanate from a single, sovereign authority, the discipline has generally not questioned that such power vests somewhere, usually in those sovereign states that are the source of international law.

So, for example, when Louis Henkin says 'First, law is politics', we have a shared sense of what he means and does not mean by that statement. Traditional international legal scholarship assumes that politics goes on in the public sphere, and that power is a commodity that can be held by particular entities. Those entities may be superpowers exercising power over the new world order, sovereign states exercising power over their peoples and territories, international organisations at times managing to exercise such power over 'failed' or disordered states during successful interventions, or the market disciplining states that have failed to organise their 'economic fundamentals'. International law is primarily understood as either in service to, or as an attempt to constrain, such powerful entities. The principal disciplinary question relating to power is how to orient international law to power, or how best to deal with the realities of the operation of power in the international sphere. As a result, international lawyers focus most of our attention on analysing the ways in which international law can assist in constraining, disabling or negotiating with those who are imagined as holding power.

In the essay upon which this paper is based, I argue that international lawyers as a whole need to think more broadly about the relation between power and international law, and that one way this can be done is by following the methodological shift proposed by Michel Foucault away from thinking about sovereign power to thinking about disciplinary power.<sup>3</sup> Foucault argues that disciplinary power has been the dominant model of

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<sup>1</sup> J Austin, *The Province of Jurisprudence Determined* (first published 1832, 1954 ed) 302.

<sup>2</sup> For literature discussing the division, and subsequent post-Cold War rapprochement, between the disciplines of international law and international relations, see D Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9, 106–9; G Simpson, 'The Situation on the International Legal Theory Front' (2000) 11 *European Journal of International Law* 439.

<sup>3</sup> A Orford, 'Positivism and the Power of International Law' (2000) 24 *Melbourne University Law Review* (forthcoming).

power that emerged in liberal democracies in the seventeenth and eighteenth centuries, and that this form of power operates by constituting subjects.<sup>4</sup> He suggests:

Let us not, therefore, ask why certain people want to dominate, what they seek, what is their overall strategy. Let us ask, instead, how things work at the level of on-going subjugation, at the level of those continuous and uninterrupted processes which subject our bodies, govern our gestures, dictate our behaviours etc. In other words, rather than ask ourselves how the sovereign appears to us in his lofty isolation, we should try to discover how it is that subjects are gradually, progressively, really and materially constituted ... We should try to grasp subjection in its material instance as a constitution of subjects.<sup>5</sup>

Let me give two examples of how I see the relationship between disciplinary power and international law operating. The first example is the way in which legal texts about the United Nations Security Council or the North Atlantic Treaty Organisation's (NATO) actions legitimise the use of force. These texts have an effect as cultural products. The new respectability of military intervention, like nineteenth-century imperialism and colonialism, is enabled through faith in the idea that 'certain territories and peoples *require* and beseech domination'.<sup>6</sup> Whether through arguments about the need to control state aggression and increasing disorder, or through appeals to the need to protect human rights, democracy and humanitarianism, international lawyers paint a picture of a world in which increased intervention by international organisations is desirable and in the interest of those in the states targeted for intervention. The stories that explain and justify the new interventionism have increasingly become part of everyday language through media reports and political sound bites. As a result, these strategic accounts of a world of sovereign states and of authorised uses of 'high-tech' violence become more and more a part of 'the stories that we all live inside, that we live daily'.<sup>7</sup> Legal texts about intervention create a powerful sense of self for those who identify with the hero of that story, be that the international community, the Security Council, the UN, NATO or the United States.<sup>8</sup> Law's intervention narratives thus operate not only, or even principally, in the field of state systems, rationality and facts, but also in the field of identification, imagination, subjectivity and emotion.

A second example is the way in which international economic texts provide an alibi for the presence of the 'international community' in states that are subject to economic restructuring. These texts make sense of the relations between 'investors' and 'developing states' in terms of a narrative of progress and growth in which a character called Capital is the agent of wealth and prosperity.<sup>9</sup> This creates the sense that actions undertaken to enable the exploitation and control of people and resources in such states are in fact about charity and benevolence. A belief in prosperity and progress as measures of worth, the justification of desperation and suffering in the name of the gods of efficiency and order, and assumptions about value based on gender, race and class are all necessary to be able to see the world in the terms required to accept economic narratives.

Both sets of texts (military and economic) can be seen as sites of disciplinary power, in that they play a part in the 'constitution of subjects': those who read these texts are invited to become part of the stories they tell. International legal texts operate as a form of representational practice, and such practice is itself an exercise of power. This form of power operates in part through shaping the way in which 'individuals' understand

<sup>4</sup> M Foucault, 'Two Lectures' in Colin Gordon (ed), *Michel Foucault — Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (trans. C Gordon, L Marshall, J Mepham and K Soper) (1980) 78, 105.

<sup>5</sup> Ibid 97.

<sup>6</sup> On the role of this narrative in nineteenth-century colonialism, see E W Said, *Culture and Imperialism* (1993) 8.

<sup>7</sup> T Threadgold, 'Introduction' in T Threadgold and A Cranny-Francis (eds), *Feminine, Masculine and Representation* (1990) 1, 27.

<sup>8</sup> See further A Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679.

<sup>9</sup> J Grbich, 'Taxation Narratives of Economic Gain: Readings Bodies Transgressively' (1997) V *Feminist Legal Studies* 131.

themselves and the world and then regulate their own behaviour in conformity with that image. Post-Cold War internationalism requires and is conditioned upon such personal, domestic acts of identification and imagination.

As Gayatri Spivak has argued, this new disciplinary mechanism of power in operation in seventeenth- and eighteenth-century Europe was 'secured by means of territorial imperialism [over] the Earth and its products — "elsewhere"'.<sup>10</sup> The two examples of disciplinary power that I gave above can be seen as dependent upon such exploitation 'elsewhere'. Access to the bodies, labour and resources of people in states subject to military and monetary intervention is the condition of the prosperous lifestyles of those who live in industrialised liberal democracies. In turn, the exploitation of the suffering of people in civil wars or famines enriches global media corporations and their shareholders, and produces 'the surplus-value of spectacle, entertainment, and spiritual enrichment for the "First World"'.<sup>11</sup>

### Experts, power and authority

Why then do I think that it is important to talk about power and international law in this way? Perhaps the most important reason is that the adoption of the sovereign model of power discussed above limits the capacity of international lawyers to reflect upon the forms of power we exercise. International lawyers, like many other professionals in industrialised countries, see ourselves as essentially performing a neutral, technical function, and have not traditionally conceptualised power as something that we ourselves exercise. At least since the publication of Edward Said's *Orientalism*, such an understanding of the role of knowledge producers in fields that engage with 'other' countries and cultures has been difficult to sustain.<sup>12</sup> Yet much international legal literature has continued to reproduce and refine an image of international lawyers and our role as apolitical and outside of power relations. International lawyers may write about power, but often we do not see that we are implicated in reproducing or making relations of power.

For example, international lawyers are offered the roles of experts on 'development' in Africa, Asia or Eastern Europe, managers of post-conflict institution building in states that have been involved in civil wars, or agents of human rights, democracy and the rule of law in far-away places. International legal texts produce knowledge about 'other' people, and tell stories about the horrors and atrocities that occur in distant lands. All of these roles involve the reproduction of power relations. The imperial desire to know and to access 'other' peoples and territories is transformed through the practice of international law into a sense of expertise and authorisation to speak about those who can be constructed as needing 'our' help.

International law is thus a discourse that involves the constitution of subjects whose authority and identity is made possible by their relation to those in turn constituted as 'other'. The traditional legal account of the relations between law and power does not allow us to think about how that process of exclusion of others might be resisted. This would require moving from an understanding of power as something exercised only by states or international organisations and their officials to an understanding (and thus possibly a transgression of) the role of lawyers in ensuring the privilege, status and authority of experts and elites.

### Power and marginality

Second, taking a broader approach to power raises questions that are important for the kinds of feminist and anti-colonial political projects in which I am interested. When I first started writing about international law as a feminist woman in the academy, the temptation was to present my position as largely powerless, as a marginal or oppositional critic voicing my protests about the actions of all-powerful institutions and processes, including patriarchy, capitalism, globalisation and militarism.

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<sup>10</sup> G Chakravorty Spivak, *A Critique of Postcolonial Reason* (1999) 278.

<sup>11</sup> R Chow, 'Violence in the Other Country: China as Crisis, Spectacle, and Woman' in C Talpade Mohanty, A Russo and L Torres (eds), *Third World Women and the Politics of Feminism* (1991) 81, 84.

<sup>12</sup> E W Said, *Orientalism* (1978).

Gradually, I have come to realise that there are a number of problems that arise if such a position is assumed. The first is that, by understanding and presenting myself as powerless and those I am criticising as omnipotent, I run the risk of creating in myself and my audience a sense of hopelessness. If the patriarchy, the UN, the World Bank, the United States or the faceless process of globalisation are indeed all-powerful and extremely destructive, it is hard to see exactly what use writing about their actions will be.<sup>13</sup> What can a reader who has learnt about the destructive consequences of military or monetary intervention conceptualise as a useful form of response or resistance if my image of those carrying out such interventions is one of totalising power? The realistic or pragmatic response for such a reader would be either to give up hope and focus instead on local and manageable problems and issues, or to join forces with these institutions and actions, on the basis that if you cannot beat them, join them.

The second problem that arises if I imagine myself as lacking in power is that I risk failing to take responsibility for the power that I do in fact exercise, and falling into the trap of a paranoid mode of understanding politics which assumes that there are all-powerful enemies who do exercise power over me and who must if possible be destroyed. The more I read and studied about the way in which people identify with leaders who act in brutal and evil ways, the more I realised that such people understand themselves first as victims, and thus are able to feel a legitimate desire to destroy their enemies.<sup>14</sup> Clearly that raises difficult questions for a feminist: if to understand oneself as a victim is the prerequisite for being an oppressor, how could I be certain that such results were not the effects of my work?

Adopting a broader model of power allows me to think about how law disciplines its students and its officials, and to reflect upon the role that I play as an academic in that disciplining process.<sup>15</sup> It allows me to interrogate the desire which I share to be part of an international legal tradition that is built on imperialism, paternalism, elitism and the construction of others as exotic victims or enemies. It enables me to question what happens to people when they identify with a particular discipline or perform the narratives upon which it is founded. Is it possible to adopt the position often adopted by feminist lawyers, of being somehow at once inside and outside of the discipline of law, critiquing it while making use of its assumptions, tools and power? Such questions are particularly important for feminists engaging with a legal tradition which has been resistant to self-reflection and analysis of the power relations involved in constructing and protecting legal authority.

## Conclusion

To conclude, I think the discipline of international law needs more work that investigates the ways in which reading and writing about international law involve the reproduction of power relations. Such issues can only be addressed by complicating the manner in which power is understood to be operating in and through international law. While doctrinal approaches to international law remain concerned primarily with attempts to develop constraints on the exercise of centralised power as it operates at the level of states or international organisations, they ignore forms of power that operate in more personal ways. Those who participate in shaping perceptions of the legality of the actions of states and international organisations need to develop further an intellectual practice which recognises that law's stories are both an exercise, and an effect of, power relations.

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<sup>13</sup> J K Gibson-Graham, *The End of Capitalism (as we knew it): A Feminist Critique of Political Economy* (1996) 263.

<sup>14</sup> See J Rose, *The Haunting of Sylvia Plath* (1992) 210 ('perpetrators experience themselves as victims in order both to deny and to legitimate their role (to be a perpetrator you have first to "be" a victim)'); A Eckstaedt, 'Two Complementary Cases of Identification Involving "Third Reich" Fathers' (1986) 67 *International Journal of Psycho-Analysis* 317, 326 ('It is only a matter of time before the defence of experiencing oneself as a victim meets up with the repressed experience of harbouring the intentions of the perpetrator'); A M Elliott, 'Symptoms of Globalization: or, Mapping Reflexivity in the Postmodern Age' in J E Camilleri, A P Jarvis and A J Paolini (eds), *The State in Transition: Reimagining Political Space* (1995) 157, 167.

<sup>15</sup> See further J E Grbich, 'The Body in Legal Theory' in M Fineman and N Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (1991) 61.

## **Human Rights and Cultural Diversity**



# Reconciling Individual and Group Rights in Fiji

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When I agreed to speak about reconciling individual and group rights in Fiji, I had some hopes that the 1997 Constitution<sup>1</sup> would provide an enduring basis for the country's governance. Since then, George Speight has seized Prime Minister Chaudhry and other parliamentarians and held them at gunpoint. A military government has abrogated the Constitution. In supporting Speight, many indigenous Fijians apparently see an unreconciled conflict between the right of all citizens to play a full part in a democratic political process and the rights that Fijians believe are due to them as a group.

There is considerable speculation about the power plays behind Speight's actions and the various responses to it.<sup>2</sup> A general election under a democratic constitution had led to the appointment of the multi-ethnic Fiji Labour Party's leader, Mahendra Chaudhry, as the country's first Indian Prime Minister.<sup>3</sup> Aspects of his policies and personal style, especially in the controversial area of agricultural leases, had subsequently given rise to criticism.<sup>4</sup> But it seems likely that this situation was simply used by Speight and his backers to justify their attempt to seize the political power they had not won at the ballot box.

Speight was able to mobilise support merely by claiming that his illegal actions were necessary to safeguard the 'rights' of indigenous Fijians, particularly their rights to their land. This was a reversion to the old dogma that Fijians can protect their rights and interests only if they have 'political paramountcy'.<sup>5</sup> Within the Fijian community, the 1997 commitment to democratic government and reliance on constitutional guarantees of their rights clearly had shallow roots.

What is not in doubt is the strength of indigenous Fijians' sense of group political identity. The same is true of the members of many other ethnic communities around the world. I use the term 'ethnic community', as the Fiji Constitution Review Commission (FCRC) did, to describe: 'groups of people within the state who, by reason of

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<sup>1</sup> *Constitution Amendment Act 1997*. Although this Act was, in form, an Act to alter the 1990 Constitution proclaimed by the interim revolutionary government, it was, in reality, a new, self-contained constitution. Section 195 repealed all provisions of the 1990 Constitution except Chapter XIV which conferred immunity from prosecution on all who had taken part in the 1987 military coups. The *Constitution Amendment Act* was itself amended in minor and mainly technical ways by the *Constitution (Amendment) Act 1998*.

<sup>2</sup> See, eg, T Teaiwa, 'Indigenous Fijians' struggle for power' *The Evening Post* 29 May 2000, 5; M Mottram and G Roberts, 'A personal coup' *The Age* 26 May 2000, 19; E Bingham, 'Fijian tragedy woven from many strands' *Weekend Herald* 3-4 June 2000, A5; 'A new order rises' Cover story *The Review* June 2000, 15. Compare the emerging consensus that the 1987 coup, also, was not a simple racial conflict between Fijians and Indians. See, eg, B V Lal, *Another Way: The Politics of Constitutional Reform in Post-Coup Fiji*, Asia Pacific Press, National Centre for Development Studies, The Australian National University, Canberra ACT, 1998, 1.

<sup>3</sup> The FLP (which, although representing only Indian communal constituencies under the 1990 Constitution had resolutely continued to proclaim itself as multi-ethnic) had contested the election as a member of a pre-election coalition with the FAP and PANU, both Fijian-based. Of the 18 FLP members elected to open seats at the 1999 general election, 11 appear from their names to come from the Indian community, six from the Fijian community and one from the general voters' community.

<sup>4</sup> 'Operation Chaos' Cover story *The Review* May 2000, 12; 'Living on borrowed time' Cover story *The Review* June 2000, 17.

<sup>5</sup> See the findings of the Fiji Constitution Review Commission on the origins of Fijian claims to 'political paramountcy' as a protection for their rights and interests: *The Fiji Islands: Towards a United Future*, Report of the Fiji Constitution Review Commission, Parliament of Fiji, Parliamentary Paper No 34 of 1996, Government Printer, Suva [2.9-2.11].

their descent, religion, place of origin or other shared attributes or beliefs, regard themselves as having a common identity'.<sup>6</sup>

Despite, one might almost say because of, what has happened in Fiji, the question I always intended to ask you remains valid: does international human rights law achieve the right balance between individual rights on the one hand and group rights on the other? By 'group rights' I mean the rights, if any, of the different ethnic communities within a national society.

That balance was one of the issues facing the Commission of Inquiry set up in 1995 to review Fiji's 1990 Constitution.<sup>7</sup> That instrument<sup>8</sup> had been put in place after Colonel Rabuka's revolutionary seizure of power in 1987 and the abrogation of the 1970 Constitution<sup>9</sup> under which Fiji had become independent. The Fiji Constitution Review Commission's terms of reference required it to recommend constitutional arrangements which would meet the present and future needs of the people of Fiji, bearing in mind, among other things, 'internationally recognised principles and standards of individual and group rights'.<sup>10</sup> It must have been one of few constitution-making bodies explicitly so charged. I should now like to explain how it responded to that direction.

Ever since Britain first introduced representative government in Fiji, all seats in Parliament's lower house had always been allocated on a communal basis. Although, by 1970, Indians outnumbered Fijians, the independence Constitution established parity of representation between them. Fijians believed that, with the support of the general voters, they could remain in power indefinitely.

The object of the 1990 Constitution was to ensure that a general election could never again produce the same kind of result as in 1987: the winning of political power by what was seen as an Indian-dominated government. It abandoned the parity of representation principle and allocated a disproportionate number of seats to Fijians, in the expectation that they would then be assured of political power. The Prime Minister was required to be a Fijian, as were certain other high officers of state. At each level of a department or office, not less than 50 per cent of office-holders were required to be Fijians or Rotumans and not less than 40 per cent to be members of other ethnic communities.<sup>11</sup>

The FCRC's task of evaluating these arrangements against international standards of *individual* rights was comparatively easy. Under Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights<sup>12</sup> and Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>13</sup> every citizen has the right, without discrimination, to vote and stand for election on the basis of universal and *equal* suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to the public service. The aspects of the 1990 Constitution just described clearly contravened those norms.

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<sup>6</sup> FCRC report, note 6 [3.41]. The Commission explained that it preferred to use the concept of ethnicity instead of the unscientific concept of race. It emphasised that membership of an ethnic community did not prevent a person from being, at the same time, a member of cross-cutting communities or groups reflecting different facets of his or her identity.

<sup>7</sup> FCRC report, note 6, Appendix B, Commission to review the Constitution.

<sup>8</sup> Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990.

<sup>9</sup> The Fiji Independence Order 1970 (UK), Schedule.

<sup>10</sup> FCRC report, note 6, Appendix B, Commission to review the Constitution.

<sup>11</sup> FCRC report, note 6 [2.43–2.49].

<sup>12</sup> Fiji is not a party to this instrument.

<sup>13</sup> Fiji maintains the following reservation to Article 5(c): 'To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in Article 5(c) ... the Government of Fiji reserves the right not to implement the afore-mentioned provisions of the Convention.'



International law sources of *group* rights were harder to find. The League of Nations system safeguarding the collective rights of minorities had 'lost its virtue'<sup>14</sup> and Article 27 of the International Covenant on Civil and Political Rights had deliberately been cast in individualist language. The Commission fell back on ILO Convention No 169 on Indigenous and Tribal Peoples, its predecessor ILO Convention No 107, and the draft Declaration on the Rights of Indigenous Peoples. Work on that last document is continuing under the auspices of the United Nations Human Rights Commission in Geneva. Among other things, the present draft recognises the right of self-determination of indigenous peoples on the model of Article 1 of the International Human Rights Covenants. The Commission found that, while not necessarily authoritative or entirely in point, none of those instruments, even taken at its face value, supported a claim that a particular 'people' within a state, whether or not indigenous, was entitled to exercise political domination over other 'peoples' or citizens.<sup>15</sup>

It pointed out, however, that, because members of parliament represented only their own communities, and political parties were largely community-based, majority government was essentially government by one ethnic community. If that government was defeated, the community concerned saw political power as passing into the hands of the other ethnic community. Fijians had shown themselves reluctant to accept such an outcome. The best safeguard for all communities therefore lay in the emergence of genuinely multi-ethnic governments.<sup>16</sup>

To that end, there should be a decisive move to a more open form of representation, but some communal seats, based on the distribution of communities in the total population, should be retained as a transitional measure.<sup>17</sup> The 1997 Constitution gave effect to these recommendations, but Parliament reversed the proposed ratio of open seats to communal seats. In a lower house of 71, there were 23 seats for Fijians, 19 for Indians, 1 for Rotumans, 3 for general voters and only 25 open seats to be filled by the voters from all communities.<sup>18</sup> The pressures exerted by communal representation remained strong.

In accordance with the Commission's further recommendations, the 1997 Constitution continued to entrench the other internationally recognised fundamental rights and freedoms of individuals, and the following rights of groups:

- the rights of Fijians to the ownership of their land and the recognition of chiefly titles;<sup>19</sup>
- the prohibition on the alienation of Fijian land except by the Native Land Trust Board, and then only for temporary purposes;<sup>20</sup>
- the rights of both the landlords and the tenants of agricultural land;<sup>21</sup>
- the right of the owners of land or a registered customary fishing right to an equitable share of the royalties in respect of minerals extracted from the subsoil;<sup>22</sup>
- recognition of the role of the Great Council of Chiefs;<sup>23</sup>

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<sup>14</sup> The expression is that of C A Macartney, 'League of Nations Protection of Minority Rights' in E Luard (ed), *The International Protection of Human Rights* (1967) 22, 36.

<sup>15</sup> FCRC report, note 6 [3.87–3.99].

<sup>16</sup> FCRC report, note 6 [2.33–2.42] and [2.59–2.88]. See also Recommendations 1–7.

<sup>17</sup> FCRC report, note 6 [9.148–9.155]. See also Recommendations 252 and 253.

<sup>18</sup> Note 2, ss 50 and 51.

<sup>19</sup> Ibid ss 38(8)(a) and 185(1) and (3).

<sup>20</sup> Ibid ss 38(8)(b) and (c) and 185(1) and (3).

<sup>21</sup> Ibid s 185(2) and (3).

<sup>22</sup> Ibid s 186(3) and (4).

<sup>23</sup> Ibid ss 64(1)(a), 90, 93(2), 116 and 185(1) and (3).

- the right of Fijians to separate laws for their governance, as long as those laws do not discriminate against any person on a prohibited ground or deny any person any other human right or fundamental freedom;<sup>24</sup>
- the right of Fijians to laws applying their customs and providing for the resolution of disputes in accordance with traditional processes;<sup>25</sup>
- the right of all groups or categories of persons who are disadvantaged to social justice and affirmative action programs, based on an allocation of resources broadly acceptable to all communities;<sup>26</sup>
- the right of all communities to opportunities for employment at all levels of the state services in numbers reflecting as closely as possible the ethnic composition of the population.<sup>27</sup>
- the right to use English, Fijian or Hindustani in transacting business with the state;<sup>28</sup>
- the acknowledgment that, although religion and the state are separate, worship and reverence of God are the source of good government and leadership;<sup>29</sup>

Many of these protected rights dated back to the 1970 Constitution, and almost all of them had been included in the 1990 Constitution though sometimes in a less balanced way.

The 1997 Constitution contained one wholly new provision, a non-justiciable compact.<sup>30</sup> This set out what were supposed to be shared understandings about the future conduct of the country's government. It included the following principles:

- (h) in the formation of a government, and in that government's conduct of the affairs of the nation ..., full account is taken of the interests of all communities;<sup>31</sup>
- (i) to the extent that the interests of different communities are seen to conflict, all the interested parties negotiate in good faith in an endeavour to reach agreement;<sup>32</sup>
- (j) in those negotiations, the paramountcy of Fijian interests as a protective principle continues to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities;<sup>33</sup>
- ...
- (l) the equitable sharing of political power amongst all communities in Fiji is matched by an equitable sharing of economic and commercial power to ensure that all communities fully benefit from the nation's economic progress.<sup>34</sup>

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<sup>24</sup> Ibid ss 38(9) and (10) and 185(1) and (3).

<sup>25</sup> Ibid s 186(1) and (2).

<sup>26</sup> Ibid ss 6(k) and 44.

<sup>27</sup> Ibid ss 44 and 140.

<sup>28</sup> Ibid s 4(4).

<sup>29</sup> Ibid s 5.

<sup>30</sup> Ibid ss 6 and 7.

<sup>31</sup> Ibid s 6(h).

<sup>32</sup> Ibid s 6(I).

<sup>33</sup> Ibid s 6(j).

<sup>34</sup> Ibid s 6(l).

The FCRC saw government policy about the use of land as one matter giving rise to conflicting interests. It recommended that, in accordance with the compact principles, all political parties and all communities should reach broad agreement about the policy to be followed.<sup>35</sup>

The 1997 Constitution contained no provision about the ethnicity of the Prime Minister. Such a provision would have cut across the need for the choice of Prime Minister to reflect the electoral support received by the various political parties. It would also have been contrary to the international standards of individual political rights. Nevertheless, the FCRC recognised that, for some time to come, the ethnic identity of the Prime Minister and the ethnic balance within the Cabinet were likely to remain important. Those matters should be taken into account in negotiations about the formation of a government. In appointing the Prime Minister, the President should respect the outcome of those negotiations.<sup>36</sup> The Constitution included a further provision not recommended by the FCRC: the Prime Minister was required to invite all parties with at least 10 per cent of the total membership of the House of Representatives to be represented in the cabinet in proportion to their numbers in the House.<sup>37</sup> It appears that parties accepting this invitation were to be regarded as joining in a coalition government.<sup>38</sup>

The international community accepted the 1997 Constitution as marking Fiji's return to international human rights standards. In recommending provisions to protect *group* rights and interests, the Commission had to rely, in the main, on findings that, while not specifically authorised by international law, the measures it proposed were not forbidden.<sup>39</sup> Especially in the context of communal representation, the Commission placed considerable reliance on the conclusions to that effect of Professor W Michael Reisman of Yale University. His wide-ranging paper, 'International human rights law bearing on individual and group rights' has since been published by the University of the South Pacific, along with the other research papers prepared for the Commission's use.<sup>40</sup>

I should like to quote Professor Reisman's concluding words. He eloquently puts the case *against* the entrenchment of the political rights of groups:

Where the groups in question are traditionally organised, what is actually entrenched in the national political system is the political position of the leaderships or elites of the entrenched groups. In this respect, group political rights entrenchments retard processes of consociation, integration and new identity group formation. Insofar as one conceives of these protean re-definitions and re-identifications of the self as at the core of individual liberty and, hence, central to international human rights, political group rights entrenchments carry a significant cost. When the alternative is very destructive internal strife, the cost may seem cheap. At a particular moment, it may seem worthwhile or ineluctable, but it will never be cheap.<sup>41</sup>

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<sup>35</sup> FCRC report, note 6 [17.46–17.53]. See also Recommendations 635 and 636.

<sup>36</sup> FCRC report, note 6 [5.48–5.51] and [9.104–9.106]. See also Recommendations 238, 240 and 241. Following the 1999 general election, the President, HE Ratu Sir Kamisese Mara, was instrumental in securing the acceptance, by the FLP's Fijian coalition partners and the nation, of the appointment of the Indian leader of the FLP, Mahendra Chaudhry, as Prime Minister after his party had won the first outright majority in Fiji's political history: *The Fiji Times* 20 May 1999, 1.

<sup>37</sup> Note 2, s 99(5)–(9).

<sup>38</sup> See note 2, ss 6(g), 97 and 98. The idea that a party may decline an invitation to be represented in the Cabinet implies that it is not willing to give its loyalty to the government but prefers to remain in opposition. See also s 82 providing for the appointment of the Leader of the Opposition.

<sup>39</sup> FCRC report, note 6 [3.100].

<sup>40</sup> B V Lal and T Vakatori (eds), *Fiji in Transition* and *Fiji and the World: Research Papers of the Fiji Constitution Review Commission*, Vols 1 and 2, School of Social and Economic Development, The University of the South Pacific, Suva (1997).

<sup>41</sup> Research papers, note 39, Vol 2, 181, 226.

The validity of those observations can readily be seen in what has since happened in Fiji. At lunch the other day, Professor Tom Franck spoke to us in much the same terms. But I have a question for the two professors and for all of you: can we really envisage that in Fiji, and in many other national societies around the world, the sense of identity of ethnic communities should and will eventually have only a cultural significance, through the consociation processes to which they refer? The answer may be 'yes' when times are good and the prosperity is shared by all. But if a community feels excluded from the economic progress or the political success enjoyed by other communities or is afraid of losing its existing advantages, the politics of envy and fear are likely to result in the resurgence of a strong sense of ethnic political identity among the members of all communities. As recent events in Fiji demonstrate, the constitutional recognition of group rights, as well as individual rights, will not prevent such a resurgence in a way that frustrates democracy unless both types of right are widely understood and accepted. But, if they are, a commitment to the participation of all communities in democratic government may in time emerge.

That is my hypothesis, and my further questions are these. Despite the difficulties, should international lawyers be more concerned than they have been with the formulation and recognition of group political and other human rights? Would such a development improve conditions for the observance of the individual human rights already recognised by international law but often denied in practice? If the answer to those questions is 'yes', the balance between individual and group rights struck in Fiji's 1997 Constitution, and the report on which it was based, may be one source of inspiration

## **Intervention and International Law**



# A Clean Slate? Timor Lorosa'e during and after UNTAET'S Administration

Penelope Mathew\*

My contribution to this panel focuses on the problems that East Timor, or Timor Lorosa'e, faces as a result of the lengthy failure of the international community to respond to Indonesia's invasion in 1975. East Timor has been changed radically by Indonesian policies, the situation becoming critical as a result of the three weeks of destruction that occurred between the ballot and the arrival of the International Force East Timor (INTERFET).<sup>1</sup>

There is a large question as to the extent to which Indonesia's actions in relation to the territory should be given legal effect because of the law relating to non-recognition of acquisitions of territory acquired by force and the law of belligerent occupation contained in the Hague Regulations<sup>2</sup> and the Fourth Geneva Convention.<sup>3</sup> Yet there is a fundamental ambiguity about the basis of the international community's present involvement in East Timor. The focus of the international community has not been on the illegality of Indonesia's presence in East Timor. Rather, the focus has been on Indonesia's failure to abide by the agreements between Indonesia and Portugal, and Indonesia, Portugal and the United Nations concerning the ballot on autonomy in East Timor.<sup>4</sup> Indonesia's failure to maintain security after the ballot and the massive violations of human rights that were committed thereafter were the basis for the Security Council's authorisation of INTERFET.<sup>5</sup> Moreover, Indonesia's consent to this force was a fundamental practical prerequisite.<sup>6</sup>

I think that at some stage, this ambiguity in the basis for the international community's renewed presence in East Timor will require resolution in order to avoid problematic questions of accountability to the East Timorese for policy decisions taken by the international community. However, as with other cases of prolonged occupation, such as the Baltic states, there are also large questions as to whether all the practical and legal problems now facing East Timor can be resolved by applying the logic of non-recognition. Can East Timor begin with a totally clean slate, as a newly independent state, as if Indonesia's invasion had never occurred? My paper deals with some aspects of these questions, focusing on three areas: criminal justice; title to property; and citizenship.

## Criminal justice

By the time INTERFET arrived, the criminal justice system in East Timor was virtually non-existent. The first question was what law should be applied. Should it be Indonesian law or Portuguese law? The solution adopted by INTERFET, perhaps not surprisingly given Australia's leadership role and Australia's *de jure* recognition of Indonesian control,<sup>7</sup> was to apply Indonesian law. The legal basis for INTERFET's decision was the fact that it was authorised to restore order under Chapter VII of the United Nations (UN) Charter. It was decided that the law of occupation would be applied *de facto* and that the law existing in East Timor (which in practice was Indonesian law) would continue to be applied. Subsequently, in UN Transitional Authority in East Timor

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<sup>1</sup> International Force East Timor, established by Resolution 1264 (15/9/99), UN Doc No S/RES/1264.

<sup>2</sup> The Hague Regulations are accepted as reflecting customary international law.

<sup>3</sup> Indonesia became a party to the Fourth Geneva Convention on 30 September 1958.

<sup>4</sup> See Report of the UN Secretary-General on the Question of East Timor, UN Doc A/53/951, S/1991/513.

<sup>5</sup> Resolution 1264, above n 1, preambular paragraph 3, and operative paragraphs 1 and 5.

<sup>6</sup> Ibid operative paragraph 4.

<sup>7</sup> The announcement in 1978 relating to negotiations between Australia and Indonesia regarding the continental shelf between East Timor and Australia indicated *de jure* recognition of Indonesian control over East Timor: Statement by Mr Peacock, Minister for Foreign Affairs, 15 December 1978, reproduced in (1978-80) 8 *Australian Year Book of International Law* 281.

(UNTAET)<sup>8</sup> Regulation No 1, UNTAET adopted Indonesian law as modified by reference to international standards.<sup>9</sup>

As a matter of policy, I am in favour of this solution, at least with respect to the application of the criminal law, and so long as the East Timorese have been properly consulted. Of course, there is an argument that Indonesian acts, including the introduction of Indonesian law into East Timor should be treated as a nullity based on Article 64 of the Fourth Geneva Convention, and the general principles of non-recognition. However, there may be limits to the extent of non-recognition, as noted in the International Court of Justice's (ICJ) advisory opinion in the *Namibia Case*,<sup>10</sup> in order to be fair to the inhabitants of the territory under illegal administration.

I would suggest that there are some fundamental questions about rule of law (and, therefore, fairness) that should guide the question as to whether the law applied should be that of the displaced administering power (Portugal) or the illegal occupant (Indonesia). It is fundamental to the rule of law that law be publicly known and that it be prospective.<sup>11</sup> Thus there is a real dilemma here as to whether Portuguese or Indonesian law should be applied. In theory, the view may be taken that Portuguese law has continued to apply within East Timor until the adoption of UNTAET Regulation No 1. However, the law applied *in practice* was based on the Dutch code. A whole generation of East Timorese is ignorant as to the provisions of Portuguese law.

On the other hand, it may be equally arguable that knowledge of the provisions of the Indonesian code was just as limited as knowledge of the Portuguese code, particularly in the case of older inhabitants of East Timor unfamiliar with *Bahasa* Indonesian. However, I think there are some other arguments that probably carry the day. First, in the case of pro-Indonesian militia, application of Indonesian law avoids the appearance of victors' justice. Second, since both the Portuguese and Indonesian codes are European civil codes imported by colonial powers, it may be that they have a great deal in common, not least being their complete lack of democratic legitimization by the people of East Timor and their tendency to override the customary laws of the East Timorese. It is therefore arguable that UNTAET was correct to focus on and negate such provisions of the Indonesian code that were adopted as a means to repress East Timorese or political opposition in general, rather than as a means of preserving the rule of law. It is then up to Timor Lorosa'e to adopt whatever criminal code it thinks fit once it becomes fully independent.

Moving from the question of the law to be applied to the question of a legal system and structure, UNTAET then had to focus on rebuilding the entire judicial structure. There are now 16 judges and six prosecutors as well as a number of public defenders and some lawyers in private practice.<sup>12</sup> However, the first trial held in East Timor after the ballot, the case of *Yayasan HAK v Dili District Court*, has raised questions about the administration of justice under UNTAET.

Yahasan Hak is a legal-aid non-governmental officer (NGO) (its name means the Foundation for Law, Justice and Rights). This NGO was acting on behalf of Victor Alves, a National Council of Timorese Resistance (CNRT)<sup>13</sup> member accused of murder. It requested Alves's release from detention, arguing that the time limits for detention in the Indonesian Criminal Procedure Code had expired. The Court dismissed these arguments placing particular reliance on the introduction by UNTAET of a new regulation relating to detention, regulation No 14 of 10 May 2000. According to the Court, this new regulation meant that previous regulations on arrest and detention were void. Regulation 14, passed the day before the hearing, also provided for a panel of judges instead of a single judge, effectively resulting in a change of judge.

<sup>8</sup> UN Transitional Authority in East Timor, established by Resolution 1272 (25/10/99): UN Doc No S/RES/1272 (1999).

<sup>9</sup> See UNTAET Regulation No 1, Sections 2 and 3: UNTAET/REG/1991/1, 27 November 1999.

<sup>10</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 [1970] ICJ Rep 1971, 22.

<sup>11</sup> Article 15 International Covenant on Civil and Political Rights; Article 67 Fourth Geneva Convention.

<sup>12</sup> Lecture for the Centre of International and Public Law by J C Cady, Assistant Secretary-General of the United Nations, Deputy Transitional Administrator of East Timor, ANU, 18 May 2000.

<sup>13</sup> National Council for Timorese Resistance.



The case is controversial because of the appearance that the law is being manipulated to secure a further period of detention. Unless it is possible to justify the further detention as a derogation from human rights in a situation of a state of emergency,<sup>14</sup> there would be a departure from the principles which are supposed to govern East Timor according to section 2 of UNTAET regulation no 1. Section 2 of that regulation requires that 'all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards'. There is a real risk that UNTAET will be seen as perpetuating the style of government of the Suharto era.

### Property interests

Another pressing issue for East Timor is the resolution of matters pertaining to property interests. East Timor has the usual problems of a former colonised state, multiplied by least a factor of two. In addition to unfair expropriations that may have occurred under Portuguese rule, there has been massive dispossession and dislocation under Indonesian rule.

During the occupation of East Timor by Indonesian forces, much East Timorese property was placed in the hands of the military with the use of economic resources allocated to one military-controlled company.<sup>15</sup> The Suharto family and its friends have secured significant property interests in East Timor.<sup>16</sup> The general framework of subordinating traditional land interests to development in Indonesia has worked to the detriment of East Timorese.<sup>17</sup> The dispossession of East Timorese has also been promoted by the official policy of 'transmigration'. Under this policy, settlers from Java and other highly populated areas of Indonesia were moved into other areas of Indonesia and East Timor to Indonesianise these areas, often to aid in 'development' projects.<sup>18</sup> The correlative of these policies is that East Timorese were moved off arable land and into large centres of population whereby Indonesian control over the population was made easier. It is essential to deal with this legacy because of the possibility of violence and the threat to investment and development posed if problems are not ironed out. Having won the right to sovereignty over territory, it is important that East Timor does not implode because of a failure to resolve the related question of title to property.

So, what does UNTAET propose to do about these issues, and how much can it do when it is only a transitional authority? So far, all properties owned by the Indonesian government that were located in East Timor and all abandoned property have been placed in the hands of UNTAET until the 'true owners' are located.<sup>19</sup> Since UNTAET Regulation No 1 has adopted Indonesian law, it appears that there is no question as to titles issued by Indonesia being declared null and void simply because they were issued by Indonesia under Indonesian law. However, in response to those East Timorese who claimed that the Indonesian government had expropriated their property without compensation, as well as conflicts arising between people who have on sold property so confiscated by the Indonesian government and those who claim good title under the Portuguese administration, UNTAET has decided to establish a Land and Property Tribunal.<sup>20</sup> This would be consistent with the protections for property that exist under human rights law,<sup>21</sup> as well as the law of belligerent occupation.<sup>22</sup> A

<sup>14</sup> See Article 4 ICCPR.

<sup>15</sup> E Benvenisti, *The International Law of Occupation* (1993) 155–6.

<sup>16</sup> See, eg, the description of the interests of various Suharto family members and friends' interests in sugar, coffee and oil in East Timor in G Aditjondro, "Suharto and his Family: The Looting of East Timor" <<http://jinx.sistm.unsw.edu.au/^greenlft/1997/288/288p32.htm>>.

<sup>17</sup> Regarding the subordination of customary interests generally, see T Lindsey, 'Square Pegs and Round Holes: Fitting Modern Title into Traditional Societies in Indonesia' (1998) 7 *Pacific Rim Law and Policy Journal* 699, 705.

<sup>18</sup> Eg, in 1997, George Aditjondro wrote that Tutut and Tommy Suharto planned to open a sugarcane plantation and to evict local villagers to make way for settlers from Java and Bali who were to cultivate the cane-fields, Aditjondro above n 16.

<sup>19</sup> Regulation No 1, s 7.

<sup>20</sup> Cady above n 12, 6.

<sup>21</sup> See Article 17 of the Universal Declaration of Human Rights; Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination which requires equality before the law in the enjoyment of the right

proposal by the UN Centre for Human Settlements (Habitat) is currently circulating which adopts a human rights framework, making reference not simply to protections for property but the right to adequate housing enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to respect for the home enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).<sup>23</sup> The proposal recommends suspension of some provisions of Indonesian law,<sup>24</sup> and the accommodation of all forms of tenure, including, to some degree, East Timorese customary law.<sup>25</sup> The model proposed does not deal with all property titles but only those that are disputed or that need clarification in order to promote development.<sup>26</sup> It is proposed that *provisional* titles be issued.<sup>27</sup> And the model contains a mediation component as well as a traditional adjudication structure in an attempt to avoid win-lose situations.<sup>28</sup>

### Nationality

A final question, which may be linked to a person's ability to hold property in East Timor, is whether Indonesian settlers will be given nationality in an independent Timor Lorosa'e. Traditionally, the question of nationality laws even in a case of a state succession that is unaffected by questions as to the legality of the predecessor State's title has been the subject of acute disagreement. Some scholars have argued that the new state has complete freedom to confer or refrain from conferring nationality on whomsoever it pleases.<sup>29</sup> However, it appears that scholars advocating a form of responsible sovereignty — whereby regard is had to the human rights of the people living in the territory and at least those inhabitants with a real link with the territory and population receive the nationality of the new state — have recently gained more support with the adoption

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to own property; Article 21(1) of the American Convention on Human Rights which provides for the right of every person to use and enjoy his or her property and Article 21(2) which provides that no one shall be deprived of his or her property 'except upon the payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'; Article 14 of the African Charter on Human and People's Rights which states that 'the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'; and Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms which protects the right to peaceful enjoyment of one's possessions.

- <sup>22</sup> Article 46 of the Hague Regulations provides that private property, which includes both personal property and real estate, must be respected and *cannot* be confiscated. Article 52 provides that private property may be requisitioned 'for the needs of the army of occupation' and upon payment of cash as far as possible. Requisitions must be 'in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country'. Article 53(2) provides for *temporary* seizure of private property that constitutes war materiel, which must be restored at the conclusion of the war with the payment of compensation. Movables belonging to the state that constitute war materiel may be used for military purposes according to Article 53 of the Hague Regulations. In relation to all other public property, Article 55 of the Hague Regulations state that:

[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estates, forests, and agricultural estates belonging to the hostile State and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

- <sup>23</sup> J du Plessis and S Leckie (Habitat), *Housing, Property and Land Rights in East Timor: Proposals for an Effective Dispute Resolution and Claim Verification Mechanism*, 31 May 2000, 16–17.
- <sup>24</sup> *Ibid* 41. The provisions recommended for suspension are the Basic Agrarian Law which recognised customary land interests on paper but effectively permitted them to be overridden, and a decree known as SKEP 40 which permitted military confiscation of public and abandoned properties.
- <sup>25</sup> *Ibid* 26.
- <sup>26</sup> *Ibid* 31.
- <sup>27</sup> *Ibid* 26.
- <sup>28</sup> *Ibid* 35.
- <sup>29</sup> D P O'Connell, *State Succession in Municipal and International Law, Vol 1: Internal Relations* (1967). See also, C Zemanek, *State Succession After Decolonisation*, 116; (1965) Vol III *Recueil de Cours* 187, 227.

of the European Convention on Nationality and the International Law Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States.<sup>30</sup>

East Timor is even more complex because of the illegality of Indonesia's presence and the policy of transmigration. In the analogous case of the Baltic states, which regained sovereignty after 50 years of Soviet occupation, ethnic Russians who had come to reside in these states as a result of Soviet demographic policies were not automatically given citizenship. Rather, they were subjected to various residence, language and loyalty requirements.<sup>31</sup> Once again, it is important to question the extent to which 25 years can and should be rolled back in East Timor. On the one hand, self-determination is fundamentally about a distinct people securing sovereignty over their land. On the other hand, it may be diminishing and detrimental to the new state and its people to attempt to wipe the slate clean by refusing to confer nationality on those Indonesian settlers who wish to remain in East Timor and are supportive of the principles on which the new state is to be founded.

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<sup>30</sup> Proponents of the idea of responsible sovereignty include I Brownlie, *Principles of Public International Law* (1998) 661 *et seq* and Y Onuma, 'Nationality and Territorial Change: In Search of the Law' (1981) 8 *International Journal of World Public Order* 1. The European Convention on Nationality and the International Law Commission's work on Nationality of Natural Persons in Relation to the Succession of State give some support for the view that a person whose habitual residence is in the territory subject to the state succession shall gain the nationality of the successor state. Article 18 of the European Convention on Nationality stipulates that in deciding on the granting or retention of nationality, states parties shall take account of the genuine and effective link of the person concerned: 1997 European Convention on Nationality, ETS No 66, 37 ILM 44 (1998). The Draft Articles adopted by the International Law Commission provide that individuals have the nationality of at least one of the states involved (Article 1), and that there is a presumption that a person resident in the territory which passes to the successor state will gain the nationality of the successor state (Article 5), while emphasising the importance of choice for the person concerned (Article 11): 'Report of the International Law Commission on the Work of its 51<sup>st</sup> Session', UN GAOR 54<sup>th</sup> session, Supp No 10 (A/54/10), part IV.

<sup>31</sup> For details of the Baltic states' citizenship laws and the international community's response, see J Skolnick, 'Grappling with the Legacy of Soviet Rule: Citizenship and Human Rights in the Baltic States' (1996) 54 *University of Toronto Faculty of Law Review* 387.



# Authority to Intervene

Mary Ellen O'Connell\*

With an eloquent and inspiring address, Justice Michael Kirby of the High Court of Australia opened the 2000 joint conference of the Australia and New Zealand Society of International Law and the American Society of International Law. He spoke of the privilege international lawyers have of seeing the future and the chance they have to contribute to it.<sup>1</sup> This paper attempts to see the future of international legal rules on armed intervention and to suggest how those rules might best be shaped for the future.

It is the rare rule or set of rules, which does not need regular attention to adapt it and keep it in sync with changing conditions. The rules regulating intervention are no exception. Since the creation of this rule regime, international lawyers have made valiant efforts to keep it viable. This regime of all regimes has faced considerable pressure and could have broken down completely.<sup>2</sup> The most recent challenge of a potentially devastating nature came with the North Atlantic Treaty Organisation's (NATO) intervention in the Kosovo crisis in 1999.

Yet, during and after the intervention international legal scholars and, more importantly, international lawyers in government expressed support for the rules in existence when the intervention began. Though the 16 NATO members surely wished to have the international community view their action without condemnation, they did not wish to create a precedent that could establish new rules on intervention, permitting other states or regional groupings to do what they had done.<sup>3</sup> Despite this support, we must conclude the rules on intervention are weakened — when a violation occurs with little condemnation, even if authorities argue it is an exception, the rule is likely to emerge weakened. Nevertheless, few would argue that the rules restraining intervention have been eliminated or fundamentally changed. They remain in effect despite the pressure of NATO's intervention and other violations of the last century.

The substantive rules will still need attention, but perhaps not as much as the procedural aspects of the rules, procedures which are essential to the proper functioning of the substantive principles. If international law scholars and governments are concerned to shore-up the substantive principles, the procedural aspects will need reform. This paper considers briefly the procedural aspects of the rules on intervention. It looks toward the future and attempts to contribute to how procedure can be improved.

The paper will consider first the substantive rules — what they are and why it is argued here that they are in relatively good shape. Then the paper will turn to its larger concern — procedural rules relevant to intervention and in what way they are deficient. The final part of the paper considers what might be done in future to improve the procedural rules. In the ten minutes allotted for the paper, these points can be touched on only briefly, but hopefully in sufficient detail to provoke discussion and ideas.

## Satisfactory substance

Despite the challenges of the last century, we can with confidence point to three legal principles regulating the right to intervene in an on-going armed conflict. These are:

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<sup>1</sup> M J Kirby, 'International Law — Down in the Engine room' this volume.

<sup>2</sup> M E O'Connell, 'The UN, NATO and International Law After Kosovo' (2000) 22 *Human Rights Quarterly* 57, 68–69.

<sup>3</sup> See arguments of ten NATO governments appearing before the ICJ in a case brought by Yugoslavia, alleging, among other things, that these governments had violated the rules on armed intervention. Representative of all the arguments is that of the United States. See, 'Legality of Use of Force (*Yugoslavia v United States*)', 1999 ICJ Pleadings (Verbatim Record: Request for the indication of provisional measures) [1.7] (11 May 1999) available at [http://www.icj-cij.org/icjwww/idocket/iyall\\_cr/iyall\\_icr9924\\_19990511.html](http://www.icj-cij.org/icjwww/idocket/iyall_cr/iyall_icr9924_19990511.html) (visited 22 November 1999).

- States or inter-governmental organisations may join in collective self-defence with the victim of an armed attack until the Security Council acts.
- States or inter-governmental organisations may intervene in internal, armed conflict with the consent of a government in effective control, and
- States or inter-governmental organisations may intervene with the authorisation of the Security Council to restore international peace and security.<sup>4</sup>

These rules are the ones that most international lawyers and especially those working for governments will tell you are the ones they recognise as being in effect today, despite NATO's intervention and other examples of state practice inconsistent with these rules. International lawyers made a considerable effort to keep them viable throughout the Cold War,<sup>5</sup> and have made a similar effort following NATO's intervention.<sup>6</sup> No government has spoken out robustly in favour of carving out a right of humanitarian intervention without Security Council authorisation. In a case in the International Court of Justice (ICJ) brought by Yugoslavia against 12 NATO members, only Belgium argued that there might in the future be a right of humanitarian intervention.<sup>7</sup> Unconnected with the case, the United Kingdom has apparently made some mention of exploring the possibility of developing a right of humanitarian intervention regardless of the Security Council. Otherwise, the vast majority of countries in the world do not support such a right. Russia, China and Namibia voted to condemn the NATO intervention in Yugoslavia.<sup>8</sup> The Group of 77 condemned what they termed the 'so-called right of humanitarian intervention' during their April 2000 meeting in Havana, Cuba. The United States is not supporting a right of humanitarian intervention,<sup>9</sup> nor is Australia. Alexander Downer, Australia's Foreign Minister, in a speech to the joint conference on 28 June 2000, confirmed this.<sup>10</sup>

The substantive rules are still in effect. Yet, notice that two of the three principles explicitly include the Security Council and procedure by the Council to work effectively. Regarding principle three, the Security Council's grant of authority to intervene is the heart of the principle. But even self-defence and collective self-defence have a central role for the Security Council designed to prevent self-serving, abuses of these rights. All the principles work best with active respected Security Council oversight. States did in fact abuse the rights of self-defence and collective self-defence during the Cold War: Vietnam, Afghanistan, Nicaragua, Panama, Hungary, and Czechoslovakia are prominent examples. Action by the Security Council to counter such abuse would have been welcome. Such a security in future would be a major improvement. Before we have an activist, respected Security Council, however, we will have to move beyond the Security Council we have today. We know the lack of respect with which the Security Council is held today and understand that NATO did not feel constrained by the lack of a mandate from the Council last year. The Security Council does not command the

<sup>4</sup> M E O'Connell, 'Regulating the Use of Force in the 21<sup>st</sup> Century' (1997) 36 *Columbia Journal of Transnational Law* 473; Y Dinstein, *War, Aggression and Self-Defense* (1992).

<sup>5</sup> Dinstein, *ibid*; L Henkin, 'Use of Force: Law and U.S. Policy' in *International Law and the Use of Force* (L Henkin et al eds, 1991) 37; O Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1624–27.

<sup>6</sup> J Lobel, 'Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter' (2000) 1 *Chicago Journal of International Law* 19; M Bothe and B Martenczuk, 'Die NATO und die Vereinten Nationen nach dem Kosovo-Konflikt' (1999) 125 *Verinte Nationen*; R Bilder, 'Kosovo and the "New Interventionism": Promise or Peril?' (1999) 9 *Journal of Transnational Law and Policy* 153; B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 2.

<sup>7</sup> Legality of the Use of Force (*Yugoslavia v Belgium*), 1999 ICJ Pleadings (Verbatim Record: Request for the indication of provisional measures), 10 (10 May 1999), available at [http://www.icj-cij.org/cijwww/cdoocket/cyall/cyall\\_cr/cyall\\_cybe\\_ccr9915\\_19990510.html](http://www.icj-cij.org/cijwww/cdoocket/cyall/cyall_cr/cyall_cybe_ccr9915_19990510.html) (visited 22 Nov. 1999).

<sup>8</sup> UN SCOR, 54<sup>th</sup> Sess 3989<sup>th</sup> mtg, 5, UN Doc S/PV 3989 (1999).

<sup>9</sup> Remarks of Michael Matheson (Office of the Legal Adviser, US Department of State), April 2000 Proceedings of the American Society of International Law.

<sup>10</sup> A Downer, 'Upholding the 'Sword of Justice': International Law and the Maintenance of International Peace and Security', this volume.

authority, respect, or legitimacy to play the role intended for it or more importantly the kind of role we would like to see it play in the future to continue the progressive development toward control of the use of force.

It is a positive development that the substantive rules are preserved. Governments plainly do not want them thrown aside. But I maintain that just as at the end of the First World War and the Second World War the procedure for implementing the rules were developed and improved, it is time to improve the machinery once again.

### **Improvable procedure**

I have not forgotten that we had a flurry of Security Council reform activity in the early 1990s and that the task proved too difficult at that time. I am so convinced that procedural reform is the key to the improvement of the regime on armed intervention that I am raising it again. The previous reforms following the two World Wars came only with persistence and commitment. True, the leadership for this task is unlikely to come for the United States government this time, though the development and reforms of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), the International Criminal Tribunals for Yugoslavia and Rwanda show the United States could take on the task. If the United States does not decide to lead in reforming the Security Council, however, other countries and coalitions of countries can. In recent years major institutional developments have occurred without the United States playing a leading role. The best-known example is the establishment of the International Criminal Court. The institutions for the law of the sea are also being established without a United States leadership role. Australia has announced that it will press for reform of the United Nations human rights treaty system and seems willing to play the leading role in this effort.<sup>11</sup>

Reform of the Security Council could be another such effort. We need the kind of Security Council that is thoroughly committed to the rule of law, acts impartially, consistently and commands the respect of the international community. As Judge Bedjaoui has written, the Security Council 'will not gain in credibility, authority, and efficiency unless the convention takes root that it acts not as an institution above the Charter and international law but as their servant'.<sup>12</sup> Making the Security Council more representative and instituting a veto override possibility are two concrete steps that could move us toward this goal. My colleague at Ohio State University College of Law, John Quigley, has also urged more use of judicial review by the ICJ of Security Council action as another avenue to reform.<sup>13</sup>

In addition to thinking through what reforms are needed, international lawyers can play an important role in advocating the need for change. It will take popular pressure before governments will commit the resources and the political will necessary to achieve Security Council reform.

In conclusion, I am heartened by all that international lawyers both in and out of government have done to re-affirm commitment to substantive rules limiting the right to armed intervention. I believe the work of strengthening the rules should continue, especially by turning our attention now to contributing to the procedure associated with those rules.

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<sup>11</sup> Ibid.

<sup>12</sup> M Bedjaoui, 'The New World Order and the Security Council: Testing the Legality of its Acts' 7 (1994), cited in J Quigley, 'The United Nations Security?' (2000) 35 *Texas Journal of International Law* 167.

<sup>13</sup> Quigley, *ibid* 170–72.





# Out of Law\*

Gerry Simpson\*

## Outlaws

In 1604, Spain and the Netherlands were embroiled in a long-running war with each other in Europe. The world was in the midst of one of its regular spurts of globalisation and this conflict carried over into hostilities between Dutch trading companies and Portuguese and Spanish maritime interests in East Asia. During one of many engagements on the seas, an affiliate of the Dutch East Indies Company captured a Portuguese vessel named *The Catherine*. A Prize Court in Amsterdam declared that the capture was legal and that the vessel belonged to the Dutch company. The matter probably would have rested there were it not for the fact that among the company shareholders were members of a Mennonite sect who disapproved of war, refused to accept their share of the profits and threatened to establish a competing company in France.

In the same year, Hugo Grotius was about to turn 21. In that year he took a keen interest in the *Catherine* case and spent the remainder of the year composing his first major work, *De Iure Praedae* (*Commentary on the Law of Prize and Booty*), a defence of the Dutch seizure and a sketch of a theory of international law to be fully realised in his classic *Law of War and Peace*. *De Iure Praedae* which begins with the words:

A situation has arisen that is truly novel and scarcely credible ... namely: that those men who have been so long at war with the Spaniards ... are debating as to whether or not, in a just war and with public authorisation, they can rightfully despoil an exceedingly cruel enemy...<sup>1</sup>

This may not quite be the opening sentence in the literature of international law but it baptises the Grotian period. Martin Wight saw this opening paragraph as a description of 'a dramatic confrontation between the state that is law-abiding and the delinquent state (it is also a confrontation between the state with constitutional processes and the despotic state)'.<sup>2</sup> *De Iure Praedae*, then, inaugurates the Grotian tradition and the classical period in international law and does so by characterising certain states as beyond the pale. This conception of international law that draws legal distinctions between states on the basis of their internal or moral characteristics has remained influential since Grotius's time. The idea of the outlaw state or the 'exceedingly cruel enemy' also is quite prominent in some recent international legal theory. These states are variously characterised as illiberal (Slaughter) or indecent (Rawls) or criminal.<sup>3</sup>

According to this approach to international order, outlaw states are removed to a sphere of politics or a state of nature and are shorn of the protections of the republican peace and classical international law. Most obviously, these states no longer enjoy the immunities and rights of classic sovereignty. Their existential rights are suspended. These include the right to some zone of domestic jurisdiction, immunity from intervention and rights to territorial integrity.

Liberal confidence in the post-cold war era seems to have produced a flurry of these outlaw states. Think of the burdensome peace imposed on Iraq in Resolution 687 and the territorial porousness of Iraq throughout the past

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\* The title refers to three aspects of the paper none of which I will discuss in much detail. These are the characterisation of Serbia as an 'outlaw' state, the attempt to justify the NATO intervention by moving 'outside' law into ethics, politics, necessity etc. and the likelihood of building a new interventionist regime 'out' of the old Charter law.

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<sup>1</sup> Grotius, *De Iure Praedae* (1605) 1.

<sup>2</sup> M Wight, 'Western Values in the International System' in H. Bull and H. Butterfield, *Diplomatic Investigations* (1966). I argue in a longer paper that this confrontation is a mark of international legal order generally.

<sup>3</sup> J Rawls, *The Law of Peoples* (1999), A-M Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 510.

decade or the attacks on Sudan and Afghanistan more recently.<sup>4</sup> A milder version of this can be seen in the treatment of Austria. As if anticipating the wave of condemnation following the recent elections, the Chancellor of Austria, Wolfgang Schüssel pleaded that Austria was '...not a pariah state'.<sup>5</sup> The new Foreign Minister Benito Ferrero-Waldner, too, insisted, 'that Austria is not Naziland'.<sup>6</sup>

I think the Kosovo intervention can be partially explained in this light. Most of the scholarship on Kosovo has focused on developing a new norm of intervention or on judging the legality of the intervention from the point of view of the North Atlantic Treaty Organisation (NATO).<sup>7</sup> But another way to approach all this is to come at it from the perspective of Serbian sovereignty or lack thereof. From about the mid-1990s, Serbia had been increasingly perceived as an outlaw state. This made it more susceptible to intervention, regardless of what it was actually doing. As Julie Mertus says, 'Yugoslavia is an outlaw nation, ... Until Yugoslavia proves itself to be a country under law, it should indeed be treated as an outlaw nation.'<sup>8</sup> Meanwhile, President Clinton has said that the United States will not tolerate 'outlaw states'.

Although, the characterisation of states as outlaws and the suspension of their sovereign rights seem to have increased in intensity recently, this is no new thing. As I have said, it is there at the beginning of international law's classical literature with Grotius. And in the nineteenth century, Turkey, Japan and China played the role of uncivilised states excluded from the European family of nations. In 1904, 300 years after the *Catherine* incident, Teddy Roosevelt said in his annual message: 'Chronic wrong-doing, or an impotence which results in a general loosening of the ties of civilised society, may ultimately require intervention by some civilised nation ... may force the United States ... to the exercise of an international police power'.<sup>9</sup> The League of Nations too begins in this spirit of exclusion with (in Hobsbawm's phrase) '... the total outlawry of Soviet Russia.'<sup>10</sup> More recently in the 1960s and 1970s, South Africa and Rhodesia have played the role of outlaws.<sup>11</sup>

Indeed, one might go as far as to say that the idea of 'international community' today has generated outlaws as surely as international society depended on the stigmatisation of anti-social elements in the nineteenth century. John Westlake spoke of the ill-breeding of non-European states in the late nineteenth century while Antonio Guterres, President of Portugal said at the NATO 50th birthday party: 'Have we got an enemy? Our enemy is the rejection by so many in the world of the values of the Enlightenment'.<sup>12</sup> However the outlaw state is defined or categorised it seems to have once again become fundamental both to the way international law is practised and to at least one conception of international legality.

### Outside law

Let me turn to my second subject where to be outside law is not to be in the sphere of politics or nature as in the case of the outlaw state but to be in a place where morality or humanitarianism are the reigning ideas. In this

<sup>4</sup> S/RES/687 (1991).

<sup>5</sup> 162 (7) *Guardian Weekly* 10 February 2000 1.

<sup>6</sup> 162 (8) *Guardian Weekly*, Thursday 17 February 2000 1.

<sup>7</sup> See 'Symposia' (2000) 11 *European Journal of International Law* and (1999) 93 *American Journal of International Law*.

<sup>8</sup> *Chicago Tribune*, 14 January 1999: 'With respect to Kosovo, this means immediate withdrawal of all international monitors, the threat of complete cessation of diplomatic relations and a credible threat of military action for failure to comply with long-standing diplomatic demands' Ibid.

<sup>9</sup> T Roosevelt, *Presidential Address* (1904).

<sup>10</sup> E Hobsbawm, *Age of Extremes* (1994) 35.

<sup>11</sup> Rhodesia S/RES/253 (1968) and South Africa S/RES/181.

<sup>12</sup> 'We are an Alliance. Have we got an enemy? I think yes. No longer a country, a system, an ideology. Our enemy is the rejection by so many in the world of the values of the enlightenment, of reason as the foundation for behaviour in politics.' Meeting of the North Atlantic Council at the level of Heads of State and Government, Washington, 23 April 1999 <<http://www.nato.int/docu/speech/1999/s990423s.htm>>.

case, NATO's action is characterised as outside law but it is the law itself that is viewed as defective rather than the NATO action.

In some cases then lawyers have gone outside law for justification. Bruno Simma notes that NATO was in a 'terrible dilemma': was it to choose the technically unlawful or the morally imperative?<sup>13</sup> The House of Commons Select Committee on Foreign Affairs, meanwhile, after taking advice from several prominent international lawyers, concluded that the action was 'of dubious legality but was justified on moral grounds'.<sup>14</sup>

Others have drawn more subtle distinctions between different types of legal normativity. Christine Chinkin describes the action 'as legitimate but not strictly legal'<sup>15</sup> while others have distinguished formal and substantive legality.<sup>16</sup> In each case the idea is to get beyond the defective legal regime into a more nuanced realm of legitimacy or morality.

A variation on this theme is to expand the domain of law in order to absorb more of what others have placed in the realm of morality or necessity. Michael Reisman's analysis of the intervention is most radical in this regard.<sup>17</sup> According to Reisman, the international legal system is best characterised as a generally effective regime.<sup>18</sup> In this type of regime, unilateral action on humanitarian grounds will sometimes be justified, indeed compelled, by what Reisman calls 'the international legal process'. The participants in this process include the liberal elites who manage the media, non-governmental officers (NGOs) and inter-governmental organisations as well as states themselves. In this way, one goes beyond formal Charter law.

I just want to make one brief point about all this. Despite the different approaches there is a remarkable consensus on the necessity of the action. But this degree of consensus is not quite mirrored outside the academy and it is quite jarring (and refreshing) to read Robert Fisk's attack on the morality and legality of the operation quoted in Richard Falk's article in the *American Journal of International Law* and then disquieting to read in the European Press of NATO's routine inflation of the figures dead and deported during the Serbian campaign.<sup>19</sup> 'The terrible facts in and relating to Kosovo are little disputed' writes Louis Henkin in the second sentence of the recent AJIL symposium on Kosovo.<sup>20</sup> But, in Europe at least, it is precisely these facts that are now in dispute. A fundamental problem for lawyers when assessing an act of intervention involves getting access to the relevant facts. As a professional class, we are more comfortable moving outside law into the realm of moral justification than we are skilled in moving outside law to appraise the facts used to justify or legitimise an intervention.

### Out of law

In considering the legality of the action there appear to be two extremes. There are those who view the action as simply illegal ('break it don't fake it') and those who view the action as having swept away the whole Charter

<sup>13</sup> B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1.

<sup>14</sup> *Fourth Report of the Select Committee on Foreign Affairs, 1999-2000*, HC 28-I [138]. Available on: <[www.parliament.uk/pa/cm199900/cmselect/cmfaaff/28/2814.htm](http://www.parliament.uk/pa/cm199900/cmselect/cmfaaff/28/2814.htm)>.

<sup>15</sup> Ibid [137].

<sup>16</sup> See eg P-M Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law' (2000) 11 *European Journal of International Law* 19.

<sup>17</sup> M Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) 11 *European Journal of International Law*.

<sup>18</sup> The typical western liberal polity is an example of the fourth. Arguably, the UN in its collective security mode in the Iraq-Kuwait war operated along the lines of the fourth constitutive regime.

<sup>19</sup> See eg S Halimi and D Vidal, 'Media and Disinformation' *Le Monde Diplomatique*, March 2000, 9.

<sup>20</sup> L Henkin, 'Editorial Comments: NATO's Kosovo Intervention' (1999) 93 *American Journal of International Law* 1; R Falk, 'Kosovo, World Order, and the Future of International Law' (1999) 93 *American Journal of International Law* 847.

framework, for example, Michael Glennon.<sup>21</sup> This disagreement turns partly on the consequences of the intervention for international law. What will come out of this intervention? What will arise out of the ashes of Charter law? It may be too soon to tell with any confidence. In 1991, just as we were celebrating the realisation of the collective security dream in Iraq, it began to unravel in a series of unilateral actions by the Americans and British. One widely supported possibility is that we really do have 'a new norm that permits intervention in cases of overwhelming humanitarian catastrophe in support of purposes laid down but not acted upon by the Security Council'.<sup>22</sup>

I will conclude by making three brief points about this proposed norm. First, one consequence of its entrenchment will be that the Russians and Chinese will become much more cautious about voting for merely condemnatory resolutions such as Resolution 1160. If there is a possibility of these resolutions being used subsequently as justifications of intervention they may simply be vetoed. Second, humanitarian intervention is likely to remain a privilege of the strong. Sir Robert Phillimore put the problem nicely over a hundred years ago in discussing interventions by the west in the Balkans: 'The converse of this, viz., Ottoman (Mahometan) Intervention within Christian States, has, it is believed, never yet arisen in practice' (but it would be subject on principle to the same law).<sup>23</sup> I think we can be assured that this will remain the case.

Finally, it may be that NATO's defection from the Charter system will be as short-lived as that of the Holy Alliance's from the Vienna settlement nearly 200 years ago. In that case Russia, Prussia and Austria broke from the Security Council of the day and declared that a new interventionist mentality would order relations within Europe. The idea was to put down revolution, liberalism and nationalism (each thought to be a threat to the peace in Europe). The two other powers, France and the United Kingdom, were horrified, worrying as China and Russia do today, that the Holy Alliance would become an instrument of expansion. In the end the Holy Alliance came to nothing. Nationalism and liberalism prevailed. What survived it was not an institutional mechanics of intervention but instead the image of the outlaw states. What it means to be outside law shifts: in 1815, it is liberal states, in 1999, it is illiberal states. At points in between it is uncivilised states. In 1999, Serbia was outside law. So, too, was NATO but only Serbia was an outlaw.

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<sup>21</sup> M J Glennon, 'The New Interventionism' (1999) 78 *Foreign Affairs* 2; T M Franck, E C Luck, et al, 'Sidelined in Kosovo?' (1999) 78 *Foreign Affairs* 116.

<sup>22</sup> United Kingdom Defence Secretary, quoted in above n 14 [134].

<sup>23</sup> R Phillimore, *International Law* section 475 p 341.

# The Ambivalent Mandates of International Organizations in Bosnia-Herzegovina, Kosovo and East Timor

Ralph Wilde\*

One striking feature of contemporary military interventions is that, in certain situations, the territory concerned has been subject to the administration of international organisations following initial military action. To varying degrees, territorial administration by international organisations is currently underway in Bosnia-Herzegovina, Kosovo and East Timor.<sup>1</sup>

Bosnia-Herzegovina has been subject to the overall control of international organisations since the 1995 Dayton Peace Agreement.<sup>2</sup> Military control is exercised by the North Atlantic Treaty Organisation-led (NATO) Stabilisation Force (SFOR),<sup>3</sup> and the Office of the High Representative (OHR) enjoys a broad mandate concerning civil administration.<sup>4</sup> In Kosovo, international administration was introduced in June 1999. The NATO-led force KFOR enjoys plenary military control,<sup>5</sup> and the United Nations Interim Administration Mission in Kosovo (UNMIK) has total responsibility for the conduct of civil administration, including the deployment of an international police force.<sup>6</sup> In East Timor the UN Transitional Authority in East Timor (UNTAET) was created towards the end of 1999 to take over both civil and military administration during the transitional period before independence.<sup>7</sup>

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<sup>1</sup> This paper is drawn from the author's current doctoral research on the administration of territory by international organisations in international law.

<sup>2</sup> Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Done at Paris, 14 December 1995 (1996) 35 ILM 75 <<http://www.ohr.int/gfa/gfa-home.htm>> [hereinafter 'Dayton Peace Agreement']. See M Cox, 'Approaches to International Intervention in Bosnia and Herzegovina' (1998) 69 *British Yearbook of International Law*.

<sup>3</sup> See Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska: Annex 1A, 14 December 1995, entry into force upon signature (1996) 35 ILM 91 <<http://www.ohr.int/gfa/gfa-an1a.htm>> [hereinafter 'Annex 1A']; Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republika Srpska: Annex 1A Appendix A (with maps), no provision on entry into force, 14 December 1995 (1996) 35 ILM 101 <<http://www.ohr.int/gfa/gfa-ap1a.htm>>; Bosnia-Herzegovina, NATO: Agreement Concerning the Status of NATO and its Personnel, Annex 1A Appendix B, 14 December 1995, entry into force upon signature (1996) 35 ILM 102 <<http://www.ohr.int/gfa/gfa-ap1a.htm>>; Croatia, NATO: Agreement Concerning the Status of NATO and its Personnel, Annex 1A Appendix B, 14 December 1995, entry into force upon signature (1996) 35 ILM 104; Federal Republic of Yugoslavia, NATO: Agreement Concerning Transit Arrangements for Peace Plan Arrangements, Annex 1A Appendix B, 14 December 1995, entry into force upon signature (1996) 35 ILM 106; Bosnia and Herzegovina, Republika Srpska, Federation of Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia: Annex 1B, 14 December 1995, entry into force upon signature (1996) 35 ILM 108 <<http://www.ohr.int/gfa/gfa-an1b.htm>>; Bosnia and Herzegovina, Republika Srpska, Federation of Bosnia and Herzegovina: Annex 2 and Appendix thereto, 14 December 1995, entry into force upon signature (1996) 35 ILM 111, <<http://www.ohr.int/gfa/gfa-an2.htm>>.

<sup>4</sup> See Bosnia and Herzegovina, Republika Srpska, Federation of Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia: Annex 10, 14 December 1995, entry into force upon signature (1996) 35 ILM 146 <<http://www.ohr.int/gfa/gfa-an10.htm>>.

<sup>5</sup> SC Res 1244, UN Doc S/RES/1244 (1999), 10 June 1999 <<http://www.un.org/Docs/scres/1999/99sc1244.htm>> [9].

<sup>6</sup> SC Res 1244, above n 5 [10, 11].

<sup>7</sup> SC Res 1272, 25 October 1999, UN Doc S/RES/1272 (1999) <<http://www.un.org/Docs/scres/1999/99sc1272.htm>>.

In this paper I will briefly argue that the enterprise these mandates seek to authorise — territorial administration by international organisations — is ambivalent. This ambivalence is suggested when one looks at some of the objectives that have been set for the projects, and asks how capable international administration can be at realising them.

One objective is to perform certain vital administrative activities when local conduct of such activities is impossible, and also to improve the capacities of local actors to carry out administration, so as to remove the need for international involvement. A second objective is to increase the viability of the territorial unit as a political entity (whether as an existing state, as in Bosnia-Herzegovina, a potential state, as in East Timor, or an autonomous province, as currently in Kosovo). Moreover, the intention is to promote certain kind of politics in the territorial unit, rooted in a particular value system (invoking certain ideas of democracy, the rule of law, human rights etc.). These two objectives broadly reflect the perceptions held by those international actors involved in the projects.

In analysing the relationship between these objectives and the modality of international administration, contrasting international administration with the alternative of local administration can be useful as an initial step. On the one hand, pursuing the first objective (the eventual conduct of vital administrative activities by local actors) depends partially on local actors being empowered with the responsibility for administrative activities. Similarly, the second objective (promoting a certain kind of politics in the unit) obviously requires local actors to participate in this enterprise and thus 'own' it. Local purchase is vital. On the other hand, however, the first objective suggests international involvement when local actors lack the capacity to perform administrative activities. Equally, the second objective suggests bypassing local actors in favour of international control, when the actions of local actors threaten the viability of the unit.

These observations suggest that, as far as their relationship to the two objectives is concerned, the alternatives of control by international and local actors are paradoxically linked. Each alternative potentially undermines and is undermined by the other. With the first objective, the more that the performance of vital administrative activities is left to local actors, the greater the risk that such activities will not take place. However, intervention by international actors is necessarily disempowering and creates dependency, thereby worsening the prospect that local conduct will be eventually possible. Similarly, with the second objective the more that control is exercised by local actors, the greater the capacity of such actors to challenge the model that has been set for the territory. However, the more that control is conferred upon international actors to avoid such a challenge, the greater the risk that the project will fail because it has no local purchase, and so on.

It follows that the relationship between both international and local control and the objectives is ambivalent. Territorial administration by international actors is therefore an ambivalent enterprise, since it is capable of both promoting and undermining its own objectives: of being both a means to an end, and an end in itself. This observation refutes the idea that, on their own terms, the projects will or even can succeed. Equally, it rejects the prognosis that the projects are doomed to failure, with international involvement continuing indefinitely. Rather, the projects — as far as their own objectives are concerned — have the potential for both success and failure.

One can see this ambivalence in the allocation of responsibility as between local and international actors. For example, with responsibilities for refugees and internally displaced persons in Bosnia-Herzegovina, Annex 7 to the Dayton Peace Agreement takes divergent approaches, and locates such approaches in two types of provisions (either explicit obligations or implicit suggestions) that are themselves in conflict.

On the one hand, the explicit provisions of Annex 7 make the signatories (Bosnia-Herzegovina and its two constituent entities) responsible for return and give international organisations a relatively modest role (a right of access and a responsibility for drawing up a plan for return).<sup>8</sup> On the other hand, in various implicit suggestions, Annex 7 makes international organisations responsible for implementing the signatories' return obligations, and for repatriation assistance and drawing up a plan for such assistance.<sup>9</sup> The dialectic between the

<sup>8</sup> See Bosnia and Herzegovina, Republika Srpska, Federation of Bosnia and Herzegovina: Annex 7, 14 December 1995, entry into force upon signature (1996) 35 ILM 136 <<http://www.ohr.int/gfa/gfa-an7.htm>> (hereinafter Annex 7), Articles I–III.

<sup>9</sup> In particular, Annex 7 makes the following implicit assumptions: UNHCR and unspecified 'agencies' are responsible for

nature of the provisions — legal obligations and implicit suggestions — through which these two approaches are manifest undermines the importance of any given approach. The relevance of the ‘concrete’ obligations is undermined by the divergence of such obligations from the ‘real’ situation suggestively envisaged. Conversely, the force of the suggestions is undermined because of their relatively uncertain legal status: not only are they merely implicit, but also they neither confer responsibility, nor alternatively suggest that responsibility already exists.

Annex 7 purports to allocate competence for refugees and displaced persons as between international and local actors, but actually leaves this allocation to be determined entirely outside its framework. Any given decision on the relative competence of international and local actors could potentially fit within the terms of Annex 7. The legal regulation of decision-making necessarily implies that there are certain decisions that fit with the regulations (and are therefore ‘lawful’) and other decisions that do not so fit (and are therefore ‘unlawful’). The unlawful/lawful dichotomy suggests a normative distinction between certain decisions, but this distinction is predicated on the earlier implication. If all possible decisions comply with the regulations, the implication cannot be made, and the legality of any given decision is, as far as the regulations are concerned, of no normative consequence. It follows that the application of Annex 7 would not appear to have any normative effect as far as the suitability of any particular balance between international and local control is concerned.

To conclude, focusing on the ambivalent nature of these administration projects not only suggests how the projects are conceived, but also suggests an explanation for the nature of some of the problems they face. Such problems should be understood as being consistent with, not divergent from, the manner in which the projects are originally conceived. Addressing these problems requires an appreciation of their derivation in this original conception.

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assisting the Entities in their refugee return obligations; UNHCR and certain international organisations are responsible for drawing up a plan for repatriation assistance; unspecified actors and ‘agencies’ are responsible for providing repatriation assistance; and such provision is subject to various requirements. No suggestion about legal authority to conduct these activities is made, save an erroneous observation about assistance in refugee return being vital to the performance of existing mandates. See Annex 7, above n 8, Articles III.1, III.2, and IV.





## **Issues of International Law in Federal Systems**



# Globalisation and Australian Federalism

Brian Galligan\*

The impact of globalisation in general and international law in particular on sovereign nation states is already a matter of public concern. This is likely to become more so because of the accelerating interlinking of domestic and international affairs. Geographic borders are becoming highly permeable if not problematical, and political communities and their citizens, at least the more privileged ones, interdependent and cosmopolitan. International law is a more formalised embodiment of globalisation, and a medium for translating international norms and standards to national polities.

Globalisation is part complex phenomenon and part visionary invocation, being now probably 'the most overused and under-specified explanation for a variety of events in international relations'.<sup>1</sup> The potency and novelty of globalisation are routinely overstated by globophiles and globophobes alike. The key elements of modern globalisation are technological innovation in information and communication mediums and an increasingly global economic system.

Understanding capitalism as a world system where networks of production and distribution cross national boundaries and shape national economies is not new. Fernand Braudel<sup>2</sup> and Immanuel Wallerstein<sup>3</sup> have documented how the capitalist world system organised accumulation and production on a world scale over a period of centuries. According to Manuel Castells, one of the leading contemporary exponents of globalisation, a *global* economy differs fundamentally from a *world* system that has been around since the origins of capitalism in the sixteenth century. Castells defines a global economy as 'an economy with the capacity to work as a unit in real time on a planetary scale'.<sup>4</sup> According to Castells this is quite new:

A technological revolution, centred around information technologies, is reshaping, at accelerated pace, the material basis of society. Economies throughout the world have become globally interdependent, introducing a new form of relationship between economy, state, and society, in a system of variable geometry.<sup>5</sup>

Most writers agree that globalisation is a multi-dimensional process that entails an intensification of world-wide relations. How novel or revolutionary it is depends upon preference and argument. 'Gee-whizzers', with whom Anthony Giddens tends to agree, 'are so impressed with all the changes happening today, especially those to do with technology, that they see a world breaking quite radically with its past'.<sup>6</sup> Others like Giddens' coeditor, Will Hutton, see greater continuities with the past.

If the world of today is indeed *On The Edge*, as Hutton and Giddens title their new book, and breaking radically with its past, we will need new paradigms of law and governance to conceptualise the inter-related global and national in the new world order. If continuities are significant and globalisation has been around for some time with forms and technologies changing, the challenge is a different one. I want to argue that globalisation is not new, in the sense that global forces and influences shape nation states, although its form has changed with new technologies and the changing balance of global economic and political power. More particularly, Australia has been a global nation formed and shaped by global forces since its European beginning. Sovereign notions of independent nationhood are indeed challenged by globalisation, but they have never applied properly to Australia anyway. There is an obvious impact on federalism but overall a federal system is broadly compatible

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<sup>1</sup> R Higgott and S Reich (1998) 2.

<sup>2</sup> F Braudel, *Civilisation and Capitalism, 15th-18th Centuries* (tr. Sian Reynolds, 3 vols) (1981, 1982, 1984).

<sup>3</sup> I Wallerstein, *The Modern World System*, vols 1 and 2, (1974 and 1980).

<sup>4</sup> M Castells, *The Rise of the Network Society. The Information Age: Economics, Society and Culture*, Vol. 1 (1996) 92.

<sup>5</sup> Ibid 1.

<sup>6</sup> W Hutton and A Giddens (eds), *On the Edge: Living with Global Capitalism* (2000) 3-4.

with an international realm of law and governance. If the 'Gee-whiz' response is appropriate for new technologies, it is less so for the impact of international law and governance on federal systems like Australia's.

Globalisation in an earlier form played a formative role in Australian law and governance from first European settlement in the eighteenth century through federation and nation building in the early twentieth century. Australia was not founded as a sovereign independent nation, choosing instead to remain part of the British Empire. At federation, Australia's foreign and defence policy were left with the British government. Despite the transformation of the British Empire to the British Commonwealth of Nations in the 1920s, Australia did choose to assert equal status with Britain in foreign as well as domestic affairs until the 1940s. Until then Australia did not have its own diplomatic service nor make its own decisions to go to war. Australia followed Britain into both World Wars. As late as 1939 Menzies announced his 'melancholy duty' of informing Australians that Great Britain had declared war on Germany and that 'as a result Australia is also at war'. It took a more nationalist Labor government and the threat to national survival from Japanese aggression in the Asia Pacific to shake Australia from its formal mindset of British dependency. Australia made its own declaration of war against Japan after the bombing of Pearl Harbour, and adopted the *Statute of Westminster* in 1942 to ensure Australian authority over its own naval forces and foreign shipping in Australian ports. This belatedly adopted the 1931 *Westminster Act* that repealed the *Colonial Laws Validity Act* which provided that British laws no longer applied to the dominions, if they so chose by implementing it. It took the *Australia Acts* of 1986 to sever the last links of the Australian states to Britain.

Since the Second World War, Australia has become oriented towards Asia following its dominant trade patterns, broadly aligned with the United States for defence purposes, and party to numerous United Nations conventions that prescribe norms and standards, especially for human rights and environmental protection. Australia's exposure to global forces has increased in recent decades because of national deregulation that has demolished 'protective state' policies and opened up the Australian economy to world market forces.<sup>7</sup> It has become a member of numerous international bodies and a party to numerous international treaties affecting such key policy areas as human rights, the environment, indigenous people and industrial relations. Clearly Australia was not sovereignly independent before the 1940s; and its pattern of international relations and associations in postwar decades is one of complex interdependency with the global.

The problem is not with Australia's development as a global nation, but with over blown sovereignty talk and the applicability of the sovereign state paradigm to Australia. For the first part of the twentieth century, Australia was closely aligned with Britain and for the second part increasingly interlinked with United Nations, the United States and the Asia Pacific region. According to acute observers of the emerging world, the nation state will continue but 'the theory of sovereignty will seem strangely out of place in a world characterised by shifting allegiances, new forms of identity and overlapping tiers of jurisdiction'.<sup>8</sup> That is already the case for Britain itself that has moved 'Beyond the Sovereign State' in becoming part of the European union, as Neal MacCormick pointed out before Scottish and Welsh devolution have further modified centralised Westminster rule in Britain.<sup>9</sup>

Indeed the sovereignty paradigm itself is a muddle of different legal and political meanings, as Stephen Krasner's recent study of *Sovereignty: Organised Hypocrisy* (1999) shows. According to Krasner, sovereignty is organised hypocrisy because the elaborate norms of international law and diplomacy, based on recognition of national sovereignty, are often ignored or subverted in practice. Put in more technical terms, the logic of appropriateness that is inherent in the system of recognised national sovereignty often conflicts with the logic of consequences that derive from its violation.<sup>10</sup> International politics treats sovereignty quite differently than does international law.

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<sup>7</sup> A Capling and B Galligan, *Beyond the Protective State* (1992).

<sup>8</sup> J Camilleri and J Falk, *End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992) 255-6.

<sup>9</sup> N MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.

<sup>10</sup> S Krasner, *Sovereignty: Organized Hypocrisy* (1999) 9. His other two meanings that need not concern us are domestic sovereignty that refers to the organisation of public authority within the state, and interdependent sovereignty that refers to the ability of the state to control trans-border movements.

Krasner suggest two distinctive meanings of sovereignty as it used in the international context: international legal sovereignty and Westphalian sovereignty. International legal sovereignty is the recognition of the status and integrity of independent territorial entities, while Westphalian sovereignty entails the exclusion of outside forces from the nation state. The first is more formal; the second more political. While the two might ideally coincide, often they do not. The basic rule of Westphalian sovereignty is non-interference by foreign powers in the domestic affairs of a state. Since this can be violated by intervention or invitation a legal sovereign might not be a Westphalian sovereign.

The 'realist' school that previously dominated international relations assumed a formalist version of the sovereign nation state as primary actor in international affairs.<sup>11</sup> It was not sufficiently realistic, however, in capturing either the effective power and standing of states or the complexity of international affairs. Hence, 'complex interdependency' has been coined to describe the greater complexity of relations involving industrialised democracies in an internationalised world economy.<sup>12</sup> Multiple actors in addition to nation states are engaged, and multiple goals other than national security, for example economic prosperity, enhanced human well being and mutual benefit, are pursued.<sup>13</sup>

A world of complex interdependency, multiple centres of governance and rule making, overlapping jurisdictions and multiple allegiances is by no means novel or catastrophic. Medieval Europe and ancient and modern empires have been like that in different ways. Krasner points out that the modern British Empire cum Commonwealth, of which Australia was part, never fitted the paradigm of sovereign nation states. Eminent international relations scholars like Hedley Bull and Andrew Linklater invoke the Medieval state model as an indicator of the emerging world order. A key consequence in considering the continuing viability of Australia's federal system in the emerging world order is that federalism and globalism have many of the same attributes. Domestic federalism is a system of multiple centres of government and rule making, interdependency and overlapping in national and state jurisdiction and policy making, and dual allegiance on the part of citizens. Hence, at the most fundamental level, federalism and the emerging global order have much in common. Since I have made that argument elsewhere,<sup>14</sup> let me draw attention to some of the main ways in which international developments have impacted upon Australian federalism.

The Commonwealth or national government has used its treaty power to expand its jurisdiction into traditionally state areas, especially the environment and human rights. In so doing it has played what might best be characterised as a 'two-level game'.<sup>15</sup> In the international arena, the Commonwealth government plays in the Australia jersey as a decent middle power adopting world norms and standards. In the domestic game, it plays in the Commonwealth jersey, sometimes as protagonist besting the states and at other times as a cooperative partner with the states in the national implementation of those norms and standards. Increased globalisation and treaty implementation might limit national power, but it enhances Commonwealth power with respect to the states. The balance is a complex one of law and politics, as the new Howard-Downer treaty implementation procedures testify. An important and related effort of globalisation has been the streamlining of inter-governmental arrangements to facilitate international competitiveness, resulting in the new Council of Australian Governments (COAG). Curiously, the present government has shown little interest in taking this process further.

As others have pointed out, increasingly complex interdependency is having a significant impact on Australia's constitutional and domestic law systems. These need to be seen in their broader political context that affects the

<sup>11</sup> K Goldman, 'International Relations: an Overview', in R E Goodin and H D Klingemann (eds), *A New Handbook of Political Science* (1996) 429.

<sup>12</sup> R O Keohane and J S Nye, *Power and Interdependence* (1977).

<sup>13</sup> H Bull, *The Anarchical Society: A Study of World Politics* (1977); A Linklater, 'Citizenship and Sovereignty in the Post-Westphalian State', in D Archibugi et al. (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (1998).

<sup>14</sup> B Galligan, *A Federal Republic* (1995).

<sup>15</sup> R Putnam, P Evans and H Jackson, *Double-edged Diplomacy and Domestic Politics: The Logic of Two Level Games* (1993).

scope and pace of change. Governance structures and governments play an important part in mediating global influences, including international law. Clearly globalisation and international law are affecting Australia and Australian federalism, but that is not new. Federalism is an appropriate system of governance for a global nation whose national policies have always been globally inter-dependent. Moreover, a federal nation with a federal political culture is more attuned to the modern world of complex interdependency. Sovereign independence is at risk, but since it never existed in Australia's case we should be more relaxed about its absence in today's world.

# Federalism and Human Rights

Sarah Joseph\*

Federalism and international human rights law is a particularly topical subject in Australia today, in view of the vigorous political debate, earlier this year, over mandatory sentencing laws in the Northern Territory and Western Australia.

For the benefit of our American visitors, I will quickly outline the content of those laws. The Western Australian mandatory sentencing laws are modelled on United States legislation, 'three strikes and you're out' legislation in California. Once an offender, of any age, has committed his or her third property offence, he or she is mandatorily sentenced to one year's gaol. The Northern Territory laws are even more draconian, as an adult can be sentenced to two weeks' prison for their first property offence, 90 days for a second offence, and a year for a third or more offence. Juveniles may be sentenced to 28 days' prison for second and further property offences. As in the United States, these laws have led to sentences being imposed for extremely trivial offences, like stealing towels off clotheslines and the like. Earlier this year, a Darwin man received a year's sentence for stealing a few biscuits from a company's canteen. A 15-year-old Aboriginal boy was gaoled for 28 days for stealing some crayons and textas from his school. Tragically, this young boy killed himself a few days before his scheduled release.

In my opinion, these laws raise obvious human rights issues. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) prohibits freedom from arbitrary detention. A long gaol sentence for stealing biscuits is disproportionate and arbitrary. There is also empirical evidence that these laws indirectly discriminate against indigenous offenders. For example, crimes which are committed disproportionately by indigenous people are targeted under these laws, whereas others, such as fraud, are not. The laws are then incompatible with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The devastating impact on juveniles who commit petty crimes raises issues regarding the rights of the child. Further human rights issues may be raised regarding the right to appeal one's sentence, and even the right to life, considering that these laws fundamentally contradict recommendations of the Royal Commission into Aboriginal Deaths in Custody. These laws have been criticised by the Committee on the Rights of the Child, more recently by the CERD, and it is likely that the Human Rights Committee (HRC) censuring these laws after their imminent examination of Australia's report under the ICCPR in late July. Given the international human rights abuse entailed in these laws, what has Australia done about them?

First, I reiterate that the laws are contained in Western Australian and Northern Territory legislation, not federal Commonwealth legislation. However, in international human rights law, the Commonwealth, as the government with an international personality and as the party to the relevant treaties, is responsible for human rights abuses perpetrated by the states and territories. This is evident in, for example, Article 50 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that the provisions of the respective Covenants will extend to all parts of federal states, without limit or exception. Article 50 applies regardless of whether a central government has constitutional power to override provincial or state laws which breach the ICCPR.

Traditionally in Australia, many of the legislative areas which concern human rights are within the legislative realm of the states. For example, criminal laws are generally a state rather than a Commonwealth concern. Nevertheless, the Commonwealth government does have the constitutional power to override the laws in the Northern Territory and Western Australia. It has plenary power over the Northern Territory (under section 122 of the Commonwealth Constitution), which we saw demonstrated a few years ago when the Commonwealth overrode the Northern Territory's euthanasia laws. Under the external affairs power, section 51(29) of the Constitution, the Commonwealth has power to implement any international treaty obligation to which it is a party, including of course human rights treaties. This was demonstrated in 1994, when the Human Rights Committee decided in the *Toonen Case* that Tasmania's anti-gay laws breached Article 17, the right to privacy, in the ICCPR. After it became clear that Tasmania would not act to repeal the impugned laws, the

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Commonwealth overrode them with the *Human Rights (Sexual Privacy) Act* 1994 (Cth).<sup>1</sup> So there is no doubt the Commonwealth could override these laws. And indeed, a Senate Committee has recommended their partial reversal, and a bill to repeal mandatory sentencing insofar as it affects juveniles has passed through the Senate. However, it has stalled in the House of Representatives where the government of course has the numbers.

Why is this government not overriding the laws? Indeed, various members of the government, including the Prime Minister and the Attorney General, have voiced disapproval of the laws. So why not override them? The main ostensible reason is that the government does not wish to undermine Australia's federal nature and override laws which have been passed by democratic Parliaments. The laws, flawed and criticised as they are, are nevertheless said to be matters for the Western Australian and Northern Territory Parliaments and their people alone.

Now, before turning to the rights and wrongs of that argument, I wish to digress to look at the impact of international human rights law on another federation, namely Canada. Canada, like Australia, is of course responsible under international human rights law for the human rights abuses of provincial laws. Indeed, in a number of cases, Canada has been found in violation of the ICCPR due to provincial laws. In the *Lubicon Lake Band Case*, development activities authorised by the Albertan government were found to breach Article 27, the minority rights provision. In *Ballantyne v Canada*, laws which prohibited commercial signage in English in Quebec were found to be a breach of Article 19, which guarantees freedom of expression. However, Canada, unlike Australia, does not have the constitutional power to override provincial laws which breach international law. However, in the *Quebec Languages Case*, it did exercise some political muscle to get Quebec to amend the offending laws. On the other hand, the Lubicon Lake Band was not so fortunate, and to this day continue to fight a battle against corporate invasion of their homelands.

The most recent challenge by international human rights law to Canadian federalism arose from an HRC decision in November 1999, in the case of *Waldman v Canada*. In this case, a Jewish man complained about the preferential treatment given to Roman Catholics in Ontario with regard to educational subsidies. Just to give a bit of background: in Ontario only secular schools are generally funded out of public coffers. There is one exception to this, Ontario does fund Roman Catholic public schools. No other religious schools benefit from public funds. So, the HRC had to decide if the laws breached Article 26 of the ICCPR, which prohibits, amongst other things, discrimination on the ground of religion. This law undoubtedly discriminated on the basis of religion. It could therefore only be saved if the impugned distinction, here that between Roman Catholics and Jews, was reasonable and objective. Why the anomaly? Why the preferential treatment for Roman Catholics in Ontario? How could it be argued that this law was reasonable and objective. As it happens, section 93 of the Canadian federal Constitution guarantees continued funding for Roman Catholic education by the provinces upon confederation in 1867. The Roman Catholics, as the major minority religion in all Canadian provinces bar Quebec in the nineteenth century, drove this bargain in order to lend their support to confederation. In the *Waldman Case*, the Canadian government argued that without the protection of the rights of the Roman Catholic minority, the founding of Canada would not have been possible. Repeal or alteration of section 93(3) would be perceived as undoing an historical bargain upon which Canadian confederation had been founded.

The HRC found in favour of Waldman against the laws in Ontario. It stated that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. In 1999 however, evidence did not show that members of the Roman Catholic community were in a disadvantaged position compared to those members of the Jewish community that wished to secure funding for the education of their children in religious schools. Ultimately, the HRC concluded that the impugned distinction did breach Article 26. Whatever the position in 1867, there was no longer a reasonable distinction between Roman Catholics and other minority religions regarding educational subsidies.

What will Canada do? It does not have legislative authority over the issue of education; this is in Ontario's legislative sphere. The Canadian government has signalled that it is attempting to negotiate a settlement with Ontario. What can Ontario do? One way of eliminating discrimination is to fund religious schools for those

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<sup>1</sup> Of course, section 109 of the Constitution provides that the Commonwealth laws prevail over state laws in case of any inconsistency.



religions with a sufficient number. That obviously has a budgetary impact. Could Ontario take funding away from Roman Catholic schools? That would necessitate changing the Constitution which in Canada, is easier to do than in Australia. Section 93 could be altered with consent of both federal and Ontario Parliaments. However, that may cause grave political ructions amongst Roman Catholics within Canada, particularly Ontario. In any case how does it benefit Waldman if the rights of Catholics are reduced to the level of other religions? Does he gain any benefit at all? Arguably yes, as there would then be more funds available for education in general.

As of June 2000, things were at a stalemate in Canada. The federal government was making conciliatory noises to the HRC about attempting to implement the decision, while Ontario were being quite belligerent. Was the HRC too starry-eyed in its *Waldman* decision? Should it have made a difference that the impugned distinction was authorised by no less than the Canadian Constitution, without which confederation and the creation of the Canadian state could not ensue? Should it make a difference that Canada's hands are legally tied, and that it is totally reliant upon Ontario's political will to implement the decision, which is decidedly lacking. Should adherence to the doctrine of federalism ever act as a defence to findings of human rights violations? Certainly, Canada may have more of an argument than Australia in this respect as it has limited legal authority to alter provincial laws. Nevertheless, Article 27 of the Vienna Convention states that domestic legal considerations can never justify breaches of international treaties.

In any case, domestic law does not pose a difficulty for the Australian government; it can override state laws which breach human rights, such as the mandatory sentencing laws. Therefore, the defence of federalism is purely political. Indeed, it is even legally wrong insofar as it affects the Northern Territory, which is not a state, but a legislature which is wholly subject to potential Commonwealth control. Leaving aside questions of law then, is this political defence morally justified? The defence of federalism could be seen as upholding minority rights for those within the smaller federal constituency as opposed to the whole country. That is not really an argument that stands up in Australia. No state or territory specifically caters for a recognised 'human rights' minority, unlike Quebec or Nunavut in Canada. Tasmanians and Victorians are not so different, not like say the cultural differences between Scots, Northern Irish, English and Welsh. And they come from a country which is not a federation.

The defence of federalism could be seen as upholding the democratic rights, or a right of political participation of persons within, for example, Western Australia, or Ontario, and, by logical extension, the Northern Territory, gleaned, for example, from provisions such as Article 25 of the ICCPR. Indeed, federal theory holds that federalism enhances democracy by acting as a check on the power of the central government, preventing the growth of unwieldy central bureaucracies, and devolving power to local communities.<sup>2</sup> But political participation, and for that matter minority rights, are not rights without limits. Indeed, most of one's human rights have limits, in that they can be limited by another's human rights. Democratic parliaments are capable of passing laws which gravely abuse human rights. Indeed, it is culturally and politically arrogant to argue, as some Australian politicians have done, that democratic enacted laws should be somehow immune from human rights criticism. What about the internment laws in the early 1970s in the United Kingdom? With respect to our American friends, what about death penalty laws which are imposed in such a way as to discriminate against minorities and the poor? What about Australian laws authorising the compulsory removal of Aboriginal children from their families? And what about mandatory sentencing laws, which some argue continue that oppressive tradition of compulsory separations, and which led to the unnecessary incarceration of a 15-year-old boy who proceeded to kill himself?

Democracy, whether at centralised or localised levels, often fails to cater for minorities, especially those whose interests conflict with those of the majority, those whose interests generate only apathy on the part of the majority or the politically powerful, or minorities who are simply unpopular. And surely, human rights are most important when they are operating on behalf of such minorities. And one of the most unpopular minorities of all in these days of rampant law and order campaigns are criminals. Whether our governments, state, territory, or federal, like it or not; whether our populations like it, criminals do have human rights, such as freedom from arbitrary detention. Detention for a serious crime is not arbitrary. Detention for a petty crime is.

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<sup>2</sup> T Fleiner-Geister, 'Federalism in Australia and in other Nations' in G Craven (ed), *Australian Federation: Towards a Second Century* (1992) 16.

The defence of federalism to human rights abuse is simply a variation of the state sovereignty defence to human rights violations. Even if one accepts the validity of that argument, the argument does not *gain* in validity because a state is a federation. Otherwise, it would be essentially arguable that international human rights law should apply less in federations than it does in unitary states. And that is nonsense. Why should the Scots and the Welsh have more international human rights than say Western Australians, or, for that matter, Bosnians? A defence of federalism to an allegation of human rights abuse, without any attempt to engage the intellectual merits of the human rights argument, is not a coherent justification for genuine human rights abuse. In the twenty-first century, it is surely wrong to say that states' rights *per se* should ever override human rights.

## **Reviewing the Year of International Law**



# The Importance of International Dispute Settlement Mechanisms for New Zealand

Treasa Dunworth\*

In August 1999, New Zealand filed an application with the International Tribunal for the Law of the Sea (ITLOS) for an Order for Provisional Measures against Japan in respect of its experimental fishing program (EFP) of Southern Bluefin Tuna.<sup>1</sup> This application set in motion only the second set of proceedings in the Tribunal. In February 2000, the New Zealand government formalised procedures which had been on trial allowing Parliament a role in the process of ratifying international treaties.<sup>2</sup> In March 2000, proceedings were filed with the World Trade Organisation's (WTO) disputes panel challenging the tariffs imposed by the United States on New Zealand lamb imports.<sup>3</sup>

These, and other developments which could be listed, might lead one to the conclusion that New Zealand is an enthusiastic champion for a more robust international legal system and that the globalisation debate, in New Zealand at least, has been laid to rest. In fact, such a verdict would be unsound and if any conclusion can be drawn in reviewing the year of international law in New Zealand, it is that the time for critical, sustained and rigorous public debate on the direction New Zealand wants to take in respect of 'the international' has arrived.

In his keynote address, in the context of the current debate about Australia's participation in the various Human Rights Committees, Foreign Minister Downer expressed the view that it is intellectually dishonest to fail to enquire into process simply because we like the substantive outcomes. I agree. But I would add that it is just as dishonest to criticise process only because we do not like the substantive outcomes. In New Zealand, we have neglected the process debate almost entirely and where we have engaged in it, there is a tendency to fall into the trap which Foreign Minister Downer has described. Even as we rush to embrace international dispute settlement mechanisms (such as the ITLOS and the WTO), we do so on the belief that it will be 'good' for us. Behind that belief lies an assumption that New Zealand will find itself on the 'right side' of the law and our role as the good international citizen will be publicly vindicated. But there is a more worrying assumption: that the dispute systems on which we are increasingly relying are procedurally and substantively fair. Unfortunately it does seem as though we will have to wait for cracks to appear in the first assumption before we are motivated to seriously discuss the second.

As a small country, peaceful dispute settlement procedures, binding at international law, are critical to New Zealand's international functioning. It is therefore essential that those procedures are substantively and procedurally fair. In these comments, I give a brief overview of the developments mentioned above: the changes to the treaty-making process within New Zealand, New Zealand's involvement in the *Southern Bluefin Tuna Cases* and New Zealand's activities before the WTO dispute settlement understanding. In doing so, I identify some problems which I see with the process within those mechanisms and I argue that these, and other concerns, make it imperative that we engage in an informed debate about process, accountability, transparency and fairness regardless of the outcomes presently being achieved.

## Changes to the treaty-making process in New Zealand

For all the uncertainty about its meaning, globalisation was a key stimulus to changing the treaty-making process within New Zealand, shifting away from an Executive-dominated process to one which involved, at least to a degree, Parliament itself. Those who advocated change relied to a significant extent on the argument

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<sup>1</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan and Australia v Japan)* [1999] (Provisional Measures). The transcript of the proceedings together with the Tribunal's decision are available at <[http://www.un.org/Depts/los/los\\_disp.htm](http://www.un.org/Depts/los/los_disp.htm)>.

<sup>2</sup> *Standing Orders of the House of Representatives* (1999) 384–387.

<sup>3</sup> *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/1

that as New Zealanders have become increasingly affected by international obligations, the process by which New Zealand took on those obligations should be subjected to parliamentary scrutiny.<sup>4</sup> Although not formally instituted until 28 February 2000,<sup>5</sup> the 'new' system has been in operation since December 1997 when the government of the day instituted a trial permitting Parliament an increased role in the process.

Essentially, all multi-lateral international treaties are now presented to Parliament prior to New Zealand's ratification (not signature) together with a National Interest Analysis report.<sup>6</sup> Importantly, Parliament has not been given a right to approve or reject a treaty — only the opportunity to consider it. Further, not all treaties are covered: an exception clause allows the Government to avoid the procedures in cases of urgency and bilateral (read trade) treaties are not automatically within the procedures although the Government has agreed that, subject to the discretion of the Minister of Foreign Affairs and Trade, it can decide to present particularly significant bilateral treaties to Parliament.

The significant point in the present context is the lack of public interest, debate and even awareness in the trial which took place from December 1997 to mid-1999.<sup>7</sup> This is ironic when one considers that the purported aim of the changes was to generate more public accountability through parliamentary examination of proposed treaties. The lack of public interest remained steadfast throughout the trial period. Reporting on the trial, the Foreign Affairs Defence and Trade Committee (responsible within Parliament for the process) stated that of the 16 international treaties which had passed through Parliament during that time, most were given pro forma reports by the Committee and only seven written submissions were received.<sup>8</sup> Unfortunately, neither the Committee nor the Government explored the possible reasons for this apathy, nor gave any serious consideration as to whether the new procedures did achieve their stated aims.

### International dispute settlement

A similar anomaly is evident in the context of international dispute settlement. There is no question that for a small country like New Zealand, quite apart from any obligations at international law to settle disputes peacefully that politically speaking, recourse to peaceful settlement has always been the only feasible option of resolving international disputes. However, that fact by itself should not lead to an uncritical acceptance of all forms of international dispute settlement. Indeed, the exact opposite holds true. The fact that New Zealand is so dependent on international dispute mechanisms makes it imperative to ensure that the mechanisms in question are held to account for their decisions. This becomes increasingly important as the number of international treaties to which New Zealand is a party increases and as those treaties increasingly include binding dispute settlement processes.

ITLOS and the Dispute Settlement Understanding (DSU) of the WTO have been particularly significant to New Zealand in the past year and the following observations are confined to those mechanisms. In both cases, the binding and compulsory nature of the regimes' dispute mechanisms have been hailed as the proof of their

<sup>4</sup> See, eg, the report of the New Zealand Law Commission, *The Treaty Making Process Reform and the Role of Parliament*, NZLC R45, December 1997.

<sup>5</sup> See *Government Response to the Report of the Foreign Affairs, Defence and Trade Committee* A5, 28 February 2000. The procedure is formalised in *Standing Orders of the House of Representatives* (1999) 384–387.

<sup>6</sup> For a detailed historical and contemporary discussion of the procedures, see M Gobbi, 'Enhancing Public Participation in the Treaty-making Process: An Assessment of New Zealand's Constitutional Response' (1998) *Tulane Journal of International and Comparative Law* 57. To watch the story unfold, see Joseph, 'Constitutional Law' (1997) *New Zealand Law Review* 209, Joseph, 'Constitutional Law' (1998) *New Zealand Law Review* 197 and Joseph, 'Constitutional Review Now' (1998) *New Zealand Law Review* 85 and Dunworth, 'Public International Law' (2000) *New Zealand Law Review* 217.

<sup>7</sup> Only minor amendments were made to the procedures before they were made permanent, inconsequential for the purposes of this discussion.

<sup>8</sup> Foreign Affairs Defence and Trade Committee, 'Review of the International Treaty Examination Process', AJHR (1999), I.4E, Appendix 2.

success. As mentioned earlier, such an attitude is premised on the twin assumptions of New Zealand as the good international citizen and the fairness of the mechanisms in question.

The *Southern Bluefin Tuna Cases* provide an excellent illustration of the concern that the mechanisms may not be wholly satisfactory.<sup>9</sup> The cases arose as a result of a dispute between Australia and New Zealand on the one hand and Japan on the other. Australia and New Zealand challenged Japan's EFP of Southern Bluefin Tuna, a species of fish which has been seriously over-exploited for a number of years. The Convention for the Conservation of Southern Bluefin Tuna 1993, to which all three states were (and are) party created a Commission which had set fishing limits for each of the three states. The question, essentially, was whether Japan's EFP should be counted as part of that quota. The 1993 Convention did include provisions for dispute settlement but it did not extend to imposing a binding mechanism without the specific consent of all parties.

The three states were (and are) also party to the UN Convention on the Law of the Sea Convention 1982 (UNCLOS), which does include a binding dispute settlement process.<sup>10</sup> Following lengthy attempts to settle the dispute by negotiation, Australia and New Zealand filed an application for Provisional Measures with ITLOS arguing that Japan was in breach of its obligations under UNCLOS, specifically, Articles 64 on Highly Migratory Species of Part V (EEZ) and Articles 116–119 on High Seas Fishing of Part VII (High Seas).<sup>11</sup> The application sought an interim order enjoining Japan to keep within its quota as agreed by the Southern Bluefin Tuna Commission. On 27 August 1999, the Tribunal issued its Order for Provisional Measures calling on all three parties to the dispute to ensure that their annual catches did not exceed the set quota, to refrain from conducting an EFP except with agreement of the other parties and to resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of Southern Bluefin Tuna.<sup>12</sup>

While the substantive outcome of the Tribunal's Order is to be welcomed, there are some aspects of its approach which give cause for concern. First, the actual decision-making process ought to be more transparent. While the Tribunal is to be applauded for its policy of allowing the verbatim reports of the pleadings to be published,<sup>13</sup> the form of the actual decision leaves a lot to be desired. In this instance, the Order of the Tribunal is simply a recitation of the arguments made by the Parties to the dispute and it is almost impossible to discern any general principles from the decision. Admittedly, the Separate Opinions are more enlightening as to their reasoning but this is neither an appropriate nor sufficient substitute. This criticism does not suggest that in other fora (national or international) judicial reasoning is always illuminating or useful. However, given the fact that ITLOS has a very broad jurisdiction with significant powers it is critical for its credibility and legitimacy that it properly accounts for its decisions — even if it stops short of what the common lawyer would traditionally expect.

A second cause for concern arising from the Tribunal's decision is its apparent reluctance to make a clear stand. The Tribunal is a judicial body — not an 'agent of diplomacy' as was pointed out in the Separate Opinion of ad hoc Judge Shearer. Despite its judicial role, the Tribunal directed its Order at all three parties to the proceedings, as if none of the three were keeping within the fishing quota.<sup>14</sup> While the aim of the Tribunal is understandable:

<sup>9</sup> Above n 1.

<sup>10</sup> Part XV, United Nations Convention on the Law of the Sea 1982.

<sup>11</sup> B Kwiatkowska, 'The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases' (2000) 15 *International Journal of Marine and Coastal Law* 1, 9.

<sup>12</sup> *Order for Provisional Measures*, 27 August 1999, available on <<http://www.un.org/Depts/los/index.html>>. The decision of the Tribunal is significant for a number of reasons not discussed in this piece, not least its contribution to the development of the precautionary principle and its consideration of how issues of overlapping jurisdictions might be dealt with. Following the grant of the Order for Provisional Measures, an Arbitral Tribunal was constituted pursuant to Annex VII of the Convention to hear the substantive claim. On 4 August 2000, the Arbitral Tribunal declined jurisdiction, thus overturning the decision of ITLOS. See *Southern Bluefin Tuna Case Australia and New Zealand v Japan (Award on Jurisdiction and Admissibility)* available on <<http://www.worldbank.org/icsid/bluefintuna/award080400.pdf>> and <<http://www.worldbank.org/icsid/bluefintuna/opinion.pdf>> (Separate Opinion of Sir Kenneth Keith).

<sup>13</sup> Although written pleadings are not available <<http://www.un.org/Depts/los/index.html>>.

<sup>14</sup> Above n 11.

to refrain from aggravating the dispute, it is neither appropriate nor desirable for the Tribunal to temper its language to the extent that it shies away from its judicial role.

There are also a number of concerns which can be raised in the context of the dispute settlement procedures within the WTO. To a great extent, in New Zealand the focus of the debate on the WTO has been on the first of the Organization's functions: to help trade flow as freely as possible by removing trade barriers. However, the WTO's third function, that of resolving trade disputes in a binding, but peaceful manner, is also critically important, particularly given that the process is compulsory. There is an increasing volume of international literature now emerging which examines issues of procedure within the WTO dispute resolution system.<sup>15</sup> However, that debate needs to be conducted within New Zealand with specific attention being paid as to how it might affect New Zealand's interests.

This is perhaps even more important to New Zealand given the extent to which the DSU is being relied on.<sup>16</sup> As with ITLOS, the dispute settlement process is compulsory and so issues of transparency and accountability loom high. Applauded by many as the long-awaited system of enforcement to make the world's trading system credible but denounced by its detractors as further evidence of the WTO's ever encroaching on our sovereignty, the DSU has many judges. Whatever position one takes as to the WTO generally, there are important issues concerning process which should not be forgotten in the debate. While the DSU has been applauded for its efficiency and ability to (a certain extent) enforce its decisions, there is a grave concern that the cost of this efficiency has been basic safeguards which are normally considered essential in a credible and legitimate judicial system.

In both ITLOS and the WTO, all that is being proposed is that the regimes are structured in such a way as to ensure procedural and substantive fairness, most likely through ensuring that there is transparency and accountability. These principles have long been accepted within our national legal systems. There are no reasons why the same standards should not be applied in the international sphere.

Quite apart from the pragmatic reasons why New Zealand should push for transparency and accountability, there are good reasons why as a matter of general principle these standards should be applied internationally. Even with provisions for enforcement (for example, sanctions), essentially given the state-centred structure of the international system, most regimes rely on voluntary compliance. If a regime has credibility and legitimacy, compliance is more likely and the converse is true. It is precisely because of the growing importance of dispute settlement mechanisms that we need to consider issues of process carefully. We need to engage in a robust debate and deal with the details of process even as we continue with the more fundamental 'globalisation' debate. This is the key issue which has emerged from reviewing the year in international law from a New Zealand perspective

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<sup>15</sup> A good overview of many of the issues is provided in Lichtenbaum, 'Procedural Issues in WTO Dispute Resolution' (1995) 19 *Michigan Journal of International Law* 1195.

<sup>16</sup> New Zealand's direct involvement with the dispute settlement mechanism has been remarkable, given the relatively small size of New Zealand's trade. In particular, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R; WT/DS113/R (17 May 1999); *European Communities — Measures Affecting Butter Products*, WT/DS72/R (27 November 1999); *EC — Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R (16 January 1998), and most recently *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/1.



