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International Law Downunder: Antipodean Contributions and Challenges

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Antipodean Contributions and Challenges

Program

Wednesday 13 June

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Australia and International Human Rights

Elizabeth Evatt*

Introduction

I am looking today at some aspects of Australia's contribution to the treaty body mechanisms, and at a project I am now undertaking to review the work of the treaty bodies during the period that I was a member. To start, however, a few words on Australia's initial contribution to human rights in the United Nations system.

Developing the United Nations human rights system

The Australian delegation to the UN Charter conference in San Francisco, was led jointly by the The Rt Hon. Dr H V Evatt, the Minister for External Affairs, and The Rt Hon. Francis Forde. The delegation worked hard but unsuccessfully to oppose the big powers' veto in the Security Council. It strove also to expand the functions of the General Assembly, where smaller nations might have greater numbers and more influence.[1]

Evatt's vision for the United Nations was that is should become an agent to achieve high standards of living, full employment and conditions of economic and social progress and development throughout the world. Those goals were inserted in article 55 of the Charter as an Australian amendment, against stiff opposition.[2] The Australian delegation, and in particular Mrs Jessie Street, participated in the moves to ensure that women would have an equal place in the United Nations system and that there would be a permanent body in the United Nations to deal with women's rights: the Commission on the Status of Women (CSW).[3] The CSW was later responsible for drafting the Convention on the Elimination of All Forms of Discrimination Against Women.

Australia was among the first members of the Economic and Social Council and joined the Commission on Human Rights in 1947, when it began work on the international Bill of Rights.[4] In keeping with its vision for the United Nations as a whole, Australia's main goal was to ensure that the draft Universal Declaration of Human Rights provided adequate protection of economic and social rights.[5]

Perhaps in recognition of Australia's contribution to the formation of the United Nations, Evatt was elected President of the General Assembly, and held that position when the Universal Declaration of Human Rights was adopted on 10 December 1948. He had helped to get the Declaration adopted with no opposing vote and only a eight abstentions.

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* Former member of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and of the United Nations Human Rights Committee; currently Judge of the World Bank Administrative Tribunal and Honorary Visiting Professor, University of New South Wales.

1 G Evans and B Grant, *Australian Foreign Relations, in the World of the 1990s* (1995) 23.

2 H V Evatt, *Australia in World Affairs* (1946) 49.

3 see E Evatt, 'The United Nations and Women's Rights' Mary Owen papers (1995). Australia has been represented on the CSW for much of its life.

4 see Annemarie Devereux, 'Australia's International Human Rights Policy around the time of the UDHR', in the Proceedings of the 6th Australia and New Zealand Society of International Law Conference, 19 June 1998. Australia's main representative was Col William Roy Hodgson. Alternates were Jockel and Hood. Australia remained a member of the Commission on Human Rights until 1956.

5 Australia's representative, Hood, was in the drafting group that produced the provision on employment rights, article 23.1, E/CN.4/SR.65.

In a paper Evatt gave about the Universal Declaration, not long after it was adopted,[6] he was critical of the Soviet Union for their obstruction of the drafting process. One of their worst efforts had been to propose the inclusion of a provision in the Declaration to the effect that all rights should be 'dependent on the laws of the State' which would, he said, have frustrated the whole purpose of the Declaration.

Australia's commitment to human rights in the post-war period led it to make a radical proposal for an International Court of Human Rights to which individuals could have resort in respect of the rights arising under the Declaration.[7] The Court's jurisdiction would include appeals from decisions of national courts. The need for this was said to be that Security Council would act in defence of rights only if there were a threat to peace. The Court proposal did *not* find its way into the Declaration; and did not see daylight again in the drafting of the Covenants. It was brought out for inspection again in 1988 as part of Australia's statement to United Nations General Assembly in celebration of the 40th anniversary of the UDHR.

Australia continued to be firmly engaged in the human rights activities of the United Nations for many years, as a participant in the work of the Commission on Human Rights, the Commission on the Status of Women and the Third Committee of the General Assembly. It was active in drafting conventions, declarations and other instruments, and in numerous conferences.[8] One of its recent contributions was to the draft of the Statute of the International Criminal Court: Australia chaired a group of countries committed to the court concept (though we have not yet ratified the Statute).

A full assessment of Australia's contribution to the international law of human rights would need to examine not only its activities on the international stage, but also our record of domestic implementation. It would need to consider the extent to which national legislation and decisions of Australian courts have contributed to the international law on human rights. Those are subjects for another occasion. Here, it can be noted that, after delays, Australia eventually ratified all six United Nations human rights instruments, and all the individual communication procedures, at least those adopted up to 2000.

Surveying the work of the treaty bodies

My main topic today is the treaty bodies. I am now embarking on a project to study the work of the two treaty bodies with which I have been connected, CEDAW and the Human Rights Committee. The role and functions of those bodies need to be better understood, especially in the light of recent criticisms by the Australian government and the many proposals made in recent years for the reform of those bodies. I would like to show the factors which impede or which facilitate their work and incidentally to explain why my work there was so stimulating, so exciting and so frustrating.

Most discussion of the treaty bodies relates to what is on the public record about the outcomes of their work and their procedures. The inner workings of the treaty bodies, the various methods, formal and informal, used by committee members to achieve (or to retard) progress are not always fully understood by commentators, who cannot be aware of what takes place in the working groups or in other meetings which are off the record. What were the real objectives, what were the obstacles, personal and institutional, and how did the members of the Committee attempt to overcome these? How does the dynamic of the committees change over time as members come and go, and how does that affect the work, both its productivity and its general direction.

I hope to find a way to describe some of the major lines of progress and how these were achieved, from the point of view of an insider who participated in some important developments in the functioning of the treaty bodies. A discussion along those lines might help to ensure that more realistic proposals are made for the reform of the treaty bodies and for the resolution of their current difficulties. This paper foreshadows some of the issues that will be considered in the study.

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6 Held at Flinders University Library, Evatt papers.

7 E/CN.4/15, 5 February 1947. E/CN.4/SR 27, 3.12.47. E/CN.4/SR.39 15.12.47-pm, p 8.

8 (1982/19); see Erika Feller, 'Problems and Progress: The Role of the Department of Foreign Affairs', in *Human Rights: the Australian Debate*, Redfern Legal Centre (1987). pp 46, 47.

Setting an agenda for the treaty bodies in the 1980s

I was a member of CEDAW from 1984 to 1992 and the Human Rights Committee from 1993 to 2000.

CEDAW was two years old when I joined my first session, and had held three earlier sessions. I had read the reports and these had somewhat dampened my enthusiasm for the reporting process. The procedure that CEDAW had adopted for examining state reports seemed to me rather chaotic. Once a state had made its introduction, the questions and comments of members of the Committee, that might occupy two hours or more, appeared to be at random, and without any co-ordination. There did not appear to be any attempt to analyse the main issues for the state in question or to establish priorities. Of course, CEDAW was very young and had spent much time in settling rules of procedure and guidelines for states. Its procedure was similar to that of the other treaty bodies.

At that same session, in January 1985, the Committee was discussing a draft report on its work, which was to be its main submission to the Nairobi Women's conference to be held later that year.[9] My impression was that there were deficiencies in the document, because it was not based on any analysis of the Convention or its application. My suggestion was that the Committee should carry out a systematic review of the Convention and agree on the principles and goals and the measures to be taken in respect of each article. This was highly controversial, as it would involve CEDAW in interpreting the Convention. At that stage, the Committee had not reached agreement on how to implement article 21, which authorised it to make general recommendations to states parties, because of differences of opinion as to whether it had any role in interpretation.

This was during the cold war, and cold war politics affected the treaty bodies in a number of ways, their membership, their working methods and their ability to implement their mandate in full. By ratifying the instruments early, and often on the same date, the Soviet Union and its satellites had been able to ensure the election of their nationals to the treaty bodies in sufficient numbers to prevent any dangerous tendencies to criticise their own states.

Obstructionist tactics were disguised by the soft sounding word 'consensus' which, members from the eastern bloc insisted, should form the basis of decision making. Consensus decision making, at its best, gives greater moral force to decisions that claim universal support, and thus enhance their value.[10] It encourages ingenuity to find language acceptable to everyone. At its worst, the insistence on consensus prevents innovation, prolongs discussion and results in an outcome that may lack clarity or is weak where strong language would be preferable.

All these problems beset CEDAW in its early years. They made it difficult to decide even procedural matters, to adopt Rules of Procedure and to elect the Chairperson and Bureaux. The organised obstinacy of the eastern bloc members on selected issues was usually led by Mrs Biryukova of the Soviet Union. She was apparently under the 'guidance' of a political agent who was always present at her elbow. Her efforts were ably supported by the member from the German Democratic Republic and others who, despite their standing as independent experts, shared exactly the same view on most issues. Sometimes they had to wait for the word from their leader before they dared to speak.

On the question of analysis and interpretation, the Rapporteur, Edith Oeser of the GDR, a Professor of International Law, took the lead. She asserted firmly that it was the responsibility of the states parties to interpret the articles of the Convention. I maintained my view that states could seek guidance from the Committee and that there was no one else to give them such guidance. I was drawn aside at the adjournment, and quietly told that the Committee was not ready for such ideas.

By the end of that session, it had become one of my goals that the Committee should embark on a process of analysis and interpretation of its instrument in order to form views as to the proper application of each provision. How, otherwise, could it form an expert opinion as to whether states had fulfilled their obligations? Implicitly,

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9 Called the 'Compendium', *The Work of CEDAW: Reports of the Committee on the Elimination of Discrimination against Women (CEDAW), vol 1, 1982 - 1985*, UN (1989) p 532 ff.

10 Ibid p 683.

states should respect the views of the Committee. Another goal was to introduce order and system in the approach to questioning states, and that the Committee should make an assessment of the level of compliance by each state. These goals were shared by other members, and they were the basis of much of my work on the treaty bodies over the next 15 years.

The battle in CEDAW for general recommendations was won within the next two years, and this victory seemed to coincide with a waning of the cold war tensions. By 1989, the eastern bloc had lost most of its membership, as the number of ratifications increased and further elections were held.

Developing jurisprudence: general recommendations and comments

Establishing the role of General Comments in the Human Rights Commiss: 1980-1981

Although I was not aware of it at the time, the Human Rights Committee had been involved in its own internal struggle about its role in interpreting the Covenant . Article 40 (4) of the Covenant on Civil and Political Rights provides that the Committee may make General Comments arising from its consideration of state reports:

> 40(4). The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

While this seems plain enough, there was strong internal opposition to the Committee expressing views on any questions of interpretation or application.[11] When the issue was debated in October 1980,[12] Bernhard Graefrath (GDR), asserted that the Committee was not authorised to make a general assessment of the human rights situation, the fulfilment of obligations or violations in particular countries, or to interpret the Covenant or make recommendations and suggestions concerning specific states. In his view, the purpose of reports and their study by the Committee was to exchange information, to promote co-operation among states, to maintain a steady dialogue and to assist states to overcome difficulties.

The opposing view, presented by Torkel Opsahl (Norway), was that the plain meaning of paragraph 4 supported both functions. It would hardly be possible to form views under the Optional Protocol, he said, without at the same time interpreting the Covenant.

Opsahl's view prevailed, and the Committee went on to make the preparation of General Comments on particular provisions of the Covenant a regular part of its agenda. The first step was to issue a comment explaining the purpose of General Comments, in July 1981.[13] This was followed in the same session by no less than four General Comments, on reporting obligations, reporting guidelines, implementation at national level and on article 3, which requires states to take measures to ensure the equal enjoyment of rights by men and women. As time went by, the Committee was able to agree on more sophisticated General Comments, which went beyond recommending to states what they should put in their reports, and which were more analytical in their interpretation of the Covenant.

CEDAW's decisions regarding general recommendations 1986

CEDAW's struggle for a role in interpreting the Convention revolved around article 21 of the Convention, which provides that the Committee may:

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11 Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (1993) pp 568-573, 574 outlines the history of this.

12 CCPR/C/SR 231m 22 July 1980 [2 ff] (Torkel Opsahl) and [9 ff] (Graefrath). See Nowak, ibid, for discussion.

13 CCPR/C/21, 28 July 1981; Nowak, ibid, p 572.

> make suggestions and general recommendations based on the examination of reports and information received from the States Parties.[14]

Though differently worded, the intention of this provision appears to be close to that of article 40 (4) of the Covenant. But, although the Human Rights Committee had resolved the matter for itself in 1980-1981, CEDAW had to argue the matter again in 1985 and 1986. There was strong opposition in CEDAW to any use of its powers to make suggestions and general recommendations.[15] Battle was joined.

To clarify the matter, an opinion was obtained from Legal Counsel of the United Nations. That opinion, given to the Committee at its Fifth Session in 1986, was that under article 21 CEDAW could make general recommendations addressed to all states parties about matters arising from consideration of a number of reports. It could also make suggestions that might be general or specific.[16]

This opinion did not resolve the matter.[17] Some members wanted the Committee to adopt substantive recommendations at the 1986 Session and circulated their drafts. The eastern bloc, led this time by Maria Regent-Lechowicz, the forceful Polish ambassador to Sweden,[18] maintained stiff opposition to the Committee expressing any opinions about the Convention and its interpretation. Much of the argument took place off the record in a working group. There was considerable tension, as various attempts to reach a consensus view foundered. Towards the end of the session, a compromise was reached on the text of a rather inconsequential General Recommendation, which adds little to the text of article 18.

> Initial reports submitted under article 18 of the Convention should cover the situation up to the date of submission. Thereafter, reports should be submitted at least every four years after the first report was due and should include obstacles encountered in implementing the Convention fully and the measures adopted to overcome such obstacles.[19]

The first suggestion under article 21 was adopted at the same session. This was a little more illuminating. It asked states to consider setting up national machinery to ensure the elimination of discrimination. It was very politely worded.

> Where needed, states parties might consider the establishment of public institutions (national machinery) to ensure the effective elimination of discrimination against women, and where established, pursue towards this end.

Despite the weakness of these statements, those who saw a role for the Committee in interpreting the Convention and spelling out state obligations under its provisions considered that they had had a tremendous victory. The relevant provisions of paragraph 1 of article 21 (1) had been put into effect for the first time. More important, it had been agreed that there should be a working group at each session which would prepare drafts of other proposed general recommendations. The enthusiasm of members to get to grips with issues was met by the inclusion in the report of the Session of a group of 'general observations arising from the Fifth session'.[20] These

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14 Article 21 (1); Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from states parties.

15 For earlier discussion see above n 9, pp 277 [34], 278 , 350 and p 417 (3rd session, 1984); pp 473, 525 (4th session 1985).

16 The opinion of Legal Counsel was that CEDAW had the same powers as the Committee on the Elimination of Racial Discrimination (CERD), CEDAW Report of Fifth Session 1986, [358], *The Work of CEDAW, vol 2*, p 47 ff.

17 Art 21 was discussed at the Fifth Session, CEDAW Report of 5th session, 1986; *The Work of CEDAW, vol 2* ibid pp 82, 109, 172, 174, 181, 194, 202.

18 Mrs Biryukova had by then joined the Gorbachev cabinet and did not return to the Committee.

19 General Recommendation No 1 (5th Session 1986) *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN. Doc. HRI\GEN\1\Rev.4 (2000), p 154.

20 CEDAW, Report above n 17, [365], *The Work of CEDAW , vol 2*, above n 16, p 48.

covered such things as rural women, participation in government, overcoming prejudices, wage levels and unemployment of women. These issues formed the basis for later general recommendations.

The door was open. As the tensions of the cold war began to subside in the late 1980s, the resistance to more complex general recommendations was overcome. In the years that followed, CEDAW adopted a more systematic approach to the development of general recommendations on substantive issues arising under the Convention.[21] One of the results was general recommendation No 14 on Female Circumcision (1990); another was general recommendation No 19, on Violence against Women, adopted in 1992.[22]

HRC General Comment on reservations 1994

In parallel with those developments, the General Comments of the Human Rights Committee became more ambitious over the years, in terms of their substance and detail. Perhaps the most ambitious General Comment was No 24 on Reservations, adopted in October 1994.[23] Among other issues dealt with, this General Comment spelled out the Committee's view as to its role in determining whether a particular reservation was compatible with the object and purpose of the Covenant.[24] Although there is no express support for such a role in the Vienna Convention on Treaties, the Committee was very clear that it must form a view as to the compatibility of reservations in order to carry out its functions:[25]

> In order to know the scope of its duty to examine a state's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law (para 18).

An even more challenging issue was whether the Committee could determine the consequences of a reservation which it considered incompatible with the Covenant. The point of view argued for in the draft, and which was accepted by the Committee, was that in the vast majority of cases, the state making such a reservation, has in fact accepted the Covenant as its main purpose. Therefore, it would be in accordance with the primary intention of the state not to take account of the reservation.

> The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation (para 18).

In this formulation, allowance is made for the situation when a reservation is so significant and fundamental that the obligations of the treaty have not really been accepted by the state. In such a case, the result would be that the state is not a party at all. In the case of human rights treaties, that would not be the best result, but it had to be allowed for. The General Comment on Reservations has had considerable impact on the Committee's relationship with states parties; it has also led to certain differences of opinion in the Committee.

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21 M R Bustelo, 'The Committee on the Elimination of Discrimination against Women at the Crossroads', in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* Cambridge University Press (2000) p 96ff.

22 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* above n 19, pp 161, 166.

23 General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under art 41 of the Covenant (52nd session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, above n 19, p 118.

24 The draft (prepared by Mrs Higgins) was discussed at the July and October sessions, 1994, HRC Summary Records of meetings Nos 1366, [53]-[62]; 1368, 1369, [17] to end; 1381, 1382.

25 There was prior jurisprudence on the meaning and effect of reservations, eg, the French reservation on art 27, and others relating to the Optional Protocol.

The General Comment had been adopted only one session before the United States presented its initial report to the Committee in March 1995. This was highly significant, as the US had ratified with many 'reservations, declarations and understandings'. While introducing its report, the US government delivered to the Chairman of the Committee a statement of its concerns about the General Comment.[26] Among other concerns, the US objected to the Committee's view that it could disregard an incompatible reservation. It also challenged the Committee's claim to interpret the Covenant in such a manner as to bind a state.[27]

Despite these negative reactions of the United States, the Committee did not hesitate to express its regrets about the extent of the United States' own reservations, declarations and understandings to the Covenant, and their effect.[28]

> It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

The Committee recommended that the US review its reservations, declarations and understandings with a view to withdrawing them.

The UK and France joined the United States in objecting to the Committee's view that it could disregard an incompatible reservation.[29] These three States, though disagreeing with certain of the Committee's views as expressed in the General Comment, were by formally responding in writing, indicating that they were taking very seriously the opinions of the Committee, though it might be too much to claim that failure to respond in a similar way should be taken as acquiescence in the Committee's views. There remains an unresolved issue as to the status of the Committee's views on its role in respect of reservations as against that of individual states.

The Committee's position in regard to reservations came under the spotlight later, when the International Law Commission published its preliminary conclusions on reservations to multilateral treaties and sought comments from the treaty bodies.[30] The Committee was concerned that the International Law Commission (ILC) should recognise the contribution of universal treaty bodies, such as the Human Rights Committee, to the development of practices and rules in this area. It emphasised that it must assess the compatibility of reservations as part of its monitoring functions, and that it would also have to decide on the effect and scope of a reservation in order to determine the admissibility of an individual communication. The final views of the ILC are pending.[31]

The General Comment on reservations gave rise to an internal drama when Trinidad and Tobago denounced the Optional Protocol in May 1998 and re-acceded on the same date, with a reservation excluding the Committee's competence to deal with communications relating to any prisoner under sentence of death in relation to his arrest, trial and sentence. The state party's reasons for this reservation were that proceedings under the Optional Protocol led to delays in carrying out the death penalty, and that these delays would lead to violation of the Constitution, as a result of the Privy Council decision in *Pratt v Morgan*.

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26 HRC Concluding Observations on the United States, HRC Report for 1995 A/50/40 [278]; the Report drew attention to the observations made by the chairman of the Committee at the 1406th meeting, on 31 March 1995 (CCPR/C/SR.1406). It had been informally agreed that the issues relating to the General Comment would not be discussed in detail.

27 This was in response to para 11, which said: Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty. Discussed briefly [13] in SR 1381.

28 HRC Report for 1995 above n 26 [279], [292].

29 see ibid, annex, and HRC Report for 1996 A/51/40 , annex.

30 International Law Commission, Report of 49th session.

31 above n 26 p 128, annex VI, letter to ILC. The meeting of Chairpersons in Feb 1998 thought ILC too restrictive and supported GC 24.

In the case of *Kennedy v Trinidad & Tobago*, the Committee had to pronounce on the compatibility of the reservation and the effect of any incompatibility.[32] These issues divided the Committee. Nine members of the Committee were of the view that the communication in question was admissible, despite the reservation. The view of eight members was that reservation was contrary to the object and purpose of the Optional Protocol, because it sought to exclude consideration of issues relating to the right to life, and because it was in essence discriminatory. In the view of this group, as the reservation was limited to a defined group, and as it appeared that the state was otherwise willing to accept all obligations under the Optional Protocol, the incompatibility of the reservation did not preclude the Committee from considering the communication. Four members dissented strongly, on the basis that the reservation was not incompatible with the object and purpose of the Optional Protocol. Only 13 members participated in the decision. Trinidad and Tobago denounced the Optional Protocol again after the decision.

How General Comments/Recommendations are developed

The preparation of General Comments requires an individual member to take on the task of preparing and circulating a draft. This is voluntary and often takes up a considerable amount of time between sessions. Other members also give time to consider and comment on the drafts. Discussion of the drafts has to be fitted into available time in-session, often when there is time left at the end of a meeting. Secretariat resources can give little support to this work. The Committee is able to produce General Comments only because individual members are willing to undertake this work.

My project will look at selected General Comments and examine the problems encountered in taking them from a member's first draft to a final consensus document. Themes to be covered include the following: how CEDAW overcame tensions between women from the developed western countries and those from developing countries, particularly African countries, in order to adopt a General Comment on Female Circumcision; how the end of the cold war opened the way for the Human Rights Committee to draw up a General Comment on democratic rights, and how it dealt with divergent views about the workings of democracy, found consensus on some fundamental issues relating to voting rights, the meaning of representative government and the close relationship between freedom of expression, assembly and association with political rights.

Developing jurisprudence: concluding observations

It took the treaty bodies many years before they could agree to make a formal assessment of the level of compliance by states with their obligations under the instruments they had voluntarily ratified. For a long time, the reporting process concluded with no more than individual comments by members. Even if several or even many members made the same observation, this fell far short of a committee opinion.

The first concluding observations appear to be those of the Committee on Economic, Social and Cultural Rights (CESCR) in 1990.[33] Some abortive attempts were made to persuade CEDAW to adopt concluding observations on particular states in the early years.[34] A further unsuccessful attempt was made at the 10th session in 1991.[35] Consensus was finally achieved by CEDAW in 1993, and the first concluding observations were adopted in 1994.[36]

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32 *Kennedy v Trinidad & Tobago*, 845/1999, decided November 1999, HRC Report for 2000, A/55/40 vol II, p 258.

33 Philip Alston, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, E/CN.4/1997/74, 27 March 1997, [109 ff], reprinted in Anne F Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (2000) 625. Scott Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System needing Reform', in Alston & Crawford, above n 21, 129 at 135; E/C.12/1990/8 [249].

34 CEDAW vol 2 p 129.

35 Report of 10th session, 1991, [392]. The procedure was not settled until the following session.

36 CEDAW, Report of 13th Session 1994. Bustelo, above n 21, p 93 ff.

The Human Rights Committee's procedure for drawing up concluding observations was settled by 1992, after the objections of the eastern bloc to expressing views on compliance by particular states had evaporated.[37] There was, however, continuing insistence that members should be able make their own concluding comments. It had been accepted that the adoption by the Committee of a written concluding observation would not preclude any member from making individual comments at the end of the examination of the state's report.[38] Individual comments were finally abandoned in 1997, partly because there was no time for it and partly because members were willing to leave it to the Chairperson to make a general summary of the discussion and the chief issues raised.

Concluding observations, that point out clearly laws and practices considered incompatible with the Covenant, are intended to guide states in carrying out their obligations and to provide the Committee with a basis for assessing progress by states in later reviews. Concluding observations linking the Committee's concerns with particular provisions of the Covenant have also made a significant contribution to the Committee's jurisprudence and to the preparation of General Comments. An example is the General Comment on article 3, equal enjoyment of rights by men and women, discussed below.

No one would assert that the Concluding Observations of the treaty bodies are perfect. They are variable in length and in detail. Particular observations may be too general, and may fail to identify what is wrong or what action is required. Occasionally there are errors in detail as a result of inadequate information. It is difficult for such voluntary bodies, with their scant resources, to absorb and deal in an informed way with the complexity of the issues in each state considered. The drafting of concluding observations is, in most cases, assigned to a member, who may be more or less willing to take up responsibility for the work entailed. Often there are problems in adopting the observations, because of differences of opinion about the application of the Covenant or the extent of compliance which must be resolved. It can be a long drawn-out process, with many compromises along the way. However, there is no doubt that overall, the Concluding Observations are a positive step forward in assessing the level of compliance by states and in enhancing their accountability. In 2000, the Human Rights Committee took a further step in this direction by adopting a formal follow-up procedure, aimed at ensuring that states respond positively to the Committee's observations.[39]

An illustration of the merit of concluding observations is provided by Australia's experience in 2000, when four treaty bodies drew up concluding observations on this country. Each committee received considerable information from government and from non-governmental organisations. Studying the observations from the point of view of someone familiar with the scene in Australia, it is clear that, despite the complications of native title and mandatory sentencing, the observations present a picture of a state with a good record for the most part, but with flaws in a few important areas: indigenous rights, including mandatory sentencing, treatment of asylum seekers and lack of effective enforcement measures. Regrettably, Australia's report was presented to the Human Rights Committee before it had adopted its follow-up procedure.

Expanding women's rights in the treaty body system

In the 1990s, all the treaty bodies were called on to pay more attention to women's rights. The movement 'women's rights are human rights' was very active in the lead up to the Vienna World Conference on Human Rights in 1993. A major goal was to have violence against women in all its manifestations recognised as a human rights issue. A concern was that the Women's Convention, though it addresses trafficking of women, does not deal expressly with the many forms of violence against women, such as rape and sexual violence, family violence, honour killings, female genital mutilation, dowry death, all of which involve serious violations of women's rights. Pressure was building for a new instrument to deal specifically with violence against women.

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37 Nowak, above n 11, p 572-573; see also Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (2000) p 12.

38 HRC Report for 1992, A/47/40 [18] and [45] (March 92).

39 HRC Rules of Procedure CCPR/C/3 Rev.6, 24 April 2001, Rule 70 (5), 70A. This was implemented in 2001, see eg, Concluding Observations on Venezuela, CCPR/CO/71/VEN, 26 April 2001 [30].

During this period, CEDAW was dealing with the issue of female circumcision, an issue which caused considerable tension between CEDAW members from developing countries and those from the developed world. Nevertheless, the Committee, was able to find a consensus which enabled it to be the first UN body to pronounce on this issue.[40] (The project will explain how this happened.)

The Committee then undertook on a comprehensive General Recommendation on violence against women.[41] The starting point was article 1 of the Convention, which defines discrimination as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (article 1).

The General Recommendation defines gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. It proclaims that violence not only violates the Convention, but that it also violates the obligations of states under other human rights instruments.

The issues of women's rights and violence against women were successfully incorporated in the outcomes of the World Conference. The Program of Action calls for the appointment of a Special Rapporteur on Violence Against Women. The treaty bodies were asked to give greater attention to women's rights, to gender issues and to all forms of violence against women. The World Conference also called for early consideration of a right of petition under the Women's Convention.[42] CEDAW, as well as non-government organisations (NGOs) and commentators, had been pushing for this as a way to make its monitoring work more effective.[43]

Following the 1993 World Conference, the treaty bodies were challenged to do more to integrate women's rights into their work.[44] Until then, they had given little attention the gender dimension of the rights protected by their instruments, perhaps because there was a Women's Convention, or for other reasons. They dealt with discrimination against women only in limited areas, such as employment, political participation, family law, etc.

The Human Rights Committee responded to the recommendations of the World Conference by amending its Guidelines to invite states to report, in respect of each Covenant right, on any factors affecting the equal enjoyment of that right by women.[45] Changes in the Committee's membership, which occurred at this time, led to an increased focus in the reporting process on gender-specific issues arising under the Covenant.[46] The concluding observations which resulted from this approach were an important basis for the Committee's revised General Comment on article 3 of the Covenant, adopted in 2000.

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40 General recommendation No 14 on Female Circumcision (1990), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, above n 19, p 161.

41 General Recommendation No 19 (11th session, 1992).*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, above n 19, p 166.

42 Program of Action [40].

43 Eg, T Meron, 'Enhancing the Effectiveness of Prohibition of Discrimination against Women', (1990) 84 *American Journal of International Law*, 213. Andrew Byrnes, 'Towards more Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures', in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (1994) 189.

44 The Chairpersons agreed in 1994 that states should include information about the rights of women and describe the special obstacles to their full enjoyment of human rights 1994.

45 At its 53rd session in 1995.

46 The 1994 election had brought into the Committee five new progressive minded members, including Cecilia Medina; she was elected as President in 1999.

The Committee's first General Comment on article 3 was one of the earliest to be adopted in 1981.[47] Its focus was on laws or measures which make a distinction between men and women, so far as they adversely affect the rights provided for in the Covenant. It recognised that the prevention of discrimination required not only measures of protection but also affirmative action to ensure the positive enjoyment of rights.

The Committee had not, however, analysed the meaning of the equal enjoyment of each Covenant right by women, or the relationship between violence against women and Covenant rights, such as the right to life or the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It had not considered the circumstances in which the state could be considered responsible for rape or other forms of violence.

A chance meeting in July 1995, in Geneva, with the founder of a New York based organisation for women's rights, called Equality Now, resulted in that organisation providing to members of the Human Rights Committee on a regular basis information about the violation of women's rights in states whose reports were under consideration. The information provided to the Committee by Equality Now on women, particularly in developing countries, was thoroughly researched and linked to the relevant articles of the Covenant. Relevant laws, court decisions, articles and press comments were annexed. Members of the Committee found the material reliable and used it frequently. In this way, they were learning about the gender-specific issues which arise under the Covenant.

From that period, the concluding observations on states regularly dealt with issues such as culturally influenced murder of women, rape and violence, the impact on women of unlawful abortion, forced sterilisation, genital mutilation, trafficking of women and other forms of sexual exploitation and abuse. When Cecilia Medina came to draft the new General Comment on article 3, the concluding observations of the Committee contained a wealth of jurisprudence on specific gender issues concerning women under each of its provisions.

The project will describe how the members of the Committee contributed to the drafting of the General Comment, and how they added to it with further proposals ideas of their own, such as the treatment of women and in particular mothers, in prison. The final text was genuinely a consensus document to which nearly all members had contributed. The General Comment on article 3 was the Human Rights Committee's contribution to the Beijing + 5 Special Session of the General Assembly held in 2000.

The outcome had resulted from a positive relationship between the Human Rights Committee and an NGO, a fact which was acknowledge by the President of Equality Now, at the special meeting of the Human Rights Committee to celebrate the 25th anniversary of the Covenant on Civil and Political Rights, held in New York in March 2001.

Communications procedures

This paper does not discuss the communications procedure in the Human Rights Committee, though this will be part of the main project. An important point to make is that while the views of the Human Rights Committee are not legally binding as such, the states parties have legal obligations under the Covenant and those states ratifying the Optional Protocol recognise the competence of the Human Rights Committee to consider and reach views on individual complaints. The Committee approaches its work in communications as if it *were* a court of precedent, seeking not to depart from its settled jurisprudence.

The Optional Protocol to the Women's Convention, proposed by the World Conference[48] and supported by CEDAW,[49] was adopted in 1999 and came into force in December 2000.[50] The Protocol will create new

47 General Comment No. 4, adopted at the 13th Session, 1981.

48 Vienna Program of Action [40].

49 Suggestion 5, *Report of the 13th Session of the Committee on the Elimination of All Forms of Discrimination Against Women*, 1994, A/49/38, p 10. EcoSoc (res 1994/7).

opportunities for CEDAW to develop jurisprudence under the Convention, and should strengthen its standing in the UN system of human rights protection. An attempt was made in the early drafts to close an obvious gap in the Optional Protocol to the ICCPR by making CEDAW's views legally binding. This failed; nevertheless, the Protocol requires states to give due consideration to the views of the committee, and to respond within six months with information about action it has taken.[51] There is provision for CEDAW to initiate an inquiry procedure, when it receives reliable information which appears to indicate that there is a serious or systematic violation by a state party of rights under the Convention or a failure to give effect to its Convention obligations. State consent is needed to conduct the inquiry.[52]

Australia is not a party to this Protocol. This is a matter for regret, and is difficult to understand, as the Australian government provided financial support for the meeting of a non-governmental group of experts which prepared the first draft for the Protocol and actively supported the drafting process in the CSW.

Reform of the treaty bodies, membership and resources

In the last few years there has been much discussion about reforming the treaty body system. The growing number of ratifications, the failure of many states to submit their reports, the lack of resources of the system and its often cumbersome procedures have prompted this debate. Major studies of the functioning of the treaty bodies were carried out by Philip Alston for the United Nations Secretary-General.[53] These are essential reading for everyone concerned with the reform of the treaty-body system.

Philip Alston is currently Professor of International Law at the European University Institute at Florence. He was an original member of UN Committee on Economic, Social and Cultural Rights, after its restructure, and remained a member of that Committee from 1987 to 1998. He was Rapporteur from 1987–1990, and Chairperson from 1991-1998. During his time as a member of the Committee, Alston played a key role in the Meeting of Chairpersons of United Nations Human Rights Treaty Bodies, both as Rapporteur and as Chairman. In the context of a conference about Australia's contribution to international law, and a discussion of the treaty bodies and their reform his contribution should be acknowledged. Alston's work on the treaty bodies has not been displaced by the most recent report prepared by Professor Bayefsky, prepared in collaboration with the UNHCHR.[54]

My view is that treaty-body reform cannot be imposed from outside but must emanate from and be carried out by the treaty bodies themselves. Members of the treaty bodies know the needs and constraints of the system, and are willing to improve procedures in order to carry out their mandate effectively. External support is needed primarily to ensure that the committees have adequate resources and that the quality of their membership is maintained.

The standard of membership is a matter of considerable importance. On this depends the quality of the treaty bodies' work, the standards of objectivity and integrity, the rigour of analysis and consistency of jurisprudence. In my experience, most treaty-body members are committed to making human rights effective in the states parties. Many have high levels of competence and experience in human rights. Some are willing and able to put in hours of time in session and out of session to work on communications and lists of issues and to draft General Comments, etc. The election of members, which occurs every two years, usually changes the composition of each treaty body to a greater or lesser extent. But it does not seem to me that the states always give weight to the needs of the treaty bodies in deciding how to allocate their votes. They do not automatically exclude from

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50 Of 23 parties as at July 2001, three are in our region, New Zealand, Bangladesh and Thailand.

51 Art 7 (4).

52 Art 8, The procedure follows art 20 of ICAT, though its coverage is wider.

53 Alston, above n 33. See also: Philip Alston and James Crawford (eds), above n 21.

54 Professor Anne F Bayefsky, *Report: The UN Human Rights Treaty System: Universality at the Crossroads*, April 2001; Bayefsky, above n 33 includes Alston report, reports of the meetings of Chairpersons of UN treaty bodies.

consideration persons who hold government or diplomatic office in their own states, something which both limits the availability and casts a shadow on the independence of that member.

Australia could take a lead in encouraging states parties to take these factors into account in the election of members.[55] Regrettably, the election process seems often to involve trade-offs with dubious partners for reasons unconnected with the efficiency and independence of the treaty bodies.

Lack of resources is at the heart of many of the problems faced by the treaty bodies, and in particular the Human Rights Committee. Time pressure and resource inadequacy mean that individual members have increasing burdens of work both in session and between sessions. If changes in membership bring in members with less time or ability to carry out the necessary work, the system could get into further difficulties. If Australia could succeed in gaining additional resources for the treaty bodies it would make a significant contribution to their effective operation.[56] Another important issue is that of overlapping mandates, that put extra burdens on states and hamper the effectiveness of the system. This problem is not so easy to resolve, as each body guards its own mandate with some jealousy. Reform measures designed to streamline the process, especially those that may seek to redefine mandates, cannot readily be imposed on the committees. The treaty bodies must themselves be encouraged to undertake the practical steps that are needed to resolve these questions of overlap.

Effective and efficient operation of the treaty bodies will be of no avail unless states accept their own accountability for compliance with their treaty obligations. The Human Rights Committee has made considerable progress in establishing a follow-up procedure both for communications and for the reporting process. The aim is to impress on states parties that they should take seriously the views and recommendations of the treaty body.

In practice, the work of the treaty bodies is likely to be most effective, in terms of its impact on national law and practice, in states that take seriously their treaty obligations. In this context, it is more than disappointing to hear the Australian government say that it can disregard the views of the Human Rights Committee because they are not binding. It is disappointing to hear the assertion that the opinion of the government is what matters. Attitudes of this kind undermine the effectiveness of the human rights system. It is also cynical and illogical to assert that as the treaty bodies are so overloaded with work that their views need not be taken seriously, while making no attempt to secure additional resources for their work.

In the long run, the importance of developing a detailed and comprehensive global human rights jurisprudence may suggest the need for a single body to undertake that task. Sooner or later consideration will have to be given to make the determinations of the committees binding or to setting up an international court of human rights.

Some observations

In this paper, I have tried to give a brief outline of some of the developments in the treaty bodies over the last 16 years in which I have participated. These will be incorporated in more detail in my current project. I believe that in order to foster and encourage progress within those bodies it is essential to understand their dynamics and the kinds of interactions which occur between different members and groups of members. My hope is that this discussion, and the later study, will lead to more realistic practical and positive proposals being made for the reform of the treaty bodies.

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[55] Bayefsky, ibid, 45, 179. The government has announced that it would more actively identify Australian candidates for positions on treaty bodies. Attorney-General Williams, press statement 5.4.01

[56] An announcement to this effect has been made by the Attorney-General, 5.4.01.

Antipodean Contributions to the Development of International Law

An American's Perspective on Antipodean Contributions to International Law

Susan L Karamanian*

I noted with interest that antipodean lawyers were meeting in the capital city of an antipodean country to discuss antipodean contributions to a body of law important to both the antipodes and the 'anti-antipodes', or the rest of the world, of which I am a part. Surely, I thought, the perspective of a Texan, the functional equivalent of an antipodean in the United States, could assist my antipodean colleagues? Or, if over the past six months we have heard too much from Texans on too many issues, then perhaps one American's perspective would be of interest? So, I am delighted to be in the antipodes to present, humbly, an American's thoughts on antipodean contributions to international law.

Before I present my perspective, please indulge me while I engage in the time-honoured American tradition of presenting someone else's view on the topic at hand. A distinguished international law scholar and my colleague at The George Washington University Law School, Professor Louis B Sohn, is well-versed in the antipodes. Thus, I asked Professor Sohn: 'What do you think is **the** most important antipodean contribution to international law?' It came as no surprise that Professor Sohn immediately mentioned the Law of the Sea. For eight years, Professor Sohn served as the United States delegate to the Law of the Sea Conference. He then mentioned Antarctica. But then Professor Sohn advised, 'write this down': 'Australia and New Zealand made very important contributions to international law by opposing the testing of nuclear devices in the Pacific Ocean that endangered inhabitants of the islands.' I would add, the nuclear tests posed a grave danger to valuable natural resources and, perhaps, to all of mankind.

In any event, the willingness of Australia and New Zealand to institute proceedings in the International Court of Justice (ICJ) prompted the ICJ to issue interim protection ordering France to avoid nuclear tests causing the deposit of radioactive fallout on the territory of New Zealand and Australia and the referenced islands.[1] Eventually, France halted its above-ground nuclear tests.[2]

Professor Sohn's observation about the *Nuclear Tests Cases* confirmed my initial thoughts on antipodean contributions. Having worked with Australians and New Zealanders, participated in conferences with them, and studied their writings, I sense a willingness, an almost anxiousness, to be engaged in the international process when the involvement is deemed necessary. They act at the highest levels, the International Court of Justice,[3] the International Tribunal for the Law of the Sea,[4] and the World Trade Organization,[5] for example, to seek to

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1 See Nuclear Tests (*Austl. v Fr.*) [1973] ICJ Rep 99, 106 (Interim Protection Order of June 22); Nuclear Tests (*N.Z. v Fr.*) [1973] ICJ Rep 135, 142 (Interim Protection Order of June 22).

2 See Nuclear Tests (*Austl. v Fr.*) [1974] ICJ Rep 253, 272 (Judgment of Dec. 20); Nuclear Tests (*N.Z. v Fr.*) [1974] ICJ Rep 457, 477 (Judgment of Dec. 20). As Australia's former Solicitor-General Gavin Griffith observed in his remarks on June 13, 2001 at the Australian and New Zealand Society of International Law Annual Meeting, New Zealand did not succeed in its attempt in 1995 to have the judgment in the *Nuclear Tests Cases* re-examined to challenge France's underground nuclear tests. *See* Nuclear Tests (*N.Z. v Fr.*) [1995] ICJ Rep. 288, 307 (Order on Request of Sept. 22).

3 See above nn 1 and 2.

4 See Southern Bluefin Tuna (*N.Z. v Japan; Austl. v Japan*), 1999 ITLOS Cases Nos 3 and 4 (Provisional Measures Order of Aug. 27), reprinted in 38 ILM 1624 (1999). See also Southern Bluefin Tuna (*Austl. and N.Z. v Japan*), Jurisdiction and Admissibility, Award (UN Law of the Sea Arb. Trib., Aug. 4, 2000) included in <http://www.worldbank.org/icsid/>.

5 See D Williams, 'International Law and Responsible Engagement', International Legal Challenges for the Twenty-First Century, Proceedings of a Joint Meeting of the Australian & New Zealand Society of International Law and the

remedy a wrong or resolve a disagreement. Participating as the 'good international citizen'[6] has a price, however, as their citizens seem well aware. Professor Treasa Dunworth of the University of Auckland observed at last year's Joint Meeting between the Australian and New Zealand Society of International Law and the American Society of International Law (Joint Meeting) that 'the rush to embrace international dispute settlement mechanisms' is based on the sense that the countries are in the right.[7] With some prescience, she appears to have foreshadowed the criticism and second-guessing that would occur if an international tribunal were to rule against Australia and New Zealand.[8]

In addition to participating in international dispute resolution, the antipodean nations are leaders in building international institutions and defining international law. Australia is at the front of the movement to establish the International Criminal Court.[9] Its citizens hold positions at The Hague tribunals.[10] A New Zealander and an Australian have been active in the UN International Law Commission.[11] Under an Australian, the UN General Assembly unanimously adopted the Universal Declaration of Human Rights.[12] And last but not least, Australian and New Zealand scholars have contributed immensely to scholarship in international law, whether it be human rights, feminist theories, the rights of peoples, or state responsibility.[13]

American Society of International Law, 267, 272-73 (2000) (referring to Australian and New Zealand cases under the dispute settlement mechanisms of the World Trade Organization).

6 See M Kirby, 'International Law–Down in the Engineroom', 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, 3, 8 (2000) (noting that Australia 'is a good international citizen'); T Dunworth, 'The Importance of International Dispute Settlement Mechanisms for New Zealand', 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, 327 (2000) (referring to the role of New Zealand 'as the good international citizen'). See also Williams, above n 5, 267 ('Australia takes its international rights and obligations seriously').

7 See Dunworth, above n 6, 328-29.

8 See 'Southern Bluefin Tuna Loss Blamed on Government', 2000 AAP Newsfeed, Aug. 7, 2000, available at LEXIS, News Library, Austl. File (noting the Humane Society International 'said the Australian government had wrongly relied solely on the international court case to keep a check on Japan's fishing level, instead of protecting the fish when it had the chance').

9 See A Downer, 'International Law and the Maintenance of International Peace and Security', 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, 103, 106 (2000) (noting that 'Australia has been active in encouraging the signature and ratification of the Statute of the International Criminal Court' and citing its involvement as Chair of the Like-Minded Group).

10 Sir Ninian Stephen, a former Justice of the High Court of Australia, has served as a judge of the Appeals Chamber of the International Tribunals. Australian David Anthony Hunt is a presiding judge at the International Criminal Tribunal for the Former Yugoslavia, while Australian Graham Blewitt is that Tribunal's Deputy Prosecutor.

11 A New Zealander, Robert Q Quentin-Baxter, an ILC member from 1972 to 1984, served as the ILC's Special Rapporteur on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. An Australian, Professor James Crawford, the Whewell Professor of International Law at Cambridge University, United Kingdom, is a current ILC member and serves as the ILC's Special Rapporteur on State Responsibility.

12 See H Charlesworth, 'Human Rights', in Harry Reicher, *Australian International Law Cases and Materials* 614-15 (1995) (noting that Australia's then Foreign Minister, Dr H V Evatt, was President of the United Nations General Assembly when in 1948 the General Assembly unanimously adopted the Universal Declaration of Human Rights and that Dr Evatt had 'worked hard to garner support for the Declaration').

13 See, eg, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); Henry J Steiner and Philip Alston, *International Human Rights in Context* (1996); R H Barnes, Andrew Gray, and Benedict Kingsbury, *Indigenous Peoples of Asia* (1995); D Otto, 'Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women' (1993) 3 *Transnational Law and Contemporary Problems*

Not to be overlooked are these nations' willingness to enter into important treaties, particularly human rights treaties. I am pleased to be present in a country that has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty,[14] the First Optional Protocol to the International Covenant on Civil and Political Rights,[15] and the Convention on the Elimination of All Forms of Discrimination Against Women.[16]

As a bit of an aside but still on the topic of treaties, Professor Ivan Shearer, the Challis Professor of International Law at the University of Sydney, has commented on the United States 'tardiness', as he politely and diplomatically put it, in ratifying major human rights treaties.[17] The United States President has the power to make treaties but only with the advice and consent of two-thirds of the United States Senate.[18] Ratifying a treaty can be a political event and the process itself is 'lengthy and unpredictable'.[19] The 'tardiness' is welcomed, no doubt, by many Americans, who accept that the United States Constitution, including the Bill of Rights, affords sufficient protection. In analysing Constitutional rights, however, United States courts remain hesitant to invoke international standards, even though more than a century ago the United States Supreme Court announced that '[i]nternational law is part of our law'.[20] For example, when asked to invoke non-domestic standards of decency in determining whether a juvenile should be executed, Justice Scalia remarked it is 'American conceptions of decency', not standards of other countries, that determine whether the punishment is 'cruel and unusual' in violation of the Constitution's Eighth Amendment.[21]

This paper will not attempt to list the many antipodean accomplishments in international law and then attempt to compare it to a comparable list for the United States. My antipodean hosts, no doubt, know the many antipodean contributions to international law, including those set out in my introductory remarks. I would like, however, to shift gears and address briefly a topic that both Justice Michael Kirby and the Australian Attorney-General Daryl Williams mentioned in their respective Keynote Addresses at last year's Joint Meeting. The topic concerns international law in federal systems and, in particular, the effect of treaties and agreed-upon means of dispute resolution.

The United States, like Australia and New Zealand, has ratified the Vienna Convention on Consular Relations (Vienna Convention).[22] Australia and New Zealand, but not the United States, have enacted legislation to

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371, 376; and J Crawford, P Bodeau and J Peele, 'The ILC's Draft Articles on State Responsibility' (2000) 94 *American Journal of International Law*, 660.

14 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, Dec. 15, 1989, GA Res 44/128, UN GAOR, 44th Sess, Supp No 49, at 206, UN Doc A/44/824, reprinted in 29 ILM 1464 (1990).

15 First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, reprinted in 6 ILM 383 (1967).

16 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNTS 13, reprinted in 19 ILM 33 (1980).

17 I Shearer, 'The Internationalisation of Australian Law' (1995) 17 *Sydney Law Review* 121, 123.

18 US Constitution art II, § 2(2).

19 Shearer, above n 17, 18, at 123.

20 *The Paquette Habana*, 175 US 677, 700 (1900).

21 *Stanford v Kentucky*, 492 US 361, 369 n 1 (1989). Compare ibid. at 389-90 n 10 (Brennan, J., dissenting) (recognising the 'rejection generally throughout the world [of the death penalty for juveniles], provide[s] to my mind a strong grounding for the view that it is not constitutionally tolerable that certain States persist in authorising the execution of adolescent offenders" and also citing 'three leading human rights treaties ratified or signed by the United States' that prohibit the death penalty for juvenile offenders).

22 Convention on Consular Relations, April 24, 1963, 21 UST 77, 596 UNTS 261.

implement the Vienna Convention.[23] Nevertheless, in the United States, a ratified treaty is the supreme law of the land to which judges shall be bound.[24]

Under the Vienna Convention's Article 36, when a foreign citizen is arrested, the competent authorities of the arresting state must notify the citizen of his rights under the Vienna Convention, including the right to communicate with his consulate.[25] The foreign citizen also has the right to have his consular officials visit him and to have them arrange for legal representation.[26] In 1974, the United States argued before the ICJ in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* that Article 36 of the Vienna Convention 'establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others'.[27]

Article 36 of the Vienna Convention has been repeatedly breached in the United States as to foreign nationals in custody. Upon arrest, many foreign nationals have not been advised of their consular rights. The United States, which has acknowledged the problem, has apologised but has not recognised a breach of an international legal obligation that affords the accused a meaningful remedy. Indeed, in the *LaGrand* and *Breard* cases before the ICJ, involving nationals of Germany and Paraguay, respectively, who had been sentenced to death yet not been afforded their consular rights under the Vienna Convention, the ICJ issued provisional measures that the United States 'should take all measures at its disposal to ensure that [Walter LaGrand and Angel Francisco Breard are] not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order'.[28] Despite the provisional measures orders, Messrs LaGrand and Breard were executed. In addition to not complying with the Vienna Convention or the ICJ's provisional measures orders, the United States, through its Solicitor-General, opposed Germany's effort to stop LaGrand's execution and advised the United States Supreme Court that an 'order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief'.[29]

In both *LaGrand* and *Breard*, the United States challenged whether the failure to notify the accused about his consular rights would have affected the guilty verdict and the death sentence. Also, the ICJ's provisional measures raised important federalism issues by effectively requiring the United States to become involved in the criminal justice systems of the Commonwealth of Virginia and the State of Arizona.[30] Whether the ICJ's orders of provisional measures created binding obligations was also purportedly subject to reasonable dispute.

Now contrast the United States conduct in *LaGrand* and *Breard* with Australia's after the UN Human Rights Committee (HRC) found that Tasmania's anti-sodomy statute violated Article 17 of the International Covenant

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23 See Consular Privileges and Immunities Act 1972-1973 (implementing the Consular Convention in Australia); Consular Privileges and Immunities Act of 1971 (implementing the Consular Convention in New Zealand).

24 See US Constitution art VI, cl 2.

25 See Vienna Convention, above n 23, at art 36.

26 Ibid.

27 See LaGrand (*Fed. Rep. of Germany v US*), Oral Argument of Germany on Nov. 30, 2000 (citing Case Concerning United States Diplomatic and Consular Staff in Tehran [1980] ICJ Rep 174).

28 See LaGrand (*Fed. Rep. of Germany v US*) [1999] ICJ Rep 9, 16 (Provisional Measures Order of March 3); Vienna Convention on Consular Relations (*Paraguay v US*) [1998] ICJ Rep 248, 258 (Provisional Measures Order of April 9).

29 See *Federal Rep. of Germany v United States*, 526 US 111, 113 (1999) (Breyer J, dissenting). Justice Souter concurred in the *per curiam* decision that denied the motion for leave to file a bill of complaint and a motion for preliminary injunction against the United States and the Governor of the State of Arizona having 'taken into consideration the position of the Solicitor General on behalf of the United States'. Ibid. at 112 (Souter J, concurring).

30 After this paper was originally presented, the ICJ decided the merits of *LaGrand*, and held that the United States had breached its obligations owing to Germany under Article 36, paragraphs 1 and 2, of the Vienna Convention and breached its obligation under the order indicating provisional measures. See LaGrand (*Fed. Rep. of Germany v US*), Judgment of June 27, 2001, reprinted at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

on Civil and Political Rights (ICCPR)[31] by arbitrarily interfering with the petitioner's privacy.[32] The HRC indicated that the offending portions of the Tasmanian Criminal Code should be repealed. That same year, federalism aside, the Australian government enacted the *Human Rights (Sexual Conduct) Act* 1994, which provides, in part, that 'Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.' In a similar vein, the Australian High Court has cited the ICCPR as embodying principles that may have a 'legitimate influence' on the development of the common law.[33]

Is Australia an upstanding international citizen because it followed the HRC while the United States (with its 'a nationally-turned face' to borrow a phrase from Professor Hilary Charlesworth of the Australian National University), not an upstanding international citizen by not following the ICJ's orders?[34] Only part of the story has been told. In analysing the requirements of Article 36 of the Vienna Convention, the Court of Criminal Appeal of New South Wales in *R. v Abbrederis* refused to exclude statements made by an Austrian citizen before he was advised of his Consular Convention rights.[35] The Court found that the failure to provide the consular notification rights did not affect the investigation. The holding in *Abbrederis* is consistent with decisions in United States courts which refuse to reverse convictions on the ground that evidence obtained before the accused had been advised of his consular rights should have been excluded.[36] Not only is the Australian Court's holding consistent with the decisions of United States courts, an *en banc* panel of the United States Court of Appeals for the Ninth Circuit relied on *Abbrederis* in a leading case on the issue, *United States v Lombera-Camorlinga*.[37] An esteemed United States federal court has relied on the law of Australia to further support the conclusion that violation of the notification provisions of the Vienna Convention does not warrant the exclusion of evidence. Indeed, the Ninth Circuit recognised that it promoted harmony in interpreting an international agreement by reaching a conclusion consistent with the Australian decision.[38] Thanks to events nearly seven thousands of miles away in New South Wales, the United States criminal jurisprudence is now apparently better in line with other nations' jurisprudence.

A discussion of federalism and treaties should also address Australia's status vis-à-vis the various UN human rights committees, a topic that Attorney-General Williams mentioned at the Joint Meeting.[39] The Attorney-General's remarks brought to mind the post-*LaGrand*/*Breard* debate in the United States about the fundamental nature of treaties in a federal system. At issue is the right of a separate state or territory in a federal system to control criminal conduct that principally occurs within its own borders. Under the Constitution, and as the United States argued in *LaGrand*, the separate states of the United States retain their independence and authority in criminal law enforcement matters except where the Constitution has given this authority to the federal government. An analogous situation in Australia involves the Northern Territory's claim of a right to impose mandatory sentencing standards even though the UN Committee for the Elimination of Racial

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31 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, reprinted in 6 ILM 368 (1967).

32 See *Toonen v Australia* (1994) 1 Int'l Human Rts Reports 97 (No 3), reproduced in Steiner and Alston, above n 13, 545.

33 See *Dietrich v R* (1992) 177 CLR 292.

34 *See* Remarks of Professor Hilary Charlesworth given in the Jesuit Lenten Seminars, edited version at <http://members.dynamite.com.au/dci-aust/htm1/unmandatory.html>. According to Professor Charlesworth, a "nationally-turned face refuses to acknowledge the domestic implications of its international obligations." *Id.*

35 *R v Abbrederis*, (1981) 36 A.L.R. 109.

36 See, eg, *United States v Jiminez-Nava*, 243 F.3d 192, 198 (5th Cir 2001) (recognising that '[a]ll of our sister circuits have held that suppression of evidence is not a remedy for an Article 36 violation').

37 206 F.3d 882, 888-89 (9th Cir. 2000) (*en banc*).

38 Ibid, 889 (noting that under the Restatement (Third) of Foreign Relations § 325 cmt. d, '[t]reaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems').

39 See Williams, above n 5, 273.

Discrimination has found that mandatory sentencing affects Aborigines, including children, the hardest.[40] The UN Committee against Torture has similarly called for a review of mandatory sentencing laws 'to ensure compliance with Australia's international obligations'.[41] The Australian federal government has recently sought to restrict fact-finding visits of UN human rights monitors, which one lawyer stated resembles the 'patriotic isolationism' expressed in another democratic nation, namely, my country, the United States![42]

Australians should take comfort that the United States must also deal with the HRC and its attempt to influence the criminal laws of the individual states. The recent case of *Beazley v Johnson*,[43] involving an inmate on Texas's death row sentenced for a crime that allegedly occurred while the defendant was a juvenile, is instructive. Article 6(5) of the ICCPR prohibits a death sentence for a crime committed by a person under 18 years of age.[44] In ratifying the ICCPR, however, the United States Senate expressly provided that the 'United States reserves the right … to impose capital punishment on any person … including such punishment for crimes committed by persons below eighteen years of age.'[45] The defendant in *Beazley* argued that the HRC's General Comment in 1994 that a state may make a reservation to the ICCPR provided that the reservation 'is *not* incompatible with the object and purpose of the treaty' and '*[a]ccordingly, a State [in ratifying the ICCPR] may not reserve the right … to execute … children*' voided the United States Senate reservation to the ICCPR on juvenile offenders.[46] Also, in 1995, the HRC stated that the Senate reservation on juvenile offenders was 'incompatible with the object and purpose of the [ICCPR]', and it recommended the reservation be withdrawn.[47] Observing that the Senate reservation was invalid and should be severed from the remainder of the ICCPR, the defendant argued that his death sentence should be reversed.[48]

Rejecting the defendant's argument, the United States Court of Appeals for the Fifth Circuit expressly noted that the HRC had not found the reservation invalid.[49] It cited State court cases that had rejected the argument that the Senate reservation was illegal or void, and also cited federal court cases upholding the Senate reservations to the ICCPR.[50] Further, the Fifth Circuit distinguished various cases on the basis they recognised the HRC could

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40 See Barbara Crossette, 'Australia Balks at UN Rights Scrutiny', *International Herald Tribune*, Sept 1, 2000 at 6 available at LEXIS, News Library, Austl. File.

41 See 'Australia Reminded of Torture Obligations', AAP Newsfeed, Nov. 22, 2000, available at LEXIS, News Library, Austl. File.

42 See 'Human-Rights Record "Patchy": Australia Sliding into Patriotic Isolationism, Says ANU Academic', *The Canberra Times*, June 20, 2000 at A11 available at LEXIS, News Library, Austl. File (quoting Professor Charlesworth that 'another factor in Australia's failure to implement its human-rights treaty commitments is a perturbing form of patriotic isolationism … [i]t is eerily similar to the isolationism of the United States where senior politicians have long regarded the United Nations, in the words of Senator Strom Thurmond, as the work of the devil'). Compare Crossette, above n 40 (quoting John Bolton, Executive Vice President of the American Enterprise Institute in Washington, DC and a former Assistant Secretary of State in the administration of President George Bush that '[w]hat Australia has done [in challenging the UN human rights bodies] is a triumph for democracy … [w]ithin a constitutional system of representative government, you're allowed to struggle for policy outcomes. In a democracy, sometimes you win and sometimes you lose. What Australia is objecting to is the idea that a losing side in a democratic country can ask for a lifeline to a UN agency.').

43 242 F.3d 248 (5th Cir 2001).

44 Ibid, 263 (quoting the ICCPR).

45 Ibid, 264 (quoting the statement of the presiding office of resolution of ratification, 138 Cong Rec S4783-84).

46 Ibid, 264-67 (emphasis in original).

47 Ibid, 265 (quoting Annual General Assembly Report of the Human Rights Committee, UN GAOR Human Rights Comm., 50th Sess Supp No 40, ¶¶ 279, 292, UN Doc A/50/40 (3 Oct. 1995)).

48 Ibid, 264. The defendant claimed that article 6(5) of the ICCPR voids Tex. Penal Code § 8.07(d) which provides that a person is eligible for the death penalty if he was at least 17 years of age when he committed a capital offence. Ibid.

49 Ibid, 266.

50 Ibid, 266-67 (citing *Ex parte Pressley*, 770 So.2d 143, 148, 2000 WL 356347, at *5-7 (Ala.), *cert. denied*, __US, 121 S.Ct. 313, 148 L.Ed.2d 251 (2000); *Ex parte Burgess*, No 1980810, 2000 WL 1006958, at *11 (Ala. July 21, 2000);

provide 'guidance' in interpreting an ICCPR claim but they did not hold that the HRC could 'void an action by the Senate'.[51]

The Fifth Circuit is not the only federal court to have addressed HRC pronouncements. As *Beazley* indicated, domestic courts have looked to the HRC's interpretation of the ICCPR as to claims made under the ICCPR.[52] In his dissent in *Knight v Florida*,[53] in which two death-sentenced inmates who had spent nearly 20 years or more in jail claimed 'cruel and unusual punishment', Supreme Court Justice Breyer noted that the HRC 'has written that a delay of 10 years does *not* necessarily violate roughly similar standards set forth in the Universal Declaration of Human Rights'.[54] He relied on the HRC statement to conclude that it is unclear what position the HRC would take given the lengthier delays in the cases before the Supreme Court, even though the Justice recognised that 'foreign authority does not bind us'.[55] Both the United States and Australia obviously recognise their respective federal governments have international obligations that must be respected. The Hon. Daryl Williams made this clear: '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' and '[a]s good international citizens, states must show responsible engagement with the international legal system.'[56] Consistent with this statement, the United States Supreme Court, in certain situations, defers to the federal government in international matters, particularly in commercial disputes.[57] In a similar vein, there are many areas of Australian law, again, in the commercial realm, 'where international standards are adopted and applied as the relevant standard with little debate'.[58]

The debate over the relevant legal standards, including the role of international law, and the meaning of 'responsible engagement' in the international system will likely continue with vigour in the courts and political arena on both sides of the Pacific Ocean and beyond. While at the moment the United States appears to seek solutions more from within than from without, rest assured many American lawyers do not embrace this provincial approach. I sense antipodean lawyers are outward focused, even perhaps more so than their American counterparts, which makes the legal research, writing, analysis, and advocacy from the antipodes ever the more important for all of humankind.

Domingues v Nevada, 114 Nev. 783, 785, 961 P.2d 1279, 1280 (1998), *cert. denied*, 528 US 963 (1999); *White v Johnson*, 79 F.3d 432, 440 & n. 2 (5th Cir.), *cert. denied*, 519 US 911 (1996); *Austin v Hopper*, 15 F. Supp.2d 1210, 1260 n.222 (M.D. Ala. 1998); *Stanford v Kentucky*, above n 21).

51 Ibid, 267.

52 Ibid (citing *United States v Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) and *United States v Benitez*, 20 F. Supp.2d 1361, 1364 (S.D. Fla. 1998)).

53 528 US 990 (1999).

54 Ibid, 996 (Breyer J. dissenting) (emphasis in original).

55 Ibid. Justice Breyer then noted that the Supreme Court 'has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment'. Ibid, 997 (citations omitted).

56 Williams, above n 5, 275.

57 See, eg, *Crosby v National Foreign Trade Council*, 530 US 363 (2000) (striking down a Massachusetts law restricting agencies of Massachusetts from buying goods or services from persons doing business with Burma because a federal statute that imposed a set of mandatory and conditional sanctions on Burma preempted the state law; the United States President should have the power 'to speak for the Nation with one voice in dealing with other governments'); *United States v Locke*, 529 US 89 (2000) (striking down certain regulations of the State of Washington regarding general navigation watch procedures, crew English language skills and training, and maritime casualty reporting for tankers coming into waters off the State of Washington; while the Court relied generally on the principle that federal rules preempted the state regulations it recognised that important international maritime concerns were reflected in the federal rules).

58 H Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review*. 127, 134-39 (setting forth a useful discussion of Australia's compliance with treaties).

Australia's Contribution to International Human Rights Law: From Multilateralism to Regional Bilateralism, and Back?

Ann Kent*

Australia's contribution to international human rights law has been shaped by its size, strategic status, geographical position and domestic polity. As a middle power, a parliamentary democracy and a welfare state in the Asian region, it has generally conformed to the profile drawn of the 'other' Western human rights tradition espoused by Canada and the Nordic countries, and as opposed to the US tradition.[1] While the US tradition emphasises civil and political rights almost exclusively, and is more likely to resort to unilateral sanctions to achieve global change, the 'other' tradition generally prefers moral persuasion over economic sanctions, evinces bipartisanship and consistency in its human rights policies and is supportive of economic and social rights. Like other states in the same tradition, Australia has until 1997 also been critical of its own domestic human rights performance. Most importantly, it has emphasised the importance of multilateral activity and has generally seen bilateral or unilateral mechanisms for the enforcement of human rights as subordinate to the development of international human rights law and enforcement mechanisms through the United Nations.

At the same time, it is important to understand the variability that has been apparent in Australia's contribution over time. For this reason, and particularly given the presence here today of Elizabeth Evatt, it is fitting, when considering the question of Australia's contribution to international human rights law and its associated challenges, to compare the role of H V Evatt and Percy Spender in the United Nations half-a-century ago with Australia's more recent activity. My time frames for comparison, neatly, but not wholly arbitrarily, spaced half-a-century apart, will be 1945 to1951 and 1995 to 2001.

1. 1945–1951: Evatt and Spender

H V Evatt, 1945–1949

Despite Australia's orientation toward multilateral diplomacy, its strong sense of physical and cultural isolation has also encouraged it to activate bilateral relationships, especially with the great powers. In the League of Nations, for instance, Labor Prime Minister Billy Hughes was motivated less by a spirit of multilateralism than by a narrow nationalism modified primarily by ties of loyalty to Britain.[2] Equally, as Geoffrey Sawer has pointed out, there was a significant difference between the policies of the Labor government from October 1944 to December 1949, when H V Evatt was Minister for External Affairs, and the subsequent 1949–51 period, when Sir Percy Spender was Minister for External Affairs under the Liberal-Country Party government.

In Evatt's view, 'Australia's contribution to international affairs has been made, to a large extent, through the United Nations'.[3] Moreover, he argued that the middle and smaller powers had a special role to play and, as evidenced by his outspoken opposition to the Big Five veto in the Security Council, was preoccupied with limiting the influence of the big powers which sought to work bilaterally rather than multilaterally. He stressed the economic causes of war and aspired to international governance mediated by international law and international organisations. Percy Spender (and Casey after him), on the other hand, although not repudiating Evatt's vision, shared, as Geoffrey Sawer has observed, 'the typical anti-socialist preference for power-political arrangements outside the United Nations, the belief that military preparedness and strong alliances are more

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1 See Jack Donnelly, *International Human Rights* (1993); Rhoda E. Howard, "Monitoring Human Rights: Problems of Consistency" (1990) 4 *Ethics and International Affairs* 33-51; and Jan Egeland, *Impotent Superpower – Potent Small State: Potentials and Limitations of Human Rights Objectives in the Foreign Policies of the United States and Norway* (1988).

2 See, for instance, W.J. Hudson, *Australia and the League of Nations* (1980) 32.

3 H.V. Evatt, House of Representatives, Parliament House, Canberra, 21 June 1949 (1949) 20 (6) *Current Notes on International Affairs* 757.

important than international ideals, a disbelief in economics as a main factor in bringing about war, and … a very heavy stress on fighting communism'.[4] Such views had also been reflected in the Opposition's criticisms of Evatt's UN activity from 1945. This interweaving of the major and minor themes of multilateralism and bilateralism in Australian foreign policy, which also influenced the nature of its international contribution, continued to characterise succeeding Labor and Coalition governments, the former leaning towards multilateralism and the latter to bilateralism.

In the Evatt period, Australia's contribution to international law and, in particular, to international human rights law, whether at the San Francisco Conference or later, in the UN proper, was justifiably renowned.[5] At San Francisco, Australia proposed 38 amendments to the draft UN Charter, 27 of which were 'adopted without material change, adopted in principle or made unnecessary by other alterations'.[6] However, some of Australia's proposals were not adopted and in any case, as Sawer reminds us, most were not peculiar to the Australian delegations. The particular contribution of Evatt and his officers in his eyes were that they played 'an important but not exclusive part in organising the opinion and votes of the meeting in a general direction which the mental climate of the time favoured'.[7]

Notwithstanding this corrective, Australia is generally seen to have made a constructive contribution on the following issues:

Economic and social rights

At the San Francisco Conference in 1945, Australia was a member of the Steering Committee, the Executive Committee and the Coordination Committee. Its most important amendments to the Dumbarton Oaks Proposals promoted economic and social rights as a major objective of the proposed Organisation. These sought:

- a pledge from all members to take action for the purpose of securing improved labour standards, economic advancement, full employment and social security through a General Assembly with enlarged powers, through the Economic and Social Council and the International Labour Organisation, and to report annually on progress made by each state;

- the elevation of the Economic and Social Council to the rank of a principal organ of the UN with specific functions, an effort which was largely successful; and

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4 See Geoffrey Sawer, "The United Nations", in Gordon Greenwood and Norman Harper (eds) *Australia In World Affairs, 1950-1955* (1957) 93.

5 At the end of the Conference, President of the Conference and US Secretary of State, Edward Stettinius, told the Executive Committee that "no one had contributed more to the Conference than Mr Evatt", and at the final meeting of the Steering Committee, the Peruvian delegate, Manuel Gallagher, moved that the smaller powers represented at the Conference "pay homage to their great champion, Mr Evatt". Cited in W.J. Hudson, *Australia and the New World Order: Evatt at San Francisco – 1945* (1993) 152. Dean Griswold of the Harvard Law School also wrote of Evatt: "There is no-one who has played a more intimate part in the formulation and development of the United Nations". Cited in Penny Wensley, "Australia and the United Nations: Challenges in the New Millennium", *Law and Policy Paper* 14 (2000) 4. Jessie Street wrote that Dr Evatt was "among the leading personalities" at the San Francisco conference, and that "during his term of office, Australia, in spite of the size of the population, was regarded as one of the most influential members of the United Nations". See Jessie M.G. Street, *Truth or Repose* (1966) 279.

6 Parliament of the Commonwealth of Australia, *United Nations Conference on International Organisation: Report by the Australian Delegates* (1945) 20, cited in Norman Harper and David Sissons, *Australia and the United Nations* (1959), 56.

7 Sawer, above n 4, 96.

- the establishment of the main purpose of trusteeship as the welfare of the dependent peoples and their economic, social and political development.[8]

At the UN, on 2 October 1946, Australia was elected to the UN Economic and Employment Commission, the Human Rights Commission, the Commission on the Status of Women and the Population Commission. Here, particularly in the Human Rights Commission, it continued to pursue the issue of the recognition and enforcement of economic and social rights, insisting on the interdependence of all rights.[9]

Human Rights

On human rights in general,

- Australia's amendments to the Dumbarton Oaks Proposals at San Francisco sought to enlarge the powers of the General Assembly, to strengthen the proposed Organisation's enforcement powers, to create binding obligations on States members, and to establish Australia's position on domestic jurisdiction, on universal membership, on welfare and labour standards, on standards of justice and morality and on women's rights.[10]

- At the Paris Peace Conference in August 1946, seeking to protect the rights of minorities in ceded territories, Evatt proposed the establishment of an International Court of Human Rights to which individuals, groups or States might have recourse.[11] While the proposal was not adopted at the Conference, the Australian delegation continued to pursue it at the first meeting of the Commission on Human Rights.[12]

- At the first session of the General Assembly in January 1946, Australia was a member of the eight member formal Drafting Committee for a Declaration of Fundamental Human Rights and Freedoms. It supported the simultaneous drafting and promulgation of the Universal Declaration and the Covenant and, as late as 1951, maintained the view that economic and social rights and civil and political rights should form part of the same covenant.[13] As President of the UN General Assembly in 1948, Dr Evatt presided over the adoption of the Declaration.[14]

- Australia favoured the judicial enforcement of human rights through the Permanent Court, in preference to the US and UK policy of opening bilateral negotiations between the accusing and the accused state and, in the event of non-resolution, referring the matter to a specially-convened international Human Rights

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8 Harper and Sissons, above n 6, 46. See also speech by Francis Forde, Agenda for the Second Plenary Session, April 27 1945, Doc. 13 in *Documents of the United Nations Committee on International Organisations, San Francisco 1945* (hereafter *UNCIO Documents*) (1945) vol 1, 170-180.

9 Annemarie Devereux, "Australia's International Human Rights Policy Around the Time of the UDHR" in *ANZSIL Proceedings of the 6th Annual Conference 1998* (1998) 49-50.

10 For details of amendments by Australia and other states, see *UNCIO Documents* above n 8, vol 3, 639-710.

11 The Australian proposal was as follows: "1. To establish an impartial Court of Human Rights to enforce obligations created by the treaties regarding citizenship, human rights and fundamental freedoms. Subject to reasonable conditions this court could be invoked by the way of appeal from national courts or in special cases by direct approach. The right of invoking the jurisdiction of this court should extend to individuals and to groups, as well as to States, and its judgments should be accepted under the treaty as enforceable not only against individuals or groups but against States and local agencies; 2. To extend the United States proposal to protect the fundamental rights of the people within any territory to be ceded by Italy to all other territories ceded under the five treaties'. Text in "Evatt to Propose New World Court for Human Rights", *New York Times*, 19 August 1946, 1.

12 See Devereux, above n 9, 45.

13 Harper and Sissons, above n 8, 254-255.

14 Continuation of the Discussion on the Draft Universal Declaration of Human Rights: A Report of the Third Committee UN GAOR (183rd plen mtg), 934, UN Doc. A/777 (1948).

Committee. However, should the US and UK proposals be adopted, Australia insisted on the right of individuals to petition the Committee.[15]

- In the UN Commission on Human Rights, as Anne-Marie Devereux has shown, Australia pressed for the implementation and rigorous enforcement of human rights standards, in particular through the drafting of the international covenants and the proposal to establish an International Court of Human Rights.[16] In other forums, Australia also pushed hard for final action on the Genocide Convention and was a prime mover behind the United Nations Appeal for Children.[17]

- In her capacity as Vice-Chairman of the Commission on the Status of Women, Australian Jessie Street worked hard to ensure that the Commission enjoyed the same status within the UN system as the other Commissions. In conjunction with the delegates from other smaller powers and with Evatt's backing, she submitted significant amendments to the International Bill of Human Rights such as the inclusion of the provision to Clause 39 on reward for labour: 'without discrimination based on sex, colour, race, language and religion'.[18]

- As a non-permanent member of the Security Council from 1946, Australia made a significant contribution to the UN's practical promotion of the principle of self-determination, bringing hostilities between the Netherlands and the Republic of Indonesia to the attention of the Security Council, and participating as a member of the Good Offices Committee and after it, the United Nations Commission for Indonesia.[19]

Despite its enthusiastic internationalism, Australia drew a clear dividing line between matters of domestic jurisdiction and matters of international concern. For instance, Evatt argued, in relation to Chapter II para 8 (now Chapter I, Art 2 (7)) of the Charter, that the Security Council should not be empowered by the provisions of Chapter VIII, Section (B) (now Chapter VII) to make recommendations to a threatened state on matters of domestic jurisdiction. At the same time, he accepted that this should not prejudice the application of enforcement measures under the same Chapter and Section.[20] Nevertheless, the challenge he and all States members continued to face was how to reconcile the two often conflicting requirements in the UN Charter, the international protection of human rights and the principle of domestic jurisdiction.

Percy Spender, 1949–1951

Geoffrey Sawer has written of the Spender/Casey period, as of the 1950s as a whole, that 'the problem was not to accommodate domestically oriented policies so as to make them accord with the elements of world order represented by the United Nations: instead the Government was concerned to adjust its relations with the United Nations so as to make them accord with its domestically determined policies with as little disturbance as possible to the latter'.[21] Yet even then, considerable continuity was maintained, in the form of its policies on Spain and on UN membership, the economic and social rights emphasis of the 1950 Colombo Plan initiative, the scope of Australian participation in the United Nations and its contributions to international human rights law.[22] For instance, while accepting the majority decision on the Human Rights Committee in 1951, its proposal to enable

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15 Harper and Sissons, above n 8, 260.

16 Devereux, above n 9, 44-48.

17 Herbert V. Evatt, *The Task of Nations* (1949), 102-109.

18 See "Amendments to the Bill of Human Rights" submitted by Mrs Jessie Street, in Heather Radi (ed), *Jessie Street: Documents and Essays* (1990), 208.

19 Evatt, above n 17, 199.

20 See "Amendment by the Australian Delegation to Proposed Paragraph 8 of Chapter ll (Principles), Doc 969, 14 June 1945", *UNCIO Documents* vol 6, above n 8, 436-440.

21 Geoffrey Sawer, "The United Nations", in Gordon Greenwood and Norman Harper (eds), *Australia in World Affairs, 1956-1960* (1963) 145.

22 See Sawer, above n 4, 114-117, 122.

either party to bring a case before the International Court of Justice which the Human Rights Committee had failed to settle was adopted by the Commission in 1953.[23]

However, under Spender, Australia no longer supported the right of individuals to petition the Committee.[24] In general within the UN, according to Sawer, the Coalition government exhibited a 'somewhat bone-headed conservatism', bordering on 'reactionary' policy, which could only be avoided if 'more opportunities were sought for going along with the majority on colonialism, economic assistance, human rights and similar issues, occasionally taking a small legal risk rather than forever negating or abstaining'.[25] Moreover, the new focus on bilateral policies led to Spender's vigorous involvement in the formation of the ANZUS Pact, which became a foundation of Australia's anti-communist commitment. This focused much of Australia's activity in the UN on Cold War concerns and diverted its focus away from economic and social rights as an integral part of 'human rights', to a preoccupation with civil and political rights.

2. Intermediate period: 1951–1994

Elsewhere,[26] I have summarised the intermediate years, particularly the governments of Whitlam, Fraser and Hawke, during which Australia became a fully participating member in the international human rights regime and acceded to the major human rights treaties.[27] Australia served on numerous UN human rights bodies, provided distinguished experts on UN Committees,[28] and played a role in developing the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Committee on the Rights of the Child (CROC). A willingness to accept international human rights scrutiny was indicated during the Hawke government with the removal of ten of the 13 reservations made by Australia in 1980 when ratifying the International Covenant on Civil and Political Rights (ICCPR), and in Australia's accession to the two Optional Protocols in 1990 and 1991.[29] Australia also played a leading role in the UN World Human Rights Conference in Vienna in June 1993, particularly in its initiative proposing the establishment of National Action Plans. One

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23 Harper and Sissons, above n 8, 261.

24 Ibid.

25 Sawer, above n 21, 157.

26 See Ann Kent, "Australia's Contribution to International Human Rights Law: From Evatt to Downer", unpublished paper; and Ann Kent, "Australia and the International Human Rights Regime", in James Cotton and John Ravenhill (eds), *Australia in World Affairs, 1996-2000* (2002, forthcoming).

27 By 1993, Australia had become a Party to the International Covenant on Civil and Political Rights (1966) (ICCPR) (r. 1980); the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) (r. 1975); the Optional Protocol to the ICCPR (1966) (r. 1991); the Second Optional Protocol to the ICCPR (1989) (r. 1990); the Convention on the Elimination of all Forms of Racial Discrimination (1966) (CERD) (r. 1975); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT) (r. 1989); the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) (r. 1983); the Convention on the Rights of the Child (1989) (CROC) (r. 1990); the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (r. 1949); the Convention on the Political Rights of Women (1953) (r. 1974); the Convention on the Nationality of Married Women (1957) (r. 1961); the Slavery Convention (1926) (as amended) and the Protocol amending the 1926 Convention (1953) (r. 1927 and 1953); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery (1956) (r. 1958); the Convention on the Reduction of Statelessness (1961) (r. 1973); the Convention relating to the Status of Stateless Persons (1954) (r. 1973); and the Convention relating to the Status of Refugees and related Protocol (1968) (r. 1954 and 1973). See Department of Foreign Affairs and Trade, Human Rights Manual (1993) 3, 202. The same number is listed in Department of Foreign Affairs and Trade, Human Rights Manual (1998).

28 Wensley, above n 5, 5-7.

29 Ian Russell, "Australia's Human Rights Policy: From Evatt to Evans", in Ian Russell, Peter Van Ness and Beng-Huat Chua, *Australia's Human Rights Diplomacy* (1992), 27.

adverse bilateral development during this period, following Indonesia's invasion of East Timor in 1975, was Australia's recognition of that state's incorporation of East Timor, an act not accorded recognition by the UN.[30]

3. 1995–2001: Gareth Evans and Alexander Downer

Within the new environment of the post-Cold War world, Australia made contributions to international human rights law under both Labor Foreign Minister, Gareth Evans, and Coalition Foreign Minister, Alexander Downer.[31] During Evans' term, Australia helped draft the resolution on the International Decade of the World's Indigenous People, supported the development of the *Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination against Women*, and played an influential role at the UN Fourth Women's Conference in Beijing in November 1995, and the follow-up conferences.[32] Under Mr Downer, Australia was a key player in negotiations to establish the International Criminal Court.[33] It made contributions with respect to National Action Plans, the draft Declaration on the Rights of Indigenous Peoples, UN General Assembly resolutions on Cambodia, and Commission on Human Rights (CHR) resolutions on Good Governance and on National Human Rights Institutions.[34] It made a significant contribution to United Nations action enforcing an act of self-determination in East Timor, and in the events leading up to that act.[35] It placed a new emphasis on economic and social rights and on the indivisibility of all rights. Finally, in conjunction with the UN, it supported regional multilateralism by encouraging the growth of regional human rights institutions, and co-financing the Asia Pacific Forum of National Human Rights Institutions.[36]

From 1997, however, the growing bilateral focus of the Coalition's foreign and human rights policies led to a diminution in Australia's multilateral human rights contribution.[37] In addition, the Government's increasing sensitivity about its domestic human rights record, particularly with respect to indigenous rights, labour rights and the rights of refugees, led to its rejection of criticisms in reports by the Committee on the Elimination of All Forms of Racial Discrimination (CERD), the Human Rights Committee, the Committee against Torture and the ILO Governing Body Committee on Freedom of Association.[38] In particular, the Government sent Comments to

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30 Following the Whitlam government's failure to take action to dissuade the Indonesian government from invading East Timor, the Fraser government accorded *de facto* recognition to Indonesia's incorporation of East Timor in January 1978 and *de jure* recognition on 14 February 1979. Under Prime Minister Hawke, in August 1985 the Labor Party changed its former policy of non-recognition. See details in James Cotton (ed), *East Timor and Australia: AIIA Contributions to the Policy Debate* (1999), 8-9, 193.

31 For details, see Kent, above n 26.

32 See Department of Foreign Affairs and Trade, (1996) 1 and 2, *Human Rights and Indigenous Issues Newsletter*, http://www.dfat.gov.au/hr/hr_news/hr, 2; and Susan Coles, "Human Rights Year in Review: A Practitioner's Perspective", *ANZSIL Proceedings of the Fourth Annual Meeting, 1996* (1996), 81-83.

33 Wensley, above n 5, 12.

34 For details, see Department of Foreign Affairs and Trade, *Human Rights and Indigenous Issues Newsletter*, 2-11 (May 1996-January 2000); and Department of Foreign Affairs and Trade, *Human Rights* 12 (December 2000), http://www.dfat.gov.au/hr/hr_news/hr.

35 See Wensley, above n 5, 9-12; and Alexander Downer, "Australia's Hopes for the United Nations in the Twenty-first Century", Speech to the 2000 National Youth Conference of the United Nations Youth Association, Melbourne, 3 July 2000, 2-3, http://www.dfat.gov.au/media/speeches/foreign/2000.

36 Asia Pacific Forum of National Human Rights Institutions, *Forum Bulletin* 3 (March/April 2000), 1.

37 For details, see Kent, above n 26.

38 See reports in Report of the Human Rights Committee, UN GAOR, para 506, UN Doc. A/55/40, New York (2000); Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, UN Doc. CERD/C/SR/1398 (2000); Summary Record of the 1856th Meeting: Australia, UN Doc. CCPR/C/SR.1856 (28 July 2000); Report of the Human Rights Committee, paras 498-527; and Conclusions and Recommendations of the Committee against Torture: Australia, UN Doc. CAT/C/XXV/Concl.3, Geneva (21 November 2000); International Labour Office, 320th Report of the Committee on Freedom of Association (277th Sess) 241 GB.277/9/1 (March 2000).

CERD rebutting the Concluding Observations of its report, which were later attached as Appendix 10 to CERD's 2000 *Annual Report* to the UN General Assembly.[39] In August 2000, the Government also issued a media release outlining proposals for treaty body reform which were highly critical both of those bodies and of NGOs.[40] Greeted with dismay by UN human rights officials, by some prominent Australians and by Amnesty International and other international NGOs, some of the Australian proposals resembled those of a group of less-developed UN States members, which include China, Syria, Iran, Malaysia and Cuba.[41] While this group also seeks reform of the UN human rights treaty system, its purpose is not to strengthen that system, but to strengthen state sovereignty and domestic jurisdiction against it. In particular, the implicit criticism in the Government's proposals of NGO participation in treaty committee hearings, the requirement that committees 'work within their mandate', and the sensitivity to *in situ* investigations by UN Committees were reminiscent of the critiques by such states.[42]

On the other hand, the revised plans for that reform issued in April 2001 are a hopeful, but not yet unambiguous, sign, of greater multilateral cooperation.[43] Their support for increased resources for the Office of the High

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According to Breen Creighton, there had been 13 complaints to the ILO Committee on Freedom of Association (CFA) since 1951 and 48 direct requests and 15 observations had been submitted to Australia between 1960 and March 1998 by the ILO Committee of Experts in relation to the effect given to the six "core" human rights conventions in Australia. However, unlike the CFA report on Case 1963 (Australia), "none of these communications or complaints [had] disclosed significant non-compliance with the relevant standards". See Breen Creighton, "The ILO and the Protection of Fundamental Rights in Australia" (August 1998) 22 *Melbourne University Law Review*, 261.

39 It commented: "While noting some positive commentary [in the Committee's concluding observations], the overall thrust is unduly negative. The Australian Government rejects these comments … The Australian Government is very disappointed that the Committee's concluding observations ignored the progress Australia has made in addressing indigenous issues, gave undue weight to NGO submissions, and strayed from its legitimate mandate. The Australian Government is also deeply concerned about the lack of consideration the Committee accorded to its views, and to its outstanding record of commitment to international human rights obligations. Following the issue of the Committee's concluding observations, the Government in March 2000 initiated a review of its engagement with United Nations treaty bodies, which will involve, *inter alia*, consideration of the working procedures of CERD". See *Comments of the Government of Australia on the Concluding Observations Adopted by the Committee on the Elimination of Racial Discrimination on the Tenth, Eleventh and Twelfth Periodic Report of Australia*, in *Report of the Committee on the Elimination of Racial Discrimination* UN GAOR (56th and 57th Sess) UN Doc A/55/18/Annex X (2000). For details of government criticism of UN human rights treaty committees, see Department of Foreign Affairs and Trade, "Australian Initiative to Reform the UN Treaty Committees: Frequently Asked Questions", 9 April 2001, http://www.dfat.gov.au/un/treaty_faq.html. For response on ILO, see "Reith Rejects ILO Criticism", *Sydney Morning Herald*, 31 March 2000, http://www.smh.com.au. For government criticism of the UNHCR, and the international community's criticism of Australia's treatment of asylum seekers, see Paul McGeough, "Global Scorn for Ruddock Refugee Curbs", *Sydney Morning Herald*, 9 July 2001, 1; and McGeough, "Australia in the Dock over its Treatment of Refugees", *Sydney Morning Herald*, 9 July 2001, http://www.smh.com.au/news/0107/09/world/world4.html.

40 Minister for Foreign Affairs, "Improving the Effectiveness of United Nations Committees", Joint Media Release FA97, 29 August 2000, <http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html>, 1.

41 In particular, UN Human Rights Commissioner, Mary Robinson, said it would be "tragic" for a country like Australia to respond in a defensive way. Reported in ABC Lateline, 29 August 2000 at http://www.abc.net.au/lateline/s168973.htm. Amnesty International sent an open letter to the Prime Minister requesting the government to reconsider these measures which, it stated, constituted an attack on the UN human rights protection system and set a bad example internationally. See Amnesty International, "Australia", *Annual Report 2001* (2001), at http://www.web.amnesty.org/web/ar2001.nsf.

42 For details of China's and other developing states' attitude to treaty bodies, NGOs and *in situ* investigations, see Ann Kent, *China, the United Nations and Human Rights: The Limits of Compliance* (Philadelphia, University of Pennsylvania Press, 1999), 82, 103, 119, 113-116, 165, 236-240.

43 Minister for Foreign Affairs, "Australian Initiative to Improve the Effectiveness of the UN Treaty Committees", Joint Media Release, 5 April 2001, http://www.dfat.gov.au/media/releases/foreign/2001/fa43a_01.html. The contrast between the August 2000 and April 2001 proposals was pointed out in Hilary Charlesworth, "Australia and the International

Commissioner for Human Rights and for treaty bodies suggests a more constructive position. However, the Government has continued to refuse to sign the Optional Protocol to CEDAW and will continue to decide whether to allow visits by UN treaty bodies on a 'case-by-case' basis.[44] One indication as to whether the purpose behind its initiative is constructive or destructive will be whether or not the planned workshops on reform include NGOs and other members of the larger epistemic human rights community.

4. Conclusion

Over half-a-century ago, Australia, through the influence of H V Evatt, made a contribution to international human rights law which was distinguished by its concern for global social justice and development, its devotion to the rule and due process of law and its lively defence of the interests of small and middle powers. Since then, its contribution has waxed and waned, in response to the shifting emphases on multilateralism or bilateralism by successive Australian governments and to their changing domestic policies.

The two periods of Australian contribution under review, the Evatt-Spender and Evans-Downer eras, exhibit some similarities. Both saw a shift from multilateral preoccupations to bilateral objectives: but while in Spender's day bilateralism was a theme which did not interfere unduly with Australia's multilateral performance, in the current phase bilateralism has become a predominant theme. This is partly because the international focus of human rights activity has shifted from the early phase of standard setting and institution building to the phase of domestic implementation. However, it is also a function of the deep-seated philosophical differences between Australia's major political parties.

Even considering these substantial differences, there are greater parallels between Labor in the late 1940s and the Coalition today than might have been anticipated. These suggest the enduring character of Australia's impact, typical of other, like-minded middle powers.[45] While Evatt's main contribution to international human rights law was a new emphasis on economic and social rights, Downer's regional bilateral initiatives have broken new ground for Australia in the sense that they consciously link economic rights, assistance programs, and distributive justice with civil and political rights. This has had the effect of harmonising more closely with regional human rights priorities while at the same time reflecting a practical acceptance of the indivisibility of all rights. Similarly, whether in the earlier internationalist phase of Evatt or in the more regionally and bilaterally focused period of Downer, Australia has supported UN action promoting self-determination, originally in Indonesia and, currently, in East Timor.

There are, however, significant differences between the past and present emphasis on the importance of domestic jurisdiction. As already noted, Evatt combined a concern with national sovereignty typical of the post-Second World War era with a belief that international organisations and international law could be harnessed to produce international peace, security and even global welfare. The effort to identify and maintain a viable balance between sovereignty claims and the protection of human rights constituted his, and the world's, main challenge. His early push for an International Court of Human Rights represented an inspired leap into the future of the present globalised and rights-conscious world. By contrast, the current government's concern with sovereignty, which has acted more as an obstacle to the reach of international human rights treaty bodies, is more backward-looking and less appropriate in the actual globalised world.

The interest of Australia in UN reform in both periods may also not be similarly motivated. Although the signs are now more hopeful than in August 2000, a question mark still hovers over whether the intentions behind the present treaty reform initiative proposed by the Coalition government are constructive or destructive.

Other differences include Evatt's insistence on the right of individuals to petition UN committees and his support for women's rights, which throws an unfavourable light on the Coalition's current refusal to sign the Optional

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Human Rights System: Recent Developments", Legal Edge Seminar Series 2001, Centre for Commercial Law, Faculty of Law, Australian National University, 29 May 2001.

44 See *UNity*, 6 April 2001, http://www.unaa.org.au/fset.html, 1-2.

45 See Donnelly, Howard and Egeland, above n 1.

Protocol to CEDAW. In general, whereas Australia's policy during the Evatt period had an important and constructive impact on international human rights law, the Coalition's recent, positive contribution towards an act of regional self-determination in East Timor and its role as key player in the International Criminal Court negotiations have been diluted by a potentially negative development. This arises from the regional bilateralism of Australia's international human rights policies and from defensiveness about Australia's own human rights conditions. Whereas Evatt's focus in a state-centred world was global, Australia's current focus in a globalised world is, at most, regional multilateralist, and more often, regional bilateralist. And while Evatt bestrode the world stage and his era, overshadowing the actual complexity of factional and party differences in Australia on international human rights, the Coalition government's apparent problems in the global multilateral arena and in its domestic policies disguise its ongoing contributions to international human rights law.

Internationally, the current preference expressed by Australia and other states for bilateral human rights dialogue has arguably weakened multilateral monitoring mechanisms by overriding the authority of international human rights treaty bodies.[46] More dangerously, the failure of a developed middle power like Australia, with a strong tradition of support for international human rights, to show respect for the authority of UN treaty bodies, and its readiness to challenge the recommendations of their reports, runs the risk of undermining the legitimacy of international human rights law. We are reminded of Thomas Franck's circular but accurate conundrum that the legitimacy of international law depends on the number of states complying with it.[47] Reaction from UN human rights bodies and international NGOs underlines the very real danger, as, in a negative sense, does the interest China has expressed in Australia's response to the CERD report.[48] Therefore, given its significant historical role in the establishment of multilateral human rights institutions, and given its identity as a developed, multicultural welfare state, the current challenge for Australia is to transcend its regional bilateralism and domestic sensitivity and to return to its tradition of making well-considered and positive contributions to international human rights law, including in the area of constructive treaty-body reform, rather than seeking to blunt the authority and minimise the universal jurisdiction of that law.

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46 See Ann Kent, "States Monitoring States: The United States, Australia and China's Human Rights, 1990-2001", *Human Rights Quarterly* (August 2001, forthcoming).

47 Franck argues that "with a few arguable exceptions, the failure of states to obey an international rule … does affect its 'rule-ness'. It becomes more acceptable for others also to ignore the rule until, eventually, habitual disobedience may lead to the rule's demise". See Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York, Oxford University Press, 1990), 44. Conversely, habitual obedience strengthens the rule's legitimacy.

48 Kent, above n 46.

The Role of a 'Middle Power': Australian Contributions to the Law of Arms Control and Disarmament

The 'Design-Dependent' Effects of Weapons: A Fundamental Consideration in Reviewing the Legality of Weapons

Robin Coupland*

Abstract

This presentation introduces the concept that weapons cause injury to human health in a manner that are specific to their design (the 'design-dependent' effects). The argument is made that the design-dependent effects are a fundamental consideration in assessing the legality of a weapon.

All weapons that have been used commonly in armed conflict in the last 50 years cause injury to humans by explosive force or projectiles (bullets or fragments). With the exception of buried antipersonnel mines, such 'conventional' weapons, do not *as a function of their design* target part of the human anatomy or physiology. Other weapons cause injury by thermal means (eg, napalm, flamethrowers), electromagnetic energy (eg, lasers) or by changing body chemistry (eg, chemical and biological weapons).

Thus, all weapons can be placed in one of two groups according to their foreseeable, design-dependent effects: namely, those that do and those that do not cause injury to humans by explosive force or projectile. It is important to note that any weapon that has been deployed and does *not* injure by explosive force or projectiles has been subject to a prohibition, limitation on its use, attempts to regulate it or stigmatisation in the public mind.

The SIrUS Project was the work done by a group of experts at the invitation of the International Committee of the Red Cross (ICRC). The distinction between the design-dependent effects of weapons that cause injury by explosive or projectile force and the design-dependent effects of all others is the core concept of the Project The Project attempted to use this distinction to make objective the meaning of the legal notion 'superfluous injury or unnecessary suffering'. The ICRC made certain proposals to states on the basis of the SIrUS Project in relation to article 36 (New weapons) of 1977 Additional Protocol I to the Geneva Conventions of 1949. However, the perception by some states that the Project proposed an automatic prohibition on certain weapons according to their effects without consideration of military necessity has led to difficulty in accepting the ICRC's proposals.

The ICRC nevertheless believes that the fundamental distinction regarding the design-dependent effects of weapons described above should be taken into account when states fulfil their obligations, under article 36, to review the legality of any weapon it is developing, acquiring or deploying. The ICRC recommends that when conducting such reviews particular multidisciplinary consideration should be given to weapons that do not injure by explosive force or projectiles. This means that the legal review of a weapon should take into account not only obligations under existing treaties but also strategic factors, the foreseeable design-dependent effects of weapons and even possible notions of public abhorrence.

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The Role of a Middle Power: Australian Contributions to the Law of Arms Control and Disarmament

Martine Letts*

When looking at the Antipodean contributions to the law of arms control and disarmament, and specifically the effectiveness of middle power diplomacy, few efforts can match those that were made by Australia in helping bring the Chemical Weapons Convention (CWC) to fruition after more than 20 years of negotiation.

The achievement

The 1925 Geneva Protocol which prohibits the use in war of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" and also of "bacteriological methods of warfare" prohibited the use, but not the development, production and stockpiling of chemical weapons, and did not prevent their use in non-international conflicts. The CWC, opened for signature in Paris in 1993 is the first and only multilaterally negotiated instrument which abolishes an entire class of weapons of mass destruction under a comprehensive, intrusive, verification regime. Other multilateral armaments instruments briefly touched on today are neither as comprehensive in scope nor in verification. The 1972 Biological Weapons Convention (BWC) lacks adequate verification provisions, the Nuclear Non-Proliferation Treaty (NPT) has different provisions for different states, the Convention on Certain Conventional Weapons (CCW) only limits certain types of conventional weapons and the Comprehensive Test Ban Treaty (CTBT) is a total ban of nuclear test explosions with international verification provisions. It is, however, only one step, albeit critical, in the process of nuclear disarmament and non-proliferation.

The context

Chemical weapons proliferation was becoming a very serious issue by the early 1980s. By 1984 the 40-nation Conference on Disarmament had already produced a well-developed text known by this stage as the "Rolling Text" which was to be the basis for a comprehensive treaty. The negotiations in the CD were assisted by the thaw in the bilateral relationship between the US and the then Soviet Union. The world community was keen to put pressure on the two states to begin serious negotiations on nuclear disarmament and had also asked to be involved in those negotiations given the perceived threat the nuclear arms race posed to international peace and security. The two superpowers asserted firmly that this was a matter for bilateral negotiation for the foreseeable future, perhaps bringing in the remaining three Nuclear Weapon States at a later stage.

For chemical weapons, however, the consensus was that a ban needed to be negotiated multilaterally and this was becoming more urgent by the day. Large chemical producing companies, especially from the West, had been implicated in assisting Iraq and Iran develop a chemical weapons capability which was used, primarily by Iraq during the Iraq/Iran war with horrifying consequences. Furthermore, a number of states, not least the USA and the USSR, had begun to seriously question the military utility of chemical weapons. This alone was not enough to move the CD, of course.

Many countries had been able to hide behind US/USSR conflict. Once these two states had agreed bilaterally that they were ready for the CWC, the moment of truth for those remaining states still interested in Chemical Weapons and producing them had arrived. Other delegations were not technically equipped to deal with accelerated negotiations, where much of the discussion was increasingly centred around some highly complex technical issues. Many delegations were also operating under old instructions and were not prepared (or yet willing) to move into final negotiating mode.

Given the tarnished image of the two superpowers, lack of leadership in the negotiations was increasingly becoming a problem. The United States understood that strong leadership from it was likely to be

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counterproductive. It was also clear that in order to be effective, such a treaty must be embraced and supported by the world's chemical industry. The recent shame over the use of chemical weapons needed to be capitalised on.

Australia took on the challenge of chemical weapons in a way that no other nation of its size and influence had done. In 1984 the Australia Group had been established, comprising a group of supplier countries chaired by Australia which wanted to put in place supplier guidelines to prevent the further proliferation of chemical weapons, although it was clearly understood that such an arrangement was no substitute for a verifiable total ban. In 1989, Canberra hosted a "Government – Industry Conference Against Chemical Weapons" which was a great success and committed the world's chemical industry firmly to the CWC. All this activity notwithstanding, by 1991, the negotiations were again in the doldrums. Australia decided that now was the time to act.

Australia's role

Since the early 1970s Australia had established itself as a committed, active and respected player in multilateral diplomacy, including in the field of disarmament and international security affairs. While we felt comfortable with our strong positioning in what could broadly be described as the Western Alliance, we realised that a country of Australia's location, size, geography, strategic circumstances and economy required the pursuit of active diplomacy bilaterally, regionally and globally to protect and promote our security and interests. We felt that these interests were shared by many like-minded countries, including and perhaps especially in what we have come to regard as our own Asia-Pacific region. In this policy there was a strong element of prevention and peace-building strategies in a region which in the 1980s was still relatively free of Weapons of Mass Destruction (WMD), but where proliferation threats and pressures were growing.

Our role as a player in the multilateral disarmament and arms control scene was perhaps ironically strengthened by the pursuit of our trade objectives in the sale of uranium which permitted us to be an especially strong advocate for and practitioner of strict safeguards, over and above what was required under the NPT.

Our diplomatic efforts — be it in disarmament diplomacy or in multilateral trade — relied extensively on coalition building, which routinely involved multi-layered contact and lobbying at the multilateral, regional and bilateral levels. Australia's experience in the Cairns Group of Fair Agricultural Trading Nations as a third force in the then GATT negotiations launched at the 1985 Uruguay Round and in the Australia-Cambodia Peace Proposal in 1990 were good examples of the kind of role a so-called middle power like Australia could play in helping identify creative solutions to seemingly intractable problems.

By 1991 Australia was indeed a widely respected member in the Conference on Disarmament (CD) for playing a bridging role between the more powerful states, such as the Nuclear Weapon States and the states which belonged to the Non-Aligned Movement (NAM). How did this positioning specifically come about?

Starting with initiatives pursued by the Whitlam government in the early 1970s, Australia's first really comprehensive arms control policy was announced at the UN General Assembly's 1978 First Special Session on Disarmament. In 1979 we joined the newly expanded Committee on Disarmament. The Committee is now known as the CD. This selection left Australia well placed to play a much more prominent role in global disarmament and arms control efforts than it had in the past.

In his 1978 address to the UN General Assembly, then Prime Minister Fraser called for middle and smaller powers to work together to foster a climate of cooperation and arms control. He said that a realistic approach to disarmament lay in the step-by-step development of arms control and that the practical agenda for world disarmament should start from measures to increase mutual confidence and trust between nations. In fact multilateral activities were aplenty; but the Cold War and superpower tensions continued to put a block on results. Concern over such developments as the breakdown of talks between the United States and the Soviet Union to reduce strategic nuclear forces and the deployment of missiles by both sides in the European theatre, generated considerable concern in Australia.

The election of the Labor Government in 1983 also led to a more pro-active disarmament stance. A dedicated Ambassador for Disarmament based in Geneva was established, with matching resources at head-quarter level

through the creation of the Peace and Disarmament Branch at Department of Foreign Affairs and Trade. Contacts with the peace movement were strengthened through the establishment of a National Consultative Committee on Peace and Disarmament (NCCPD) to advise the Minister of Foreign Affairs on peace and security issues. That Committee still exists today. This significant increase in Australian resources devoted to arms control and disarmament was a critical element in positioning Australia to play the role it played on the CWC.

During the mid-1980s, Australia launched the negotiation of a nuclear-free zone in the South Pacific as a major Australian diplomatic effort. Under the Treaty of Rarotonga, there was a very large chunk of the world where it is forbidden to manufacture or otherwise acquire, store, test or use nuclear explosive devices. The significance of such a move is enhanced when you consider that nuclear-free zones now cover extensive areas of the planet. As well as Australia and the South Pacific, they include Antarctica, Latin America, Africa and South East Asia.

Successive Australian governments have considered the US alliance as the bedrock of Australia's security, yielding considerable benefits for Australia's strategic and defence interests. The alliance has a major influence over the conduct of our disarmament diplomacy; but has also come in useful in bringing them along on other objectives. At the same time, we took a firm independent line on key nuclear issues such as our opposition to SDI as fundamentally strategically destabilising.

During this period we also expended a great deal of diplomatic effort campaigning for a Comprehensive Nuclear Test Ban Treaty (CTBT). This took the form of gathering support in the United Nations General Assembly for a resolution that called on the CD to set up an ad hoc committee to address this issue. We pursued this for several years only very gradually increasing our support. Our position on UN disarmament resolutions was respected because we obviously voted for resolutions on merit and on the basis of how realistic they were in building peace and security.

The active pursuit by Australia of greater stability through disarmament and arms control advocacy within a realistic step-by-step framework without abandoning the US alliance built us a reputation of integrity and pragmatism which few nations had been lucky enough to claim. There was also a growing recognition in Australian foreign policy of the very important role multilateral diplomacy played in Australian foreign and security policy; also extended to broader security issues which included human rights and the environment.

There were other elements that made up Australia's reputation for credibility, dedication, integrity and commitment which put us in a good position to advance the CWC when we decided to take action lest the CWC whither on the vine, which we judged to be a distinct possibility at the end of the 1991 CD negotiating session. A strong sense of Aussie independence, a "can-do mentality", and our occupation of the middle ground added to our strengths as an effective middle power.

Our historical experiences in World War I, World War II, Korea, Vietnam, the experience of nuclear tests in Australia and in the Pacific in the 1950s and in the 1970s, 1980s and 1990s and, perhaps, curiously, a certain sense of detachment by never having been forced into a position of having to acquire such arms for the maintenance of our own national security were other key elements.

Finally, there is simply the fact of having been there in the right place at the right time. The same coalition of factors applied, incidentally, when we took up the CTBT challenge in 1996. That same year Australia also initiated the Canberra Commission on the Elimination of Nuclear Weapons, which issued its report on August 1996 and, which, while recognising the principal responsibility of NWSs to take decisive nuclear disarmament action, sent a clear message that all states have a part to play through active support of the non-proliferation regime. 1991 in Geneva and taking into account the stage the CWC negotiations were at — advanced enough to succeed but also threatened to fail spectacularly — was the right time and place for a country of Australia's positioning, stature, independence and commitment to take up the challenge.

We were poised to take leadership on an issue where other, more powerful states which had shown a preparedness to pursue chemical disarmament seriously, would most probably not have succeeded given the lack of trust many of the smaller, non-aligned states had about their motives. Critically, Australia was also prepared to take the challenge of leadership while being at pains to point out that by drawing up a model clear text — 80 per cent of which was already broadly agreed — we had done it as much as an internal exercise to see whether or not

a CWC was achievable and whether it was close enough to conclusion to justify a major diplomatic effort to help close the remaining gaps.

In tabling the model clean text in the CD in March 1992, then Foreign Minister Evans was at pains to stress that we had taken the initiative as an independent effort in good faith to help accelerate the conclusion of a final CWC text. Importantly, the options we had chosen were not necessarily Australia's preferred options, representing what we thought was an acceptable balance between effectiveness, cost-effectiveness intrusiveness and national security considerations and minimising the burden on chemical industry. Senator Evans's challenge to CD delegations was that:

> If the international community is able to make the same relatively small leaps of imagination that we have done, and to grapple in the same spirit of compromise with the few remaining unresolved issues, then we can indeed have an instrument which will materially and significantly contribute to the security of us all. And we can have the Convention soon … Our text is not an alternative to the Rolling Text. Our text is no more, and no less, than an accelerated refinement of the Rolling Text. Eighty per cent of it is an embodiment, in treaty format, of all the achievements of the CD to date. The remaining twenty per cent is our response to issues where agreement does not already exist: our text here advances a model for the kind of compromises which it will be necessary for all parties to make if agreement is to be reached.

Indeed, the Australian draft text demonstrated that a Convention was well within our grasp. The negotiating strategy which accompanied it and which aimed to see the final treaty text concluded by the end of the CDs 1992 negotiating session underpinned the overall package presented by Senator Evans to the CD on 19 March 1992. To get to the point where the Chairman of the negotiations at that time, Ambassador von Wagner of Germany, could use it to prepare his own, ultimately successful Chairman's text, had also required an intense diplomatic selling effort in CD capitals. Australian officials visited about 30 of the 40 CD capitals in time to build the momentum and support required to ensure that the Australian initiative was not dead on arrival when it was finally presented by Senator Evans to the CD.

Preceding our diplomatic effort, Australian officials had done a similar selling job of the Convention domestically with industry and defence constituencies; another critical platform to ensure that all stakeholders were prepared and able to sign on to the treaty. A similar exercise is now in train to obtain industry support for the BWC verification protocol domestically.

The history of Australian advocacy for a CTBT as a key element in reversing the nuclear arms race and our achievements in the CWC also allowed Australia to play a lead role in finalising the CTBT negotiations. Again, the time was more than ripe. The international communities' condemnation of the French and Chinese nuclear tests in the 1990s and subsequent NWS test moratoria were the curtain raisers for the conclusion of these negotiations.

CTBT

By mid-1996, almost unanimous agreement on a CTBT text having been reached and the voluntary moratoria on testing in place for the five NWS, the only thing outstanding was the consensus of all CD members to allow the Treaty to be transmitted to the UN General Assembly for signature.

India continued to insist that the draft Treaty make an explicit link between the CTBT and a time-bound framework for nuclear disarmament. India also wanted the Treaty to cover non-explosive activities. Accordingly, India was simply not prepared to consent to transmission of the Treaty to the General Assembly. As India was one of the 44 states designated to ratify for the Treaty to come into force, its opposition in the CD effectively put the process on permanent hold. There was a very high risk that the text which had been so painstakingly negotiated would unravel in the wake of an excessively prolonged stalemate.

Australia decided to take the lead in bypassing the traditional CD consensus by taking the treaty straight to the General Assembly through a draft resolution proposing its adoption. Such a resolution would only require a majority. This involved a high intensity lobbying effort in New York, Geneva and capitals in a very short space of time to secure a broadly based coalition of co-sponsors for the resolution. Australia succeeded in securing

overwhelming support for the Treaty in the General Assembly with 127 countries co-sponsoring the text and 158 countries voting in favour; including the five weapons states. Only three voted against, with five abstentions.

The initiative of taking the CTBT out of the CD was probably the first death-knell for the CD, although one might well argue that this forum's inability to reach a consensus on such an overdue measure was more an indictment of its shortcomings as an institution than a tactical error by those who chose to move the action to the UN.

What lessons can we draw from the CWC experience?

For Australia, the leadership we took, especially on CW and the CTBT — and perhaps also the Canberra Commission — stood us in good stead in taking a lead role in other disarmament and arms control negotiations. Our bridge-building reputation served us well at the 1995 NPT Review and Extension Conference. Our solid and consistent non-proliferation credentials and leadership in this area led to agreed texts in safeguards and controversial export control provisions of the Final Declaration at that Conference as they did for the strengthened safeguard provisions in the International Atomic Energy Agency (IAEA) which have set new, more intrusive standards for the monitoring of nuclear material and equipment for peaceful purposes. We have been often asked whether Australia "will do a CWC" for the BWC Protocol negotiations and for the yet to be started Fissile Material Cut-Off Treaty (FMCT) negotiations. Unfortunately the standard of the CWC has never been matched. In its implementation, the CWC has proven to be a real challenge and fraught with political difficulties. Compliance is a problem, and controversial export control regimes still exist to make up for the lack of universal application and respect for the international agreements. The political context has also changed. We live in a unipolar world where the incentives for multilateral agreements have strongly diminished; although I suspect that this is a situation which may again have to change as WMD proliferation threats become more pressing.

Australia and certain conventional weapons

A positive development in the international landscape has been the recognition of the extraordinary suffering and damage caused by conventional weapons of all kinds. The Ottawa Treaty on landmines is one consequence of that. It is a lead example of what can be achieved with the backing of civil society in obliging governments to take action; action which should not only have impact in international but also in internal conflicts.

Now with my Red Cross hat on I am delighted to see that Australia's leadership will again be put to the test through the Australian presidency of the 1990 CCW review conference in Geneva in December this year. As always, it will be a challenge, but one of which Australia will be proud, and above all well prepared to meet.

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Reviewing the 1980 Convention on Certain Conventional Weapons: An Australian Contribution to the Law of Arms Control and Disarmament

Robert J Mathews*

Introduction

Since World War II, arms control and disarmament negotiations have for the most part concentrated on attempting to contain the threats caused by the existence of nuclear, chemical and biological weapons.[1] However, arms control negotiators under pressures from various sources within the international community have also attempted to either prohibit or restrict the use of certain types of conventional weapons that exert effects that are or could be judged to be inhumane under customary international law:[2] a notable example is the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[3] This treaty is usually referred to as the Convention on Certain Conventional Weapons (CCW).[4]

This report discusses some of the weapons-related issues that led to the negotiation of the CCW during the 1970s. It considers the pioneering nature but limited impact of the CCW in the 1980s and continues with a discussion of the first Review Conference (Revcon) which took place in 1995/1996. The 2nd Revcon, will take place in December 2001, and the preparations for this will be covered together with some assessment of the potential value of a revised CCW in achieving its original objectives.

In addition, Australia's contribution to the CCW is considered, from the early negotiation phase in the 1970s, to the preparations for the 2nd Revcon. The CCW is considered, as an example of an Australian contribution to the Law of Arms Control and Disarmament, in particular as the role of a 'Middle Power'.

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* Senior Fellow, Faculty of Law, University of Melbourne. The author is very grateful to Messrs Wynford Connick (formerly DSTO) and Richard Rowe (DFAT) who were involved in the negotiations in the 1970s, and Gough Whitlam for providing their insights on the negotiation of the CCW; Ms Sharon Pimm (Resource Centre, Australian Red Cross) for providing relevant documents; and Mr Todd Mercer (DFAT) and Professor Timothy McCormack (University of Melbourne) for helpful comments on an earlier draft of this document.

1 For a discussion of the relationship between International Humanitarian Law, Arms Control and Disarmament, see R.J. Mathews, and T.L.H. McCormack, 'The Relationship Between International Humanitarian Law and Arms Control' in H. Durham and T.L.H. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, Kluwer Law International: The Hague (1999) 65-98.

2 Whilst international humanitarian law at that time used the term 'superfluous injury or unnecessary suffering', the CCW negotiators preferred the terms 'excessive injury' (applicable to combatants) and 'indiscriminate effects' (against civilians). Much legal argument went into these terms at the time.

3 The 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and Protocols I-III, opened for signature 10 October 1980, 1342 UNTS 137; 19 ILM 1523 (entered into force 2 December 1983) (1980 Convention on Certain Conventional Weapons). As at 1 June 2001, there were 85 States Parties.

4 In the 1980s, this treaty was often referred to as the 'Inhumane Weapons Convention'. There has been an increasing preference in recent years for the acronym CCW rather than IWC, as the 'inhumane weapons' label may imply that weapons not covered under the treaty are humane (or less inhumane) than those weapons that are covered by the treaty.

Concerns about weapons considered to be excessively injurious or to have indiscriminate effects

From the mid-1960s, there were increasing concerns about weapons that may cause excessive injury or have indiscriminate effects. These concerns were, at least in part, a reaction to the well-publicised use in the Indochina war of tear gases and herbicides[5] (which a number of States considered were prohibited under the 1925 Geneva Protocol), and led to a UN General Assembly Resolution,[6] which called for strict observance to the 1925 Geneva Protocol and invited all States which had not yet done so to ratify or accede to the Protocol.

In 1968, the Eighteen-Nation Disarmament Committee (ENDC)[7] concluded the negotiation of the Nuclear Non-Proliferation Treaty (NPT). The NPT was seen by many as the first major victory for the UN machinery in multilateral arms control, and many States were keen to see the ENDC continue working on 'non-nuclear' disarmament treaties. The desire for a continuing role for the ENDC, together with the concerns about chemical and biological (CB) weapons, led to the agreement for the ENDC to negotiate a treaty to ban CB weapons. In the same year, following a request by the UN General Assembly, the UN Secretary-General appointed a group of experts to study the effects of CB weapons which was subsequently discussed in the ENDC.

Concerns about other weapons considered to be excessively injurious or to have indiscriminate effects, including incendiary weapons,[8] delayed actions weapons including antipersonnel landmines (APLs), small calibre-high velocity bullets,[9] fragmentation weapons (including cluster bombs) also led to UNGA Resolutions and studies of effects of various weapon types commissioned by the UN Secretary-General. A number of States proposed that regulations or prohibitions of these weapons should also be developed.

Negotiation of the CCW

These weapons-related activities coincided with activities initiated by the International Committee of the Red Cross (ICRC) to reaffirm and further develop international humanitarian law (IHL) applicable in armed conflict.[10] To this end, by the late 1960s the ICRC had collected the relevant documents, considered on which points the existing law needed to be supplemented or improved, and then commenced developing language for draft treaties with the assistance of government experts.

In May 1971, the ICRC convened a Conference of Government Experts to consider the ICRC preliminary drafting, and this process continued at a second session of the Conference of Government Experts in May 1972.

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5 The major environmental modification weapon used since WWII was the use of herbicides in Viet Nam: in that conflict, massive defoliation was caused by 80 million litres of defoliants on mangrove jungles and other vegetation. There were also concerns in the 1970s of the possibility of the development of other environmental modification techniques.

6 GA Res A/2162 B (XXI) adopted 1966.

7 The Conference on Disarmament (CD) has evolved from the Ten Nation Committee on Disarmament, which was established in 1958 as the negotiating body of the United Nations for disarmament treaties. The Ten Nation Committee on Disarmament was enlarged to become the Eighteen Nation Disarmament Committee (ENDC) in March 1962. This became known as the Conference on the Committee on Disarmament (CCD) in 1969 (expanding to 30 members), and then the Committee on Disarmament in 1979 (40 members). This was renamed as the Conference on Disarmament (CD) in 1984. The CD membership was increased to 61 States in 1996, and further increased to 66 States in 1999.

8 Incendiary weapons had been used since ancient times, eg, 'Greek Fire'. More recently, flamethrowers, incendiary bombs, and napalm had been used resulting in terrible casualties, both on the battlefield and against civilians. See 'Napalm and other incendiary weapons and all aspects of their possible use', Report of the Secretary-General, UN Doc.A/8803/Rev.1 (New York: 1973).

9 Reduced calibre-high velocity rifle ammunition resulted from efforts since WWII to produce smaller, easier-to-use rifles and lighter, higher velocity ammunition. There is a greater tendency for these bullets to tumble, and in certain circumstances, to cause wounds similar to dumdum bullets.

10 ICRC, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949', Y. Sandoz, C. Swinarski, B. Zimmerman (eds), (Martinus Nijhoff: Geneva 1987), pp.xxvii-xxxv.

The ICRC then drew up a complete text of two draft Protocols additional to the Geneva Conventions, one to be applicable to international armed conflict, the other applicable to conflicts which were not of an international nature, which were to serve as the basis for discussion in the future Diplomatic Conference (see below). At the Conference of Government Experts in May 1972, several proposals were presented to include prohibitions and restrictions on napalm and other incendiary weapons, fragmentation weapons, air-fuel explosives and APLs in the draft Additional Protocols.

At the request of a number of States, in 1973 the ICRC convened a meeting of a group of experts on weapons and humanitarian law.[11] However, following this meeting, it was recognised by the ICRC that attempts to include restrictions and prohibitions on particular weapons in the draft Additional Protocols could jeopardise the successful conclusion of the negotiation of the Additional Protocols.[12]

The *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts* (CDDH)[13] was convened and organised by the Swiss Government in its capacity as the depositary for the Geneva Conventions in order to negotiate the Additional Protocols based on the draft documents that had been prepared by the ICRC in consultation with a number of States. The CDDH met in Geneva in four sessions: the first session was held from 20 February to 29 March 1974; the second from 3 February to 18 April 1975; the third from 21 April to 11 June 1976; and the final session from 17 March to 10 June 1977.[14]

An *Ad Hoc Weaponry Committee* was established in the first session of the CDDH in February 1974 in accordance with the 1973 UNGA and ICRC Resolutions. These Resolutions invited the CDDH to consider the question of the prohibition or restriction of the use of conventional weapons which may cause 'excessive injury' or have 'indiscriminate effects'. A working paper was presented at this session which proposed restrictions and prohibitions on incendiary weapons, anti-personnel fragmentation weapons, flechettes, high velocity bullets and anti-personnel land mines.[15] Thus, the question of arms control, at least as far as conventional weapons were concerned, had become intertwined with the further development of IHL.

In the early 1970s, the weapon which caused greatest interest to the negotiators was napalm — because of extensive use in Indochina, graphic photographs and TV footage, (and possibly because anyone who had been burnt could associate with the effects of this form of weaponry). A number of major military States opposed prohibition on napalm and other incendiary weapons against combatants, but a number of close allies of major powers sought such a prohibition.

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11 Report on the work of experts, 'Weapons that May Cause Unnecessary Suffering and have Indiscriminate Effects', published by the ICRC (Geneva, 1973). This expert group considered blast and fragmentation weapons, time delay weapons (including APLs), incendiary weapons, nuclear weapons, biological weapons and chemical weapons.

12 In the introduction to the draft Additional Protocols, the ICRC stated that 'Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach these problems.' See Commentary on Additional Protocols, p xxxii.

13 This conference is normally referred to the 'The Diplomatic Conference' or CDDH. The acronym CDDH, which was also used to designate official documents, was based on the French language title of the conference (*Conference Diplomatique sur la reaffirmation et le Developpment du droit international Humanitaire applicable dans conflits armes*).

14 The negotiation of the Protocols was concluded on 8 June 1977. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3; 16 ILM 1391 (Additional Protocol I) (entered into force 7 December 1978); and Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609; 16 ILM 1442 (Additional Protocol II) (entered into force on 7 December 1978).

15 Working Paper submitted by Egypt, Mexico, Norway, Sweden, Switzerland and Yugoslavia.

Most States at the CDDH agreed that the various weapons issues would require extensive examination before the proposals could be considered by a drafting committee, so the ICRC was requested to convene a Conference of Government Experts on the Use of Certain Conventional Weapons, which was held in Lucerne in 1974,[16] with a second meeting of the government experts held in Lugano in 1976.[17] At the Lucerne and Lugano meetings, some experts advocated total bans on specific weapons, while other experts considered that total bans were beyond reach, and that more progress would be achieved if the meeting were to concentrate its efforts on restrictions of use. This latter more pragmatic view was shared by the ICRC.[18]

The Ad Hoc Committee on Weapons met through each of the four sessions of the CDDH, and by the last session of the CDDH it had become clear that there would not be agreement on even the major issues (in particular, which weapons should be included, and the nature of prohibitions or restrictions, whether there should be prohibitions on the battlefield use of certain weapons, or prohibitions on the use of certain weapons against civilians). To a large extent, the major divergences were between a number of neutral European States (including Sweden, Norway, Switzerland and Yugoslavia) and developing States (including Egypt and Mexico) which took the view that high technology antipersonnel weapons were particularly inhumane and should be prohibited;[19] and a number of major military States (including the USA and other larger NATO members and the USSR and other larger Warsaw Pact members) which were either opposed to prohibitions or restrictions on high technology weapons, or argued that any such prohibitions should be negotiated in the UN Conference on the Committee on Disarmament rather than in the CDDH.

Decision-making on the weapons-related issues (both in the CDDH Ad Hoc Weapons Committee and subsequently in the CCW negotiations) was made difficult because decisions were taken by consensus (unlike decision-taking taken in the CDDH on other issues which, had it been necessary, could have been taken based on a two-thirds majority). However, at the final session of the CDDH, there was agreement on a Conference Resolution which expressed the wish that the weapons issues should be dealt with within the framework of the United Nations, and called for a 'Special UN Diplomatic Conference with the view to reaching agreements on prohibitions or restrictions on the use of specific conventional weapons'.

The first and second Preparatory Conferences for the 'Special UN Diplomatic Conference' were held in Geneva in August 1978 and March/April 1979, and two formal Sessions were held, in September 1979 and September 1980.[20] Draft language, which had been developed in the CDDH Ad Hoc Committee on Weapons, formed the basis of the 12 proposals submitted to the first Preparatory Conference. The weapons covered by the various proposals included incendiary weapons, fuel-air explosives, small calibre-high velocity bullets, anti-personnel fragmentation weapons, non-detectable fragment and APLs. By the conclusion of the Preparatory Conferences, there was recognition that it would be possible to negotiate restrictions on only three categories of weapons: weapons causing fragments not detectable by X-ray; APLs and booby traps; and incendiary weapons, and that

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16 Report, 'Conference of Government Experts on the Use of Certain Conventional Weapons (Lucerne 24.9-18.10.1974)', published by the ICRC (Geneva, 1975).

17 Report, 'Conference of Government Experts on the Use of Certain Conventional Weapons (Second Session, Lugano, 28.1-26.2.1976)', published by the ICRC (Geneva, 1976).

18 At the conclusion of the Lugano meeting, the Vice President of the ICRC stated, 'Moreover, I think relatively minor results which meet with general agreements are far better than projects which look dazzling on paper but which are worthless in practice and likely, when all is said and done, to undermine humanitarian law as a whole.' See Report, 'Conference of Government Experts on the Use of Certain Conventional Weapons (Second Session, Lugano, 28.1-26.2.1976)', published by the ICRC (Geneva, 1976) 78.

19 There was also an implied linkage between advanced technology in weapons with increased inhumanity: a notion which had considerable appeal to certain developing States and groups involved in guerrilla warfare and wars of national liberation.

20 The two formal sessions were attended by representatives of 82 States and 76 States respectively.

for the latter two categories of weapons, there was a sense that it might be possible to reach agreement on prohibitions applicable to civilians but not to combatants.[21]

After it had become clear that there would be agreement on only a limited number of weapon types for inclusion in a future treaty, Mexico proposed a 'Preliminary Outline of a Treaty' (an 'umbrella' or framework convention) which would consist of a general agreement and a number of protocols on specific weapons, which would be dynamic and allow the possibility of adding new protocols based on future developments. As originally drafted by Mexico, this treaty would have applied to internal armed conflicts as well as international armed conflicts. However, this proposal was subsequently negotiated, based on a UK/Netherlands proposal, and resulted in language which would limit the scope of the future convention to international armed conflicts, which was subsequently agreed.

In the course of the negotiations, several States proposed that the CCW should contain some form of compliance monitoring procedures. Perhaps most notably, in the second formal session in 1980, a proposal was introduced by Germany (FRG), co-sponsored by several other members of the Western Group[22] (and publicly supported by other States including USA, Sweden and Australia)[23] for the creation of a special consultative committee of experts to assist in dealing with specific compliance concerns under the CCW. Unfortunately, this proposal was opposed by the USSR and its allies.[24]

At the conclusion of its second session in 1980, the UN conference adopted the text of the CCW. The CCW was opened for signature in New York on 10 April 1981, and entered into force on 2 December 1983 (ie. six months after 20 ratifications).

Australia's contribution to the negotiation of the CCW

As outlined above, the negotiation of the weapons issues which eventually resulted in the CCW had its origins in the CDDH, and the CCW was to a considerable extent based on draft language developed during the CDDH. Therefore, Australia's contribution through 'Middle Power Diplomacy' to the weapons issues is considered from the early 1970s, rather than limiting it to the two preparatory meetings and two formal sessions of the UN Conference held between 1978 and 1980. At the outset, it is interesting to note that this was the first time that Australia had taken an active role in the negotiation of a weapons regulation/arms control treaty,[25] and, based on

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21 The United Nations Disarmament Yearbook, Volume 3: 1978, pp 348-366, (United Nations, New York, 1979).

22 'Draft Article on a Consultative Committee of Experts', U.N Doc A/CONF.95/L.7, Oct. 9, 1980, sponsored by Belgium, Canada, Federal Republic of Germany, France, Ireland, Italy, Japan and The Netherlands.

23 J.A. Roach, 'Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?', 105, *Military Law Review*, (1984) pp 3-72. In addition, when signing the CCW, the USA stated that it 'had strongly supported the proposals by other countries to include special procedures for dealing with compliance matters, and reserved the right to propose at a later date additional procedures and remedies, should this prove necessary, to deal with such a problem'. (See SIPRI Yearbook, 1986, p 585).

24 At that time, the USSR was opposed to international monitoring of its arms control related obligations. Indeed, it is interesting to compare the USSR approach to monitoring compliance with the CCW with the USSR opposition to international on-site verification under the Chemical Weapons Convention. The USSR was opposed to international on-site verification under the Chemical Weapons Convention for routine monitoring of CW stockpiles until the early 1980s, and did not agree with the principle of challenge inspections until 1987.

25 Australia did not become a member of the UN Conference on Disarmament (CD) until the CD was enlarged from 30 to 40 members in 1979, although Australia played an active role in the First Review Conference of the NPT which was convened in 1975. See R.W. Furlonger, 'Swift Action needed to curb Proliferation' (Statement to the NPT Review Conference made by Leader of Australian Delegation on 8 May 1975), Australian Foreign Affairs Record, Vol. 46, pp 278-284, May 1975.

the large well-qualified delegations that were sent to each session[26] it was clear that Australia took its role seriously.

The Australian Government expressed its determination to take action at every practicable opportunity to promote the development of all aspects of international humanitarian law. Prior to the first session of the CDDH, Australia had carefully considered the early ICRC draft of the Additional Protocols, and went to the CDDH with a number of proposals to improve the Protocols. Following a detailed review of the effects of various weapons, Australia had come to the view that there was no necessary correlation between the high levels of technological sophistication of weapons and the degree of inhumanity arising from the use of weapons. The delegation was therefore encouraged by Canberra to steer a middle course between those States wishing to direct the Experts Conference immediately to consider prohibition of a list of specific weapons and those States which were opposed to any such consideration.

In the early part of the negotiation, the Australian delegation supported the development of effective measures to prevent the use of napalm type weapons and herbicides.[27] For example, following the release of the UN Secretary General Report, Australia provided comments to support the prohibition of incendiary weapons,[28] and Australia presented a proposal to the first session of the CDDH to include a prohibition on environmental warfare in Additional Protocol I.[29]

As discussed above, to a large extent the major divergences on weapons issues were between a number of neutral European States and developing States which took the view that high technology antipersonnel weapons were particularly inhumane and should be prohibited; and a number of major military States which were either opposed to prohibitions or restrictions on high technology weapons, or argued that any such prohibitions should be negotiated in the UN Conference on Disarmament. The guidance from Canberra was that, despite the political nature of some of the debate, that the delegation should keep humanitarian considerations well to the fore, and that it should work to achieve reconciliation between conflicting positions that would be necessary to make progress. Further, although Australia was a member of the 'Western Working Group', the delegation was

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26 For example, at the second session of the CDDH, the Australian delegation included 10 government officials, including legal, scientific and military experts from Department of Foreign Affairs, Attorney General's Department, and Department of Defence. The Deputy Secretary-General of the Australian Red Cross was also a member of the delegation.

27 The concern about napalm for many Australians was at least in part in response to the effects of the use of napalm in the Viet Nam conflict. For example, in a Parliamentary speech by (then) Leader of the Opposition Gough Whitlam in the House of Representatives on 18 August 1971, Whitlam referred to '…the hundreds of thousands who have been killed and incinerated, the hundreds of thousands of acres which have been defoliated and destroyed; forget if you like, the 500 Australians who have been killed, and the few thousand who have been wounded and injured and who will bear those scars for the rest of their lives'.

28 In a statement to the First Committee of the UN General Assembly (6 November 1973) the Australian representative stated: 'Australia was one of a number of States which, pursuant to resolution 2932 A(XXVII), submitted its views to the Secretary General on the report *Napalm and other incendiary weapons and all aspects of their possible use*. We did so because we share international concern about the use of napalm and because to us the overriding consideration is to give priority to the humanitarian aspects of the subject. Our reply recalled that Australia is a party to international agreements to prohibit the employment in war of weapons calculated to cause unnecessary suffering. It reaffirmed the principles in those agreements and their applications to all classes of weapons, particularly napalm.'

29 At the first session of the CDDH in February/March 1974, Australia proposed the following paragraph for inclusion in Protocol I: 'It is forbidden, as a technique of war, to destroy or modify the environment in a way harmful to the well-being and health of the civilian population.' (Document CDDH/III/60). Between the first and second sessions of the CDDH, the USSR proposed to the UN a wide-ranging draft Convention on the 'Prohibition of Action to Influence the Environment and Climate for Military and Other Purposes'. Australia recognised the broader scope of the USSR proposal (which eventually became the 1977 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD)) and offered to withdraw its proposal in CDDH/III/60. However, other delegations wished to retain this provision in Additional Protocol I, and it was retained.

encouraged by Canberra not to identify itself too closely with any particular political bloc, but to enlist and give support wherever this may further Australia's objectives.[30]

The Australian approach to the weaponry issue was based on the Government policy for effective measures of disarmament and for the promotion of humanitarian controls limiting unnecessary suffering. The approach recognised that to achieve generally acceptable, practicable and effective international agreements in this area of conventional arms control, a balance would have to be struck between humanitarian objectives and the different and sometimes conflicting security interests of individual nations. Australia recognised that the proposals would have to be acceptable to the major powers and major weapons suppliers if any forward movement was to be maintained. Agreement would require the reconciliation between widely different approaches, that is, between States prepared to nominate a list of weapons for prohibition and other States reluctant to consider any weapon which was currently in use for prohibition or restriction.

In addition, in 1975 Australia's Defence Science and Technology Organisation (DSTO) commenced a research program to support the work of the negotiating team. For example, a wound ballistic range was constructed and some highly technical research undertaken on the stability of rifle bullets and their cavitation effects in gelatin (used as a soft tissue simulant). State-of-the-art high-speed photography and time-lapsed-flash-X-ray techniques were employed to study the dynamic effect of bullet-target interaction.[31] This included a study of the wounds caused by high-velocity rifle bullets,[32] and the development of a method designed to assist surgeons in assessing the extent of necrotic tissue (which has to be removed by surgery) resulting from muscle injury caused by high-velocity bullets wounds.[33] Results from this research were discussed at various expert meetings associated with the negotiation of the CCW and formed part of Australia's commitment to ongoing research that would help later revisions of the treaty and further consideration of the high-speed bullet issue, which had been set aside during the CCW negotiations because of insufficient technical data.[34]

Australia's pragmatic approach was also reflected in the UNGA statement following the conclusion of the negotiation of the CCW.[35] By the conclusion of the negotiation of the CCW, the Australian delegation was acknowledged for its active and constructive role at the working groups and conferences during the 1970s, and

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30 As an example, following the Lucerne meeting, Sweden and a number of other States proposed a UN GA Res 3255 A (XXIX) (9 December 1974) which went beyond the Lucerne consensus. Australia voted in favour of the resolution, as Australia considered that the resolution helped to advance the negotiation process, even though Australia recognised that the resolution did not fully reflect the points agreed at Lucerne (and provided an explanation to this effect). Many States, including the USA and other larger NATO members and the USSR and other larger Warsaw Pact members, abstained on the vote.

31 Y.C. Thio, 'Cavitation by High-Velocity Projectiles Penetrating Gelatin: Mathematical Formulation and Time Averaged Motion', Materials Research Laboratory Report MRL-R-735, (1979).

32 B.M. Paddle, S.E. Freeman, I. Mawson and H. Graham, 'Fine-Structure Studies of Experimental Skeletal Muscle Trauma', *British Journal of Experimental Pathology*, 62, 571-82, (1981).

33 B.M. Paddle, 'A Scanning Fluorometer for Imaging Ischaemic Areas in Traumatised Muscle', *The Journal of Trauma*, Vol. 28, pp. S190-S193, (1988).

34 For a review of the studies undertaken in Australia from 1975 until 1987, see J.D. Oliver and G.F. Whitty, *Wound-Dynamic Studies in Australia, Proceeding of the 5th Symposium on Wound Ballistics*, Vol. 28, pp S54-S57, (1988).

35 The Statement by the representative of Australia (Mr Anderson) referred to the CCW as follows: 'One of the more positive contributions in the field of disarmament was the recent and successfully concluded Inhumane Weapons Conference. Australia welcomes the outcome of that Conference, which represents a significant advance in the field of conventional disarmament. The issues addressed by the Conference were delicate and it is significant that agreement was reached on three of the items. We recognize of course that the agreements reached at the Conference were limited in scope. But they were significant both in substance and as an illustration of the continuing international will to proceed along the path towards disarmament. The agreement reached does not reflect all the hopes of all delegations but in international forums there must be willingness to compromise, to show flexibility and cooperate.' Statement made at the 14th meeting of the First Committee of the 35th Session of the UNGA (24 October 1980).

had developed a reputation for Australia for its role in 'middle-power diplomacy'.[36] Australia signed the CCW on 8 April 1982 and ratified on 29 September 1983.

Assessment of CCW in the 1980s

Nevertheless, the CCW, as finally agreed in 1980, was seen as a very modest achievement. Indeed, the final outcome was a major disappointment for its proponents, who felt that military considerations had been given much greater priority than the humanitarian concerns. In particular, the proponents had sought: a ban on a range of fragmentation weapons (not just fragments which are not detectable by X-rays, as contained in Protocol I;[37]) a complete ban on APLs and booby traps (rather than the very detailed regulations on use of these weapons, as contained in Protocol II);[38] a complete ban on incendiary weapons (rather than the prohibition of use of these weapons against civilians, as contained in Protocol III); and provisions to prohibit or regulate the use of other weapons including fuel-air explosives and high-velocity/small-calibre bullets (which were not included in the CCW at all).

Further disappointments were the absence of compliance monitoring provisions in the CCW, application of the CCW limited to international armed conflict, and the very minimal implementation-related obligations for States Parties. On the latter issue, the CCW requires the dissemination of its provisions to the armed forces of the parties so that the provisions may become known to their armed forces (CCW Article 6), but does not require translation of the CCW provisions into field manuals and operating procedures within the armed forces, and does not have penal sanctions against individuals who violate the CCW.[39]

As a consequence, there was very limited attention given to the CCW during the 1980s: it was a neglected treaty, with many smaller developing countries considering the CCW not worth ratifying and a number of militarily significant States not wishing to be bound by its provisions.[40] This is illustrated in the graph of membership of different arms control treaties between 1970 and 2000 (Figure 1). The graph also includes a plot of the UN

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[36] Indeed, in my first visit to Geneva in 1985 for the negotiation of the Chemical Weapons Convention, I was approached by a number of delegates from both 'militarily significant States' and developing States who had been involved in the CCW negotiations several years earlier, who advised me of the useful role played by Australia during the negotiation of the CCW.

[37] Other types of fragmentation weapons which were proposed during the negotiation included cluster weapons and multiple-flechette projectiles.

[38] Protocol II of the CCW placed restrictions on the use of anti-personnel land mines, booby traps and similar devices. The Protocol also prohibited, in all circumstances, the deployment of anti-personnel land mines against the civilian population; prohibited the indiscriminate use of mines; specified that all feasible precautions must be taken to protect civilians from the effects of mines; restricted the use of mines (other than remotely delivered mines) in populated areas; prohibited the use of remotely delivered mines unless their locations can be accurately recorded or an effective neutralising mechanism is used; specified that effective early warning shall be given of any delivery or dropping of remotely delivered mines which may effect the civilian population, unless circumstances do not permit; specified that the Parties to a conflict shall record the location of all pre-planned minefields laid by them and endeavour to ensure the recording of the location of all other minefields. However, there were serious limitations and loopholes in Protocol II of the CCW. For example, there was lack of clarity of some provisions and obligations, including the responsibility of removal of minefields after the conclusion of hostilities, and there were no provisions for 'undetectable' plastic mines.

[39] This is in stark contrast to Additional Protocol I of the Geneva Conventions (agreed three years earlier) which required development of military manuals, orders and instructions to ensure observance of the provisions (Article 80), including availability of legal advisers (Article 82), broad dissemination (Article 83) and criminal proceedings against those who commit 'grave breaches' of the provisions (Article 85-89).

[40] Indeed, Preambular Paragraph 6 of the CCW referred specifically to the importance of ratification by 'militarily significant States'.

Membership over the same timeframe, as this provides a useful indication of the extent of universal acceptance of each of the treaties.[41]

Clearly, based on the widespread use of APLs in various conflicts in the 1980s and on the amount of terrible suffering and devastation that was caused by their use, the CCW was clearly ineffective in reducing the inhumane deployment of APLs during that timeframe. However, this was not necessarily as a result of any intrinsic fault with the actual provisions in Protocol II, but for a number of reasons including: the limited membership of the CCW; the fact that the provisions of the CCW were not respected by the international community; the fact that the CCW was limited to international armed conflicts; and the absence of implementation, consultation and compliance monitoring provisions within the CCW. Another significant factor was the substantially increased use of APLs in armed conflicts in the 1980s because of their greater availability and reduced cost.[42]

Indeed, the CCW was regarded as a bit of a 'lemon' by the late 1980s. However, from the late 1980s, interest in the CCW was revived by the ICRC, through their convening of a series of Experts Meeting to discuss Laser Blinding Weapons[43] which subsequently resulted in a proposal for a new protocol for the CCW, and, even more as a result of the increasing APL problem, which was being highlighted by a number of States, NGOs and the ICRC.[44] At that time, the ICRC estimated that as many as 27,000 people (mainly civilians) were either killed or severely injured by anti-personnel land mines every year. It was also estimated that there were up to 120 million sown land mines in 64 countries around the world.[45] This resulted in pressure on the States Parties to the CCW to convene a Review Conference to consider how the CCW might be amended to more adequately address these issues.

CCW First Review Conference (1995/6)

A Review Conference (Revcon) for the CCW was requested by France in 1993, and supported by a number of other States, including Australia. It was agreed that the Revcon would take place in Vienna from 25 September to 13 October 1995.[46] Interest in the CCW increased in the lead-up to the Revcon, with increasing membership.

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41 It should be noted, however, that not all States are UN Members so comparisons should be made with care, especially with the NPT. For example, a number of internationally recognised States that are States Parties to the NPT are not UN Member States (eg, Holy See and Switzerland). At the end of 2000, four States (Cuba, India, Israel and Pakistan) were not States Parties to the NPT. The 'cross-over' of the NPT and UN curves in the late 1990s was a consequence of, *inter alia*, Kiribati, Nauru and Tonga (which had ratified the NPT in 1985, 1982 and 1971 respectively) not becoming UN Members States until 1999.

42 APLs had become a greater problem since the 1970s, because of improved production methods, increased use of plastics and more compact design. This resulted in APLs becoming more readily available, less expensive, less labour-intensive to deploy (ie, air-scatterable/remotely deliverable), and more difficult to detect. This resulted in massive numbers of casualties, most notably civilians after conflicts.

43 Meetings were held in June 1989, November 1990 an April 1991 to consider technical, medical, psychological and legal aspects of the use of battlefield laser weapons. ICRC, 'Blinding Weapons: Reports of the meetings of experts convened by the ICRC on Battlefield Laser Weapons 1989-1991', (ICRC, Geneva, 1993).

44 The ICRC also convened meetings to consider the means to address the APL problem. See: ICRC, 'Report on Landmines', Report of a meeting of experts convened by the ICRC, Montreux, 21-23 April 1993.

45 These UN-based figures were cited in International Committee of the Red Cross, *Special Brochure: Landmines Must be Stopped* (1995) 4. More recently, some sources have claimed that the total number of landmines deployed world-wide at that time was closer to half of the estimated 110 million or more. See Zdzislaw Lachowski, 'The Ban on Anti-Personnel Mines', *SIPRI Yearbook 1998: Armaments, Disarmament and International Security*, pp 545-558.

46 Indeed, the term 'Review Conference' is a little misleading in this context. In fact, the review of the CCW took place over 27 months, commencing with the first of several experts groups meetings in February 1994, and concluding in an extended final formal session in May 1996. The Revcon had a high rate of participation. For example, 44 of the (then) 57 States Parties participated at the October 1995 session and 40 other States attended as observers.

(eg, 31 States Parties in 1991, 57 States Parties in 1995). In addition to the quantitative aspect (as illustrated in Figure 1), there was also qualitative importance as several 'militarily significant States' (including USA) were among those States that ratified the CCW in the lead-up to the 1st Revcon.

The first (and some States might say 'only') achievement of the Revcon was during the first formal session in November 1995, with the agreement on a protocol prohibiting blinding laser weapons (Protocol IV).[47] This agreement was regarded as a landmark in arms control history because the prohibition was negotiated before the weapons had been deployed in battle.[48]

However, from the first Preparatory Meeting in the lead-up to the 1st Revcon until the close of the extended final session 27 months later, the highest profile issue was APLs. From the outset there were two divergent groups of States: one group of approximately 20 States proposing to have a total prohibition on APLs incorporated into the CCW (by the end of the Revcon, this group had increased in number to include 40 States); and another group of States (which included a number of 'militarily significant States') which were opposed to a total prohibition on APLs, but which were prepared to strengthen the provisions in Protocol II. Between these two extremes were a number of States who supported a prohibition of APLs, but recognised that the 'prohibitionists' would not achieve the required consensus during the Revcon, and on that basis accepted the role of the Revcon in strengthening Protocol II.[49] Australia, as one of the States 'in the middle' made a number of proposals to strengthen the CCW APL provisions.[50] Australia was also concerned that too much focus on the 'prohibition vs. strengthened measures' issue may have become a distraction and reduced the prospects of the Revcon achieving useful strengthening measures.[51]

The attempt to strengthen the APL provisions of the Protocol II became a long tortuous process. Consensus could not be reached by the scheduled conclusion of the Revcon (13 October 1995),[52] and eventually two extensions of the Revcon were required (15-19 January 1996 and 22 April-3 May 1996) to reach an agreed amended Protocol II (APII). By the end of the Revcon there were some useful improvements to Protocol II

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47 Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol on Blinding Laser Weapons), opened for signature 13 October 1995; 35 ILM 1218 (entered into force 30 July 1998) (Protocol IV to the 1980 Convention on Certain Conventional Weapons).

48 Apparently, a number of countries had been developing the technology to inflict blindness on victims of laser weapons and in some circumstances these weapons had gone into production, however, the weapons had not been deployed in battle situations.

49 For example, in an address to the Evatt Foundation, Sydney, on 7 February 1996, Foreign Minister Evans stated: 'Australia is committed to, and will work towards, a total ban on the manufacture, stockpiling, use and transfer of APLs, ie, their total elimination. … The practical problem that we and like-minded countries face in working towards a global ban, however much we may wish to see an immediate end to the international scourge of landmines, is that an immediate ban is not achievable. … We do not share the view of some critics that, in the absence of a consensus on total elimination, no intermediate objective is worth striving for. We will continue to work towards a total ban — but will also support lesser objectives that are worthwhile steps towards that.'

50 The proposals by Australia included a ban on long-lived APLs (ie, APLs that do not both self-destruct, and, as a back-up measure, automatically de-activate), a ban on mines which cannot be detected, a ban on trade in any mines not sanctioned by the CCW, a ban on supply of any type of APL to all non-government entities, a ban on the transfer of any type of APL to any State not party to the CCW, extension of the provisions of the CCW to cover internal conflict and civil war, and incorporation of compliance and verification mechanisms which would allow the international community to respond effectively to the misuse of APLs. See DFAT, *Peace and Disarmament News*, March 1994, p 5.

51 However, in the concluding phase of the Revcon, a joint statement by Australian Foreign Minister Downer and Defence Minister McLachlan indicated that, in addition to continuing to support the strengthening of Protocol II, Australia would also be pursuing a total prohibition of APLs beyond the Revcon. (DFAT, *Peace and Disarmament News*, July 1996, p 5).

52 Press headlines on 13 October 1995 included 'Landmine conference falls apart' (*The Times*) and 'UN Talks to ban Landmines Fail' (*International Herald Tribune*).

including: the scope extended to internal armed conflicts; strengthened general humanitarian restrictions on use of APLs (including need to discriminate between military and civilian objects); bans on non-detectable APLs; bans on anti-sensing devices on APLs; enhanced rules on mine laying (eg, long-lived mines may only be used if properly fenced, marked and monitored); stronger restrictions on use of remotely-delivered APLs (including a ban on remotely-delivering long-lived mines); and transfer restrictions. However, some of the provisions (including the requirement for specifications on detectability of APLs) incorporate a 'period of deferral' of up to nine years if a State Party 'determines that it cannot immediately comply' with those provisions.[53]

The situation with respect to implementation obligations for Protocol II was corrected to some extent, with provisions including: the obligation to take all appropriate steps to prevent violations of the Protocol; penal sanctions against individuals who violate the Protocol; and preparation and distribution of relevant military instructions and operating procedures and training of armed forces. APII also included an annual Conference of States Parties to consult on operational issues, and annual reports by States Parties to include, *inter alia*, reports to be provided on legislation related to the Protocol.

The outcomes of the Revcon were seen as useful by some States parties.[54] However, the failure of the Revcon to agree on a total prohibition of APLs caused considerable disappointment in some quarters,[55] which led to a very strong humanitarian quest which resulted in the negotiation of a disarmament treaty (the 1997 'Ottawa Treaty'.[56] It is interesting to note that 117 States have now ratified the Ottawa Treaty, whereas only 58 States have ratified APII and only 56 States have ratified Protocol IV.

It is no simple task to make an assessment of the effectiveness of the CCW since the 1st Revcon, at least in part because of the absence of compliance monitoring provisions. However, a combination of factors including: the increased membership of the CCW; the strengthened provisions in APII; the strong support for the Ottawa Treaty; and the increased resources allocated to mine clearance in recent years does appear to have had a positive impact on the APL problem.[57] The extent of the contribution of the CCW to the improving situation is difficult to judge, but if all APL supplier States were complying with the APII transfer provisions, then that in itself would be expected to have a major impact on the availability of APLs for use in armed conflicts. The situation is even less clear with respect to adherence to the provisions of Protocols I, III and IV of the CCW: the situation would be improved if the CCW included: obligatory provision of information on relevant activities by States Parties (including implementation procedures); and compliance monitoring provisions.

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53 *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices* as Amended on 3 May 1996, (1996) 35 ILM 1209 (Amended Protocol II to the UN Convention on Certain Conventional Weapons).

54 For example, Australian Foreign Minister Downer reported to parliament that: 'Amended Protocol II contains much stronger restrictions and prohibitions on landmines use and transfers, and provides greater protection for civilians and peacekeeping forces than the original Protocol II'. (Parliamentary Debates (Hansard), House of Representatives, 15 October 1996.)

55 In addition to the concerns and disappointment expressed by a number of States Parties, the ICRC stated that it considered the amended Protocol II as 'woefully inadequate' and that 'the horror of the immense human suffering caused by landmines is set to continue, and the amended Protocol II will do little to change this situation'. ICRC Press Release 96/16, dated 3 May 1996.

56 The 1997 Ottawa Treaty was negotiated, in record time, externally to the UN-based arms control negotiation machinery. For details of the negotiation, see S. Maslen and P. Herby, *International Review of the Red Cross*, No 325, 693-713, (December 1998). *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of and on Their Destruction*, opened for signature 18 September 1997, 36 ILM 1507 (*The Ottawa Land Mines Convention*) (entered into force on 1 March 1999).

57 In reference to the Ottawa Treaty, the ICRC recently stated that: 'Although a global assessment may be premature, statistics gathered by the ICRC and mine action organizations show that the average number of monthly casualties due to landmines and unexploded ordnance has decreased significantly in several affected countries.' (Statement by the ICRC, United Nations General Assembly, 55th Session, November 2000).

Preparations for the CCW Second Review Conference 2001

It has been agreed that the second Review Conference of the CCW will take place in Geneva from 11-21 December 2001. The first preparatory meeting took place in late April. The Australian Ambassador for Disarmament (Mr Les Luck) has been appointed President-designate of the Revcon and is chairing the preparatory meetings.[58]

Proposals currently being considered include:

- Scope: there are proposals to extend the scope of CCW to include non-international armed conflicts (at the moment, APII is the only Protocol of the CCW that applies to internal armed conflict).

- Compliance monitoring: there are proposals that the whole CCW be covered by compliance monitoring procedures, or alternatively that APII be covered by compliance monitoring.

- Protocol on Explosive Remnants of War (ERW): there is a proposal from the ICRC for a new Protocol to the CCW for ERW (including cluster weapons)[59] which would include: users responsible for clearance; sharing technical information on clearance; users to warn civilians; and prohibition on use against military objects co-located with civilians.[60]

- Anti-Vehicle Mines (AVMs): there is a proposal to create a new protocol containing provisions that all AVMs be detectable, and that remotely deliverable AVMs be self-destructing and self-deactivating.

- Small calibre-high velocity bullets: there is a proposal for acceptance of certain design standards for small calibre-high velocity bullets to minimise the extent of wounding.

It is interesting to note that these proposals are similar to some of the proposals that were considered during the negotiation of the CCW during the 1970s, and some of which were also considered at the 1st Revcon in 1995/1996. Currently, preparations are in an early exploratory phase, including informal consultations with interested delegations and the ICRC. At this stage it is unclear as to which of the proposals will be agreed at the 2nd Revcon.

The future of the CCW – 2nd Revcon and beyond

It is clear that the CCW has not yet fully achieved the objective of its original proponents to become an effective instrument in regulating the use of specific weapons which may cause excessive injuries to combatants and indiscriminate effects to non-combatants. It is useful to look beyond the current process leading up to the 2nd Revcon to consider what needs to be done to make the CCW a more effective instrument.

In my view, the three top priorities for the 2nd CCW Revcon and beyond should be to:

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58 The Minister for Foreign Affairs, Mr Downer, when announcing Australia's role, said, 'As President of the Review Conference, Australia will guide and coordinate deliberations on a range of proposals aimed at strengthening the Convention and making it a more relevant and dynamic instrument of international humanitarian law.' <http:www.dfat.gov.au/media/release/foreign/2001/fa044>.

59 Cluster weapons were first used in WWII, and subsequently in Vietnam, Afghanistan, Falkland Islands, Gulf War (Iraq/Iran and Kuwait), Chechnya and the Balkans. As discussed above, cluster weapons were considered for inclusion in the CCW in the 1970s; however, the issue has received greater interest following the use of Cluster Weapons in several conflicts in the 1990s (the issues of indiscriminate nature of Cluster Weapons and unexploded Cluster Bomb Munitions as an UXO issue have been highlighted by the ICRC and several NGOs).

60 P. Herby and A. Nuiten, 'Explosive Remnants of War: Protecting civilians through as additional protocol to the 1980 Convention on Certain Conventional Weapons', *International Review of the Red Cross*, Vol. 83, no 841, pp 195-205, (March 2001).

- Promote increased the membership/universality;
- Extend the scope of the CCW to cover non-international conflict; and
- Increase respect/adherence to the provisions of the CCW.

Clearly, there are particular weapon types that should be considered for inclusion in the CCW. But unless these three objectives are achieved, then there may only be limited, if any, benefit of adding new protocols to cover additional types of weapons.

To increase adherence to the provisions of the CCW, I would suggest:

- The implementation provisions currently applicable to APII (Article 14) to be included in the framework Convention (ie, to apply to all Protocols);
- An annual Conference of States Parties of the CCW to review the operation of the CCW (ie, to apply to the whole CCW, not just to APII, as at present); and
- Compliance Monitoring Provisions to apply to the whole of the CCW.

Clearly there are merits in the various weapons proposals, and the CCW would be improved by having regulations covering other weapons, in particular:

- A Protocol on Cluster Weapons (along the lines of the ICRC proposal);
- A Protocol on AVMs;
- A 'catch-all' Protocol to cover other UXOs.

However, when considering weapon issues, it will also be useful to consider, at the same time, the future structure of the CCW and Protocols, including which of the more general provisions might be more usefully placed in the Framework Convention and hence be applicable to each of the weapon-specific Protocols. Some of these issues are considered in greater detail below:

Membership/universality

Despite considerably greater interest by the international community in the CCW since the early 1990s, membership of the CCW still remains relatively low compared to other arms-control treaties. That said, most of the 'militarily significant States' which opposed the more ambitious proposals for the CCW in the 1970s, have now ratified/acceded. However, there are still approximately 90 States yet to ratify or accede to the CCW, including many small developing States. It would clearly be useful for States Parties to the CCW to undertake outreach activities to States not party, particularly in their regions of influence, in an attempt to increase membership of the CCW in the lead-up to the 2nd Revcon and beyond.

Interestingly, in its consideration of Australia's ratification of the amendments to the CCW (APII and Protocol IV), Australia's Joint Standing Committee on Treaties (JSCOT), in addition to recommending that Australia ratify the APII and Protocol IV of the CCW, also recommended, *inter alia*, that 'The Australian Government take advantage of every opportunity, especially in the South East Asian and Pacific regions, to encourage other nations to sign the Inhumane Weapons Convention [ie, CCW] and all of its Protocols'.[61] In particular, the JSCOT report stated that 'Australia should participate in any regional conference [to increase regional membership to the CCW] and give consideration to organising one if the opportunity arose' (paragraph 3.129).

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61 The Joint Standing Committee on Treaties, 'Restrictions on the use of Blinding Laser Weapons and Landmines', Fifth Report, Paragraph 3.130, (The Parliament of the Commonwealth of Australia: February 1997).

Reaffirmation of potential value of the CCW 'post-Ottawa'

One problem in attempting to convince States to ratify the CCW (especially those which are already States Parties to the Ottawa Treaty) is the perception that the CCW has been replaced by the Ottawa Treaty: 'Why do we need to join the CCW when we have already joined Ottawa?' In a quest for greater membership, there will be a need to reaffirm the relevance of the CCW. There is no question of the value of the Ottawa Treaty, but it still has the limitation in that several significant producers, users and exporters of anti-personnel land mines did not participate in the negotiations and have stated that they will not become parties to the treaty. Thus, there is still a real role for the CCW to regulate the use and transfers of APLs by those States which have decided that their security interests will not presently allow them to ratify the Ottawa Treaty.

It will be important to emphasise that the CCW is also very relevant because of the other weapons covered by the CCW, presently including AVMs, boobytraps, undetectable fragment weapons, incendiary and blinding laser weapons. As new Protocols are added to regulate additional types of weapons, the CCW will become an even more relevant instrument (provided there is an increase in membership, and greater respect for, and adherence to, the various provisions, as discussed above).

Compliance Monitoring Procedures

For the CCW to have increased credibility, and to encourage all States Parties to fully respect the various provisions of all of the Protocols, it will be necessary for the whole of the CCW to be covered by compliance monitoring procedures. The least complicated approach would be to incorporate the compliance monitoring procedures into the main body of the CCW — it would be an unnecessary complication to amend each Protocol by including compliance monitoring procedures in each Protocol (ie, each Protocol would require amendment, and in the case of Protocol II, there would be an amended version of an already amended Protocol). The Compliance Monitoring Procedures should preferably be along the lines of Article 8 of the Ottawa Treaty.[62]

Scope of the CCW

Clearly, the scope of the whole CCW (not just APII, as at present) should be extended to include application to non-international armed conflicts. Indeed, it is difficult to argue against broadening the scope to include non-international armed conflicts, as most injuries (especially to civilians) in recent conflicts have been caused during non-international armed conflicts (for example, recent conflicts involving insurgents and rebels, and civil wars).

Effective implementation

To be effective, all Protocols should be covered by the same implementation provisions that were included in APII during the 1st Revcon. While it would be possible to add similar Provisions to Protocols I, III, IV and any new Protocols, it would certainly be less complicated, and easier in the long run, to add them to the framework Convention.

Indeed, there would be a useful role for the ICRC, National Red Cross Societies and interested States Parties to encourage and assist other States Parties to develop the legislation and other necessary documentation.

Protocols for specific weapons

Clearly, there are merits in the various weapons proposals, and the CCW would be improved by having provisions covering other weapons, including Cluster Weapons, AVMs, and other UXOs. Any amendments to the Protocols should be sensitive, as far as possible, to maintaining the intended structure of the treaty (ie, general provisions in main body and particular weapons provisions in protocols) and to keep the CCW from becoming too much of a 'dog's dinner'. Thus, when considering weapon issues, it will also be useful to consider, at the same time, the future structure of the CCW and Protocols, including which of the more general provisions

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62 Indeed, it would be most convenient for States Parties when they are implementing the CCW and Ottawa Treaty if the Compliance Monitoring Provisions agreed for the CCW were identical to those contained in the Ottawa Treaty.

might be more usefully placed in the Framework Convention and hence be applicable to each of the weapon-specific Protocols.

It will also be useful to keep the Protocols as 'user-friendly' as possible. For example, consideration should be given to the Defence ministries in smaller States who will be trying to implement the various provisions (particularly those which do not have English or another UN language as their national language). For example, if there is agreement to strengthen the provisions for AVMs, then the question of the placement of the AVMs provisions within the CCW needs careful consideration. For example, should the AVMS provisions be covered by: further amendment to APII?; by including AVMs in an ERM Protocol?; or as a new Protocol specifically for AVMs? The least complicated approach would be a separate protocol for AVMs — attempting to add new AVM provisions to the already APII would further complicate Protocol II,[63] and could act as a disincentive for States not party to accede to the CCW.[64]

Concluding comments

It is useful to reflect on the efforts that have been expended, over many years, by many States, the ICRC and various NGOs, ranging from expert group meetings to long and tortuous negotiations, in order to obtain an instrument for the regulation of the use of specific weapons which may cause excessive injuries to combatants and indiscriminate effects to non-combatants. Despite the disappointments, the CCW still represents an achievement: it was the first treaty regulating conventional weapons agreed since the 1920s, and combines various elements of international humanitarian law and arms control.

It is clear that the major problem has not been in any deficiencies in the actual provisions of the CCW, but lack of respect and adherence to the CCW. The provisions of the CCW, had they been effectively implemented and fully respected, would have greatly reduced the extent of suffering caused by 'inhumane' weapons.[65] There is still a potentially very useful role for the CCW, which should be regarded as a complement to the Ottawa Treaty, with respect to APLs, and a part of the 'tapestry of treaties', including the Geneva Conventions, Additional Protocols, and the various arms control treaties which have been developed within the IHL/Arms Control framework.

It is important to recognise that the CCW was designed to be a dynamic treaty, with the facility to evolve in response to weapons developments, and within a changing international climate. There is also a changed reality with respect to the availability and use of the weapons covered by the CCW: in the 1970s there was a sense, at least in some quarters, that the major threat associated with 'inhumane weapons' was from the 'militarily significant States'. Experience in the past 20 years, exemplified by the APL problem, is that 'inhumane' weapons are readily available and used by developing countries and various non-State groups in internal armed conflict.

One would need to be a total optimist to think that all of the suggestions outlined in the previous section to strengthen the CCW could be achieved in a short term. But what does not appear achievable now may become achievable by the 3rd Revcon. In this context, it is also important to recognise the changing positions by various

63 Indeed, it may well turn out to have been less complicated to incorporate additional AVM provisions in the CCW, if the provisions on AVMs which were agreed at the 1st Revcon had been placed in a separate Protocol from the start, rather than having included them in APII.

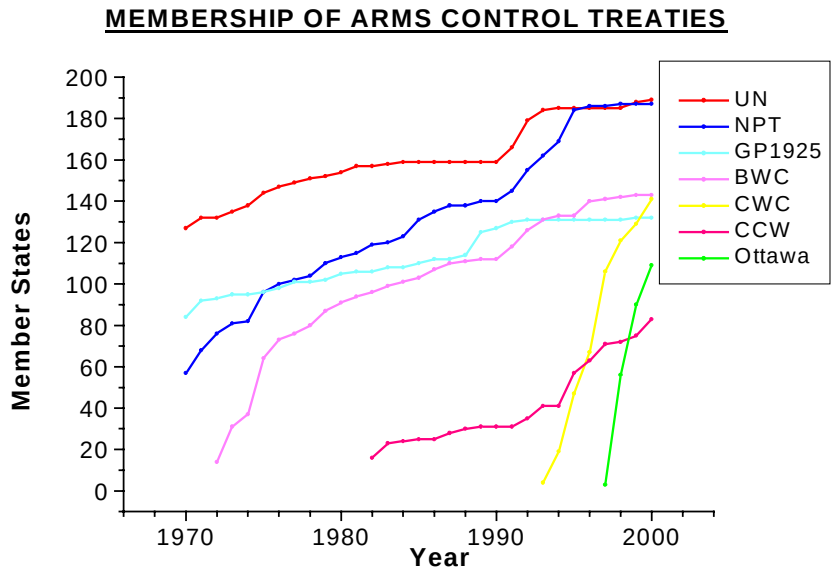
64 The most complicated part of the CCW is APII. Had APII been limited to APLs (ie, if booby traps, 'other devices' and AVMs had been covered in separate Protocols), then States already party to Ottawa would be able to satisfy all obligations of CCW by ratifying Protocols I, III and IV, and those States not party to either treaty could be encouraged to ratify Ottawa and CCW with Protocols I, III and IV (this is not to suggest that there should be a proposal to rearrange the weapons within Protocols at the 2nd Revcon, but it may be useful to consider at a subsequent Revcon).

65 This view accords with a recent statement by the ICRC, which in reference to International Humanitarian Law stated that 'The effective implementation of existing law, including the obligation to ensure its respect, is indeed the most pressing matter, rather than the development of new rules.' (Statement by the ICRC, United Nations General Assembly, 53rd session, Sixth Committee, 17 November 1998).

States over a time period with respect to the acceptability of regulations and/or prohibitions of particular weapons which may cause excessive injuries to combatants and indiscriminate effects to non-combatants.

Australia played an active role in the negotiation of the CCW, was an 'early ratifier' of CCW, actively supported the negotiation of more robust provisions at the 1st Revcon, and has taken on a responsible role in the 2nd Revcon. In addition, Australia has actively encouraged broader membership of CCW, particularly in the Asia-Pacific region. There will clearly be useful roles for Australia to play in further strengthening of the CCW, including encouragement of regional countries to join the CCW, and offering to provide implementation assistance (as Australia has done in recent years with several other arms-control treaties, perhaps most notably the Chemical Weapons Convention). Such activities would be supportive of Australia's efforts to foster international security, and promote stability and cooperation in the region.[66]

Figure 1.



66 These objectives are discussed in Chapters 4 and 5 of the recent Defence White Paper (*Defence 2000: Our Future Defence Force*).

The Australian Defence Force Approach to the Legal Review of Weapons

B M Oswald CSC*

> In the nature of things, States only come to a common view on regulating or prohibiting new weapons after the potentialities of those weapons are thoroughly explored and when no one of them can rely on obtaining or maintaining their lead in their use.[1]

Introduction

Professor Stone's analysis of the legal regulation of weapons[2] articulates the principle of military necessity but fails to mention the role that the principle of unnecessary suffering has in determining the use of a weapon. Today any determination of the legality of a weapon must take into account both the principle of military necessity and the principle of unnecessary suffering in evaluating the anticipated use of the weapon.

This paper will examine the Australian Defence Force's (ADF's) approach to fulfilling its obligations arising from Additional Protocol I.[3] This examination will be achieved by outlining the legal principles that need to be applied to the legal review of weapons, and the ADF's proposed policy for the review of new weapons. This paper will only focus on the application of international law, particularly the laws of armed conflict (LOAC), in the legal review of weapons.[4]

LOAC requirement to review weapons

The LOAC requirement to conduct legal reviews of weapons can be traced to the *1868 St Petersburg Declaration* which states, amongst other things, the following principles:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable;

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1 Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (1954) 551.

2 A weapon is an offensive or defensive instrument of combat used to destroy, injure, defeat or threaten. It includes weapon systems, munitions, submunitions, ammunition, targeting devices, and other damaging or injuring devices.

3 The *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I) was ratified by Australia 21 December 1991. The Protocol is reprinted in Adam Roberts and Richard Guellf (eds), *Documents on the Laws of War* (3rd ed, 2000) 422-79.

4 Municipal law is also relevant to the review of weapons. For example, the *Crimes (Biological Weapons) Act 1976* (Cth) and the *Chemical Weapons (Prohibition) Act 1994* (Cth) place restrictions on the use of biological and chemical weapons in armed conflict (s 8 and s 12 respectively).

> That the employment of such arms would, therefore, be contrary to the laws of humanity.[5]

The St Petersburg principles articulate the need to assess the legality of weapons by balancing the principle of military necessity for the weapon (ie the need to weaken the military forces of the enemy) against the principle of unnecessary suffering (ie prohibition to uselessly aggravate the suffering of disabled men or render their death inevitable).

The principle of unnecessary suffering was reaffirmed by the *1907 Hague Convention IV*,[6] which states amongst other things, that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'.[7] Article 23 of the Convention provides that '[i]n addition to the prohibitions provided by special Conventions, it is especially forbidden – (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering'.

The need to balance the principle of military necessity against the principle of unnecessary suffering is also reflected in article 35 of Additional Protocol I:

> 1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury and unnecessary suffering.
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

In order to ensure that new weapons reflect the principles stated in article 35, States that are parties to Additional Protocol I are obliged conduct legal reviews. Thus, article 36 of Additional Protocol I states:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party'.[8]

Article 36 implies that a High Contracting Party will establish internal procedures for assessing the legality of weapons.[9] The consequence of not meeting the obligation of article 36 will result in the High Contracting Party being responsible for any wrongful damage that arises from the use of that weapon.[10]

The International Court of Justice (ICJ) in its *Advisory Opinion On the Threat or Use of Nuclear Weapons* (Advisory Opinion on Nuclear Weapons)[11] addressed the legal principles to be applied to the review of

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5 *1868 St Petersburg Declararion Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* reprinted in Roberts and Guelff, above n 3, 54-7. The St Petersburg Declaration entered into force generally on 11 December 1868 and is applicable to Australia (Australian Treaty Series 1901 No 125 (electronic) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1901/125.html>.

6 Entry into force for Australia and generally on 26 January 1910, Australian Treaty Series 1910 No 8 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1910/8.html>.

7 *1907 Hague Convention IV Respecting the Laws of War on Land*, article 22, reprinted in Roberts and Guellf, above n 3, 69-72.

8 Article 36, ibid.

9 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds); *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 1470.

10 Ibid para 1466.

weapons. The Court recognised that 'State practice shows that the illegality of the use of certain weapons as such does not result from the absence of authorisation but, on the contrary, is formulated in terms of prohibitions'.[12]

In order to examine the legality of weapons the ICJ adopted a two-fold test: (1) Is there an international customary or treaty law that contains a specific prohibition against the threat or use of a weapon in general or in certain circumstances? (2) In the of absence of a specific prohibition, is there a general prohibition against the threat or use of a weapon in general or in certain circumstances?[13]

Clearly the greater challenge in determining the legality of a weapon lies in identifying the legal principles that give rise to a general prohibition against the threat or use of a weapon. In reaching this determination the ICJ reaffirmed both the St Petersburg principle condemning the use of weapons which uselessly aggravate the suffering of disabled men or make their death inevitable, and the article 35, Additional Protocol I prohibition against causing superfluous injury and unnecessary suffering.[14] The ICJ also endorsed the need to balance the principle of military necessity with the principle of unnecessary suffering in reviewing weapons.[15] The Court added that it is prohibited to use weapons 'that are incapable of distinguishing between civilians and military targets'.[16] The ICJ noted that the principles of unnecessary suffering and distinction are 'cardinal principles … constituting the fabric of international law.[17]

In relation to the environment and the conduct of military operations the ICJ emphasised that:

> States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality … The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.[18]

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11 *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep. While the ICJ's opinion was focused on the threat or use of nuclear weapons, the principles articulated in it are relevant to determining the legality of all weapons.

12 Ibid para 52.

13 Ibid para 52.

14 Ibid paras 77-78.

15 Ibid para 79.

16 Ibid para 78. This phrase has been criticised on the basis that it is imprecise. It has been suggested that a more precise view of the principle of distinction is stated in Additional Protocol I, article 51(4) (b) and (c) which describes indiscriminate attacks as those:

> which employ method or means of combat which cannot be directed at a specific military objective; or those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

See Louise Doswald-Beck, 'International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons' (1997) 316 *International Review of the Red Cross* 35, 39.

17 See above n 11, para 78.

18 Ibid paras 30-31.

Draft ADF policy

In order to comply with Australia's obligations under articles 35 and 36 of Additional Protocol I, the ADF is currently in the process of drafting a Defence Instruction[19] on 'Legal Review of New Weapons'. The draft Defence Instruction requires all actions by the ADF with respect to the study, development, acquisition, adoption of new weapons[20] to be consistent with Australia's international obligations. The Defence Instruction requires the Director-General of The Defence Legal Service to:

> determine the possibly unlawful nature of a new weapon, both with regard to provisions of Protocol I, and with regard to any other rule of international law. The determination is to be made on the basis of the normal use of the weapon, as anticipated at the time of the evaluation.[21]

The draft Defence Instruction acknowledges that the Director-General will need to consult appropriate subject matter experts to appreciate the capabilities of the weapon, in so far as, how it assists the ADF to achieve its lawful military objectives, as well as the likely adverse effects if the weapon is used as intended. After this consultation, the Director-General would apply the following two-fold test to determine the legality of the new weapon: First, is the weapon prohibited by a specific rule or law; and second, if not prohibited by a specific rule or law, is it prohibited by general legal principles?

In answering the first question the Director General would examine whether the study, development, acquisition or adoption of a new weapon is prohibited by a specific treaty binding Australia. Examples of such specific treaties include the *1968 Treaty on the Non-Proliferation of Nuclear Weapons*; *1972 Biological Weapons Convention; 1981 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*; *1993 Chemical Weapons Convention*; and the *1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines, and on their Destruction*.

If there is no specific treaty that covers the study, development, acquisition or adoption of a new weapon the Director-General would examine general principles that may prohibit the weapon. When examining general legal principles, the Director-General will balance the principle of military necessity for the weapon against the principle of unnecessary suffering.[22] Relevant to assessing the military necessity of the weapon will be whether the weapon will provide a military advantage to the military personnel using the weapon. Therefore, issues such as how long it takes to incapacitate the enemy,[23] the weight of the weapon, the terrain the weapon will be used in, and whether the weapon will generally enhance the security of friendly forces will be considered.

The Director-General would also examine whether a weapon breaches the principle of unnecessary suffering by assessing such factors as would the weapon: (1) cause superfluous injury or unnecessary suffering; (2) be

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19 Defence Instructions, issued pursuant to the *Defence Act 1903*, are used for promulgating instructions relating to the administration of the ADF. They are issued jointly by, or with the authority, of the Secretary and the Chief of the Defence Force.

20 New weapons, in the context of the Defence Instruction, refers to those weapons that are new to Australia.

21 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds); above n 9 para 1466.

22 The ADF defines military necessity as those measures that a combatant is justified in using, 'not forbidden by international law, which are indispensable for securing complete submission of an enemy at the soonest moment'. The ADF considers that the principle of unnecessary suffering 'forbids the use of means or methods of warfare which are calculated to cause suffering which is excessive in the circumstances. It has also been expressed as the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military objectives': Australian Defence Force Publication 37 – The Law of Armed Conflict, 1996 paras 206-207.

23 The US Army and NATO have adopted a 30 second incapacitation criterion which is used in the design of small arms and where the enemy is nearby. A five minute criterion is used for artillery ammunition where the enemy is further away and does not need to be disabled so quickly. Eric Prokosch, *The Technology of Killing: A Military and Political History of Antipersonnel Weapons* (1995) 36.

capable of being used in a way that it can be directed at a specific military target;[24] or (3) cause widespread, long-term and severe damage to the natural environment. In determining whether the weapon causes superfluous injury or unnecessary suffering the Director-General would look at issues such as the medical evidence of damage caused or likely to be caused by the use of the weapon, as well as scientific studies related to the effects that the weapon has.[25]

If a weapon is inconsistent with Australia's international obligations the Director-General must either recommend: (1) prohibiting the study, development, acquisition or adoption of the weapon; or (2) applying limits on the use of the weapon so that it complies with Australia's international obligations.

Conclusion

The ADF is meeting Australia's international obligation to conduct legal reviews of new weapons by formalising the review process through a Defence Instruction. While the Defence Instruction takes care of the process for reviewing weapons, the challenge for the Director-General conducting the review is to balance the principle of military necessity with the principle of unnecessary suffering.

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[24] See above n 16.

[25] The International Committee of the Red Cross (ICRC) has, through the SIrUS Project, proposed that what constitutes 'superfluous injury or unnecessary suffering' can be determined by design-dependant, foreseeable effects of weapons when they are used against personnel. ICRC, *The SIrUS Project: Towards a Determination of Which Weapons Cause 'Superfluous Injury or Unnecessary Suffering'* 1997. However, the SIrUS Project has not gained wide acceptance by States for various reasons, including the fact that the data it relies upon to determine the effect of weapons has not been validated by independent means. ICRC, *The SIrUS Project and reviewing the legality of new weapons* (January 2000) 8.

Revisiting the Australian Reluctance on Human Rights

Prisoners under Australian Law: Internationalisation or Provincial Pragmatism?

Richard Edney*

Introduction

Before considering the nature of prisoners' rights and what that means as a legal and social construct under Australian law, it is important to outline the fundamental conflict in the social order of the prison between the ends of freedom and security. It is imperative to do so because in the final analysis the question of the rights to be accorded to prisoners is a function of those concepts. Two competing ends characterise the prison social order: freedom and security.[1] Those ends or value commitments are also applicable to civil society, and to the law in a more general sense, but are perhaps rendered more visible by virtue of the prison order which collapses the public/private distinction that underpins the political theory of liberalism and consequently subjects prisoners to an intrusive degree of regulation.[2]

The curtailment of the freedom of the prisoner by virtue of the prison environment places prisoners in a unique position of vulnerability. In such an environment rights are often put forward as a pivotal means of securing the residual sphere of the freedom that is said to be allocated to prisoners consistent with the ends of correctional administrators to secure the prison.[3] Correctional authorities attempt to impose order, in the prison environment, in the name of security. Where the coveted interests of prisoners are curtailed in the interests of security, there is a significant cost to the freedom of the prisoner to act in an autonomous manner. Freedom in such an environment is almost contradictory, and is contingent on the satisfaction of good order and security.

The treatment of prisoners under Australian law has historically been characterised by the 'hands-off' approach.[4] This approach broadly refers to a non-interventionist stance by Australian courts to cases involving prisoners, and legislation that largely left the administration of prisons and prisoners to the discretionary decision-making of correctional authorities. In the last 15 years there has been a gradual departure from the 'hands-off' approach and towards the development of a prisoners' rights jurisprudence. This jurisprudence remains impoverished and out of touch with international law and standards. To illustrate that point I will consider the recent South Australian Supreme Court Decision of *Collins v State of South Australia*.[5] Finally I will suggest possible themes in the development of prisoners' rights in this country.

Prisoners' rights in Australia: an historical perspective

The 'hands-off' approach to prisoners' rights is not a discrete legal doctrine, rather it is the descriptive term encapsulating a particular judicial attitude when dealing with prisoners' rights cases.[6] This approach reached its

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1 See generally Sparks, R Bottoms A and Hay W *Prisons and the Problem of Order* (Clarendon Press, Oxford, 1996); Di Lilulio D *Governing Prisons: A Comparative Study of Correctional Treatment* (Free Press, New York , 1987).

2 Livingstone S and Owen T *Prison Law: Text and Materials* (2nd ed) (Clarendon Press, Oxford, 1999) 295-305. Similar characteristics in terms of the contradiction between freedom and security also figure in the discipline of forensic psychology. See Mullen P 'Care and Containment in Forensic Psychiatry' (1993) 3 *Criminal Behaviour and Mental Health* 212, 223-224.

3 For judicial consideration of the residual freedom of prisoners see *Raymond v Honey* [1983] 1 AC at 10 per Lord Wilberforce.

4 Zdenkowski G 'Judicial Intervention in Prisons' (1982) 6 *Monash University Law Review* 294 at 296-297.

5 (1999) 74 SASR 200.

6 It gained currency as a result of its use in the article Note, 'Beyond the Ken of the Courts: A Critique of the Judicial Refusal to Review the Complaints of Convicts' (1963) 72 *Yale Law Journal* 506.

highest form in Australia in the dicta of Chief Justice Dixon in the 1949 High Court of Australia decision of *Flynn v The Queen.*[7] It was a judicial method of approaching prisoners' rights cases that was common not only to Australia but was also the dominant approach in the United Kingdom[8] and the United States.[9]

Under the hands-off doctrine prisons were not to be operated with reference to principles of natural or procedural justice: rather the supposed administrative expertise and the judgment of correctional administrators were to be privileged. A number of policy reasons are discernible from the decided cases as justifying that approach.[10] First, judicial concern, that intervening in the day-to-day administration of prisons would be in breach of the separation of powers and thus transfer the control of the prison from the executive to the judicial branch of government. Second, there was an assumption that judicial intervention would tend to produce negative consequences for the administration of the prison. In this argument if prisoners could appeal to an outside authority there was a fear that prison authority and discipline would be undermined. Finally, if courts became active in supervising prison administration it would encourage frivolous and unmeritorious claims by prisoners.

Unfortunately, the difficulty with the hands-off approach was that it placed prisoners beyond the protection of the law. The hands-off approach reposed a high degree of trust with the state and its agents and thus ignored the potentially dark side or unintended consequence of reliance upon the presumed expertise and benevolence of correctional administrators. In addition it displayed ignorance of the practices that may evolve in 'total institutions'[11] and how they may place in jeopardy the coveted interests of prisoners.[12] The consequences of unfettered discretion and limited accountability structures in the hands-off period were significant. Those consequences included the abuse of that power and the ill-treatment of prisoners by those vested with the securing prisoners in a humane way according to law. In addition, it was, during the 1970s, to contribute to significant unrest in the prison systems of the most populated states of New South Wales and Victoria as prisoners organised to make public their claims of ill-treatment.[13] The *Jenkinson Inquiry*[14] in Victoria and the

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7 (1949) 79 CLR 1. The dictum of Justice Dixon is worth citing at length because of the clarity with which it details the policy reasons for the hands-off approach. His Honour, at 8, held: '…if prisoners could resort to legal remedies to enforce gaol regulations responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in the application to the courts by prisoners, for legal remedies addressed to the Crown or to the gaoler in whose custody they remain. Such a construction of the regulation making power was plainly never intended by the legislature and should be avoided. An interpretation of the power to make prison regulations and of the regulations made there under are directed to the discipline and administration and not to the legal rights of prisoners is, in my opinion, supported by the decision of this court in *Horwtiz's* case.' For examples where above dicta has been applied see *Vezitis v McGeechan* [1974] 1 NSWLR 718 at 721 per Taylor J; *Smith v Commissioner of Corrective Services* (1978) 1 NSWLR 317 at 328 per Hutley JA.

8 See for instance *Arbon v Anderson* [1943] KB 252; *Becker v Home Office* [1972] 2 QB 407. Also see Tettenboun A 'Prisoners' Rights' (1980) *Public Law* 74 at 77-79.

9 See for instance *Cullum v Californian Department of Corrections* (1967) 267 F.Supp.524; *Stroud v Swope* (1951) 187 F. 2d 850; *Banning v Looney* (1954) 213 F.2d 771; *Tabor v Hardwick* (1955) 224 F. 2d 526; *United States ex rel. Morris v Radio Station WENR* (1953) 209 F 2d 105; *Atterbury v Ragen* (1956) 237 F.2d 953. Also see Hawkins G *The Prison* (University of Chicago Press, Chicago, 1976) 136-141; Alexander E 'The New Prison Administrators and the Court: New Directions in Prison Law' (1978) 56 *Texas Law Review* 963.

10 For a more detailed elaboration of the policy reasons for the 'hands-off' approach in Australia, United Kingdom and United States see Edney R 'Judicial Deference to the Expertise of Correctional Administrators: The Implications for Prisoners' Rights' (2001) 7 *Australian Journal of Human Rights* 91, 108-112.

11 A classic account of the features of such institutions is provided by Sociologist Ervin Goffman in his seminal work *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Doubleday, New York, 1961) 3-124.

12 For instance the right to privacy and right to freedom of expression.

13 For a useful survey of the unrest in those jurisdictions see Rinaldi F *Australian Prisons* (F& M Publishers, Canberra, 1977) 50-61, 93-103.

Nagle Royal Commission[15] in New South Wales were to document in great detail acts of violence and ill treatment that had been committed upon prisoners over a significant period of time. Those reports and the method by which prisoners' complaints were presented (in mainly narrative form) render explicit the sometimes grave and horrible consequences of power exercised without reference to legal or moral standards.

The revelations of the *Jenkinson Report* and *Nagle Royal Commission* and the severe disruption to the prison systems of Victoria and New South Wales during the same period made the claim that this sphere of social life was beyond the law increasingly unsustainable. The shift away from the hands-off doctrine was not confined to Australia. The United Kingdom and the United States were to also experience chronic disorder and protest by prisoners during the 1970s.[16] In the United Kingdom, primarily through a significant number of cases in the late 1970s and early 1980s, the courts made clear that they ought and would exercise a supervisory jurisdiction in relation to the treatment of prisoners. The decisions of *R v Board of Visitors of Hull Prison; Ex parte Germaine*[17] and *Raymond v Honey*[18] were particularly important. The former for the dicta of Shaw LJ's complete repudiation of the hands-off doctrine and affirmation of the role of the courts as the 'ultimate custodian of the rights and liberties of the subject whatever his status'.[19] The latter for the claim that prisoners do possess enforceable rights that are not expressly, or by necessary implication, removed as a result of imprisonment.[20]

In addition, the membership of the United Kingdom as part of a supranational community, the European Community, was to play a part in the shift away from the hands-off doctrine. The United Kingdom although signing the European Convention of Human Rights early in its history, the British Parliament did not accept the right of citizens to petition the European Court of Human Rights until 14 January 1966. Over time the ability of citizens of the United Kingdom, after the exhaustion of domestic remedies, to petition the Court was to have a significant effect on the development of the rights and freedoms of the citizens of that country notwithstanding that the Convention had not been expressly incorporated into domestic law of the United Kingdom.[21] It did so by allowing a 'wedge' to develop between the law of the Convention and the domestic law and thus produced a

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14 Jenkinson K QC *Report of the Board of Inquiry into Allegations of Brutality and Treatment at HMP Pentridge* (Victorian Government Printer, 1973). For personal accounts by prisoners of the notorious 'H' Division High Security Unit of Pentridge Prison and the systematic nature of the violence inflicted upon them see O'Meally J *The Man They Couldn't Break* (Unicorn, Melbourne, 1978); Eastwood E *Focus on Faraday and Beyond* (Couer de Lion, Melbourne, 1987); Mooney R 'Bluestone Shadows' *The Sunday Age* 14 September 1997, A5. On the nature of prison officer violence and attempts at explanations see generally Marquart J 'Prison Guards and the Use of Physical Coercion as a Mechanism of Prisoner Control' (1986) 24 *Criminology* 347; Edney R 'Prison Officers and the Use of Violence' (1997) 22 *Alternative Law Journal* 289. In relation to the value of relying upon prisoners' account of imprisonment in the development of criminological thought see Morgan S 'Prison Lives: Critical Issues in Reading Prisoner Autobiography' (1999) 38 *Howard Journal of Criminal Justice* 328.

15 NSW Parliament, *Report of the Royal Commission into New South Wales Prisons: Volumes I, II and III* (Government Printer, 1978). For an excellent overview of the Nagle Royal Commission see Zdenkowski G and Brown D *The Prison Struggle* (Penguin, Ringwood, 1982) 158-193.

16 See generally Adams R and Campling J *Prison Riots in Britain and the USA* (St Martins Press, London, 1992) Chapter One. For an approach that uses prisoners' perspectives to investigate the causes of unrest see Sim J '"We Are Not Animals, We Are Human Beings": Prisons, Protest, and Politics in England and Wales, 1969-1990' (1991) 18 *Social Justice* 107.

17 [1979] QB 425.

18 [1983] 1 AC 1.

19 [1979] QB 425, 455.

20 [1983] 1 AC 1, 10 per Lord Wilberforce. The difficulty in this context is to outline in a positive manner what those residual or remaining rights are. The tendency in Australia is to state prisoners' rights in a negative manner.

21 See generally QC Beloff M and Mountfield H 'Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales' [1996] *European Human Rights Law Review* 467.

> continuing gap between Convention law and domestic law has meant that the European Court of Human Rights has become in effect a supreme constitutional court of the UK. British judges have been denied the power and responsibility of safeguarding Convention rights.[22]

This development, and a number of other policy grounds that made incorporation desirable, led to the passing of the Human Rights Act 1998 (UK) so as to 'bring rights home'[23] in the sense of making enforceable Convention provisions within English courts.

Thus prisoners in the United Kingdom are now placed in a more favourable position both in relation to the enforcement of the provisions of the Convention,[24] and having standards of an international nature applicable to regulate the conditions of their confinement. In addition, there is already a significant jurisprudence produced by the European Court of Human Rights on key articles of the Convention[25] upon which prisoners may rely.

In the United States there was a similar shift away from the hands-off doctrine most suitably captured in the dicta of the United States Supreme Court in *Wolff v McDonnell* that there was to be 'no iron curtain between the prisons and the constitution'.[26] This decision and others like it saw the extension of key constitutional guarantees under the Bill of Rights to the correctional context. The most important constitutional provisions were the First and Eighth Amendments to the United States Constitution, dealing with freedom of expression and cruel and unusual punishment respectively.[27] The period from the late 1960s to the late 1980s saw American courts, in particular the United States Supreme Court, produce an extensive case law concerning prisons and thus establishing important rights for prisoners including, *inter alia*, rights to: access to courts;[28] free speech;[29] religious freedom;[30] medical treatment;[31] and physical security.[32]

It is important to note that these were not free-standing rights but were contingent on the ability of the correctional administrators to secure the good order and security of the institution. This allowed correctional administrators residual power to impose restrictions on such rights, if necessary, to secure and maintain the good order of the institution with courts allowing that incursion so long as it was proportionate to the state interest to be protected, and there was a sufficient nexus between the impugned regulation and a legitimate penological objective.[33]

What was also distinctive about the entry of the United States Federal and States Courts into the penal sphere was the extent of judicial involvement and the remedial measures ordered by the courts. That is, courts were

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22 Lord Lester of Herne Hill and Pannick D *Human Rights Law and Practice* (London, Butterworths, 1999) 10.

23 Above n 21, 15.

24 But cf. Schone J 'The Short Life and Painful Death of Prisoners' Rights' (2001) 40 *Howard Journal of Criminal Justice* 70.

25 Especially Article 3: Freedom from Torture or Inhuman or Degrading Treatment or Punishment. For a survey of the case law on this Article see Harris D, O'Boyle M and Warbrick C *Law of the European Convention on Human Rights* (London, Butterworths, 1995) 55-89.

26 (1974) 418 US 539 at 555-556 per White J.

27 The First Amendment of the US Constitution provides that 'Congress shall make no law respecting an establishing of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably assemble, and to petition the government for a redress of grievances'. The Eighth Amendment provides that 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and punishments inflicted'.

28 *Bounds v Smith* (1977) 430 US 817; *Lewis v Casey* (1996) 116 S Ct 2174.

29 *Pell v Procunier* (1974) 417 US 817.

30 *Cruz v Beto* (1972) 405 US 319.

31 *Estelle v Gamble* (1976) 429 US 97.

32 *Whitley v Albers* (1986) 475 US 312; *Hudson v McMillan* (1992) 503 US 1.

33 *Turner v Safley* (1987) 482 US 78.

prepared in certain instances not only to find that prisoners possessed rights but also to impose remedies on correctional systems that in some instances 'holding entire state prison systems unconstitutional'.[34] The extent of judicial involvement became so widespread that 'by 1992, prisons in over forty states were operating under federal court orders mandating reform of unconstitutional conditions'.[35] Notwithstanding the development of this prisoners' rights jurisprudence there have been recent efforts by the federal and state legislatures to scale-back the rights accorded prisoners as a result of judicial activism, although it appears unlikely that the 'hands-off' approach will ever re-emerge.[36]

Interestingly, these developments in the United States were not the result of the incorporation of international norms to the correctional context, or the joining of the United States to a supranational community, but the adaptation of existing constitutional rights to a different context by the judicial branch of government.

The emergence of prisoners' rights in Australia

In Australia the shift away from the hands-off doctrine has not been as dramatic nor emphatic as has occurred in the United Kingdom and the United States.[37] Australia is not a member of a supranational community nor does it have entrenched constitutional guarantees of rights for its citizens.[38] Australia is a signatory to a number of international instruments that have the potential to provide enforceable rights for prisoners.[39] However, as will be appear from the case of *Collins v State of South Australia* the applicability of such instruments to regulate the conditions of confinement lacks the basic requirement of enforceability.

All states and territories within Australia have in place Acts and Regulations to control and regulate prisons.[40] There is no explicit provision in the Federal Constitution to allow the Federal government to make laws in relation to prisons.[41] The Acts and Regulations of the states and territories are not clear as to what 'rights' prisoners possess during a term of imprisonment.[42] They deal with what may be described as the day-to-day matters and include *inter alia*, classification, property, leave, discipline, use of force, searches, prisoner's money, prison offences, and other such matters which are central to the administration of a prison. To challenge the

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34 Hallinan J *Going Up the River: Travels in a Prison Nation* (Random House, New York, 2001) 28. For a comprehensive account of the judicial reform of the American prison system sees Feeley M and Rubin E *Judicial Policy and the Modern State: How the Courts Reformed America's Prisons* (Cambridge University Press, New York, 1998).

35 Above n 33, 30.

36 See for instance Robertson J 'Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly" Equal Protection Analysis' (2000) 37 *Harvard Journal on Legislation* 105.

37 I leave to one side the use of the death penalty in the overwhelming majority of American states and the ever increasing use of imprisonment in that country.

38 See generally Charlesworth H 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

39 For instance the ICCPR and the Torture Convention.

40 *Corrections Act 1986* (Vic); *Prison Act 1981* (WA); *Prison Act 1977*(Tas); *Corrective Services Act 1988* (QLD); *Remand Centres Act 1976* (ACT); *Crimes (Administration of Sentences) Act 1999* (NSW); *Prisons (Correctional Services) Act 1980* (NT).

41 The Federal Government would seem to have constitutional power to legislate for prisoners by virtue of the external affairs power (s 51 (29) of the *Commonwealth Constitution.* However, for reasons of federalism would be unlikely to do so.

42 This is even more problematic in countries such as Australia where it would be difficult to outline the nature of the rights possessed by persons not serving a term of imprisonment. As Generva Richardson, in the English Context, notes in 'From Rights to Expectations' in Player E and Jenkins M (eds) *Prisons After Woolf: Reform Through Riot* (Routledge, London, 1993) : '…there is the incorrigible problem of identifying exactly what 'civil rights' are possessed by non-prisoners' (81).

decisions of correctional administrators prisoners must use administrative or public law remedies.[43] The potential scope for judicial intervention is, however, relatively narrow and confined to situations where the prisoner has a legitimate expectation to a particular entitlement or benefit[44] or there is evidence that a decision was made in bad faith or for an improper purpose[45] and when the decision has not been made in accordance with the rules of natural justice.[46] In addition, a prisoner may also attempt to enforce other statutory rights by way of prerogative writ and by means of the equitable remedies of declaration and injunction.[47] Finally, in extreme cases prisoners may be able to challenge decisions or actions of correctional administrators on the basis that they constitute 'cruel and unusual punishment' as contemplated by the Bill of Rights 1688 (UK).[48]

These are relatively narrow grounds for curial intervention. Decisions including the transfer of a prisoner within and between a prison, segregation and wider issues such as overcrowding and the provision of condoms and syringes will be matters that fall within the policy sphere of correctional administration and thus remain outside the purview of judicial review.[49] Obviously rights potentially available to prisoners in documents such as the *Standard Minimum Rules for the Treatment of Prisoners* would be preferable from a prisoners' perspective in that they allow a wider scope for judicial review than traditional administrative law remedies.

The prisoners' rights jurisprudence that now exists in this country mostly comprises single decisions of state Supreme Court judges. From a prisoners' rights perspective these judgments are encouraging to the extent they repudiate the hands-off approach[50] and empathise with the vulnerable positions of prisoners and the associated need for judicial supervision.[51] That said there is no landmark, authoritative decision by the High Court of Australia in relation to prisoners with ironically, the last significant decision being the decision that sustained the hands-off doctrine in *Flynn.*[52] In addition, it is a jurisprudence which places a high degree of priority on the 'expertise' of correctional administrators when it is not entirely clear that that is appropriate.[53]

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43 This of course does not exclude the ability of prisoners to instigate civil proceedings should they suffer harm caused by correctional administrators' breach of the duty of care owed to them. See *Howard v Jarvis* (1958) 98 CLR 177; *Hall v Whatmore* [1961] VR 225; *L v Commonwealth* (1976) 10 ALR 269.

44 The classic statement of the doctrine of 'legitimate expectation' is provided by Mason J, as he then was, in *Kioa v West* (1985) 159 CLR 550 at 582-583. For examples where prisoners' have been successful in the use of 'legitimate expectation' in the context of an administrative law remedy see *Ex Parte Fritz* (1992) 59 A Crim R 132; *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490.

45 *McEvoy v Lobban* [1990] 2 Qd R 235; *Gray, Hunter and Speedy* (1990) 45 A Crim R 364.

46 *Kuczynski v R* (1994) 72 A Crim R 568; *Henderson v Beltracchi* (1999) 105 A Crim R 578.

47 The prerogative writs include certiorari, prohibition, mandamus and habeas corpus. The issue of such writs is discretionary. See Sykes EI, Lanham DJ, Tracey RRS and Esser KW *General Principles of Administrative Law* (4th ed) (Butterworths, 1997) 267-272.

48 This matter was raised in the South Australian Supreme Court case *Holden v State of South Australia* (1992) 62 A Crim R 308 where the prisoner pleaded the *Bill of Rights 1688* (UK) and argued that his treatment by correctional authorities amounted to 'cruel and unusual punishment'. His Honour Justice Legoe held, although denying relief in this case, that the *Bill of Rights* continued to be in force in South Australia and thus may be used by prisoners to challenge the conditions of their confinement.

49 *Prisoners AA to XX Inclusive v State of New South Wales* (1994) 75 A Crim R 205 at 210-211 per Dunford J.

50 See for instance *Bromley v Dawes* (1983) 10 A Crim R 98; *Maybury v Osborne* (1984) 13 A Crim R 180; *Modica v Commissioner for Corrective Services* (1994) 77 A Crim R 82; *Rich v Gronigen* (1997) 95 A Crim R 272; *Binse v Williams* [1998] 1 VR 381.

51 See *Sandery v State of South Australia* (1987) 48 SASR 500 at 513 per Olsson J; *Binse v Governor Her Majesty's Prison Barwon* (1995) 8 VAR 508 at 516 per Byrne J.

52 In addition, it is unlikely that the High Court will grant special level to appeal to a prisoner challenging the power of correctional authorities. As Australia's highest Court it generally only grants special leave to appeal where there is sufficient national public interest in having the Court decide in an authoritative manner a disputed area of law. Given

When domestic remedies are exhausted, Australian prisoners may petition the United Nations Human Rights Committee to complain about their treatment by correctional authorities by virtue of Australia's ratification of First Optional Protocol for the International Covenant on Civil and Political Rights (hereafter ICCPR).[54] The difficulties for prisoners are the practicality of exercising the right to petition and the lack of any enforcement mechanism for the decision made by the Committee.[55] The majority of prisoners in Australia serve terms of imprisonment of less than a year and the delay, after first exhausting domestic remedies, associated with the process of petitioning the Committee may be outweighed by the benefits of any possible outcome.[56] Moreover, as the impugned government is not bound by that decision, save to the extent that it generates unfavourable publicity, nor compelled to do anything in response to an unfavourable report of the 'views' of the Committee, the utility of it as a way of securing prisoners' rights may be limited.

In Australia no state or territory legislature has legislated in the correctional context to incorporate in a substantial manner the matters that are prescribed in international instruments. The clearest statement in any legislative instrument in Australia would be the Corrections Act 1986 (Vic) which has a section 47 titled 'Prisoners' Rights' and which purports to outline rights that prisoners subject to the Victorian correctional system are said to have by virtue of that status. This legislative initiative and this particular provision have been in operation since 1987, has not lead to the development of comprehensive prisoners' rights jurisprudence in that state. This is not to deny the moral and political significance of including positive rights in legislation.

Australia, international human rights law and the prison

As noted at the outset it is proposed to consider the case of *Collins v State of South Australia*. This is a recent South Australian Supreme Court case. Whilst this case clearly departs from the 'hands-off' approach, the difficulty is not the judicial interpretive stance but the legislative framework within which the case is decided. The decision of *Collins v State of South Australia* highlights the paucity of prisoners' rights jurisprudence in Australia.

Features of the case include: an unrepresented plaintiff prisoner; a due recognition that prisoners are not beyond the concern of the law; and a conclusion by the court that it has limited power to do anything to remedy the situation complained of by the prisoner given the statutory framework within which the court is operating.

The facts

In *Collins*, the prisoner plaintiff originally sought a mandatory injunction, during the proceedings amended to a declaration, to force the South Australian Department of Corrective Services to abolish overcrowding which had dominated that system for a number of years. During the course of the proceedings before his Honour Justice Millhouse the relief sought by the prisoner was amended to a declaration that the practice of confining remand

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that the statutes governing prison administration in Australia are state and territory based it would seem that an advocate would have substantial difficulties in persuading the Court that special leave ought to be granted.

53 See generally Edney R 'Judicial Deference to the Expertise of Correctional Administrators: The Implications for Prisoners' Rights' (2001) 7 *Australian Journal of Human Rights* 91.

54 The First Optional Protocol to the ICCPR was ratified by Australia and came into force on 25 December 1991. Provisions of the ICCPR that have particular relevance for prisoners include article 7 which 'prohibits the infliction of torture or cruel, inhuman or degrading punishment'. In addition, article 10 (1) requires that persons deprived of their liberty 'be treated with humanity and with respect for the inherent dignity of the person'. Article 10 also provides for the separation of remand and convicted prisoners, a prohibition against the confinement of youthful prisoners with adult prisoners and that the design of the prison system should have the end of rehabilitation as its primary objective. Other relevant conventions include Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia ratified the Torture Convention in 1989.

55 Opsahl T 'The Human Rights Committee' in Alston P (ed) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, Oxford, 1992) 421.

56 Opsahl above n 34 , 424.

and convicted prisoners in doubled-up cells was unlawful. In support of his argument the plaintiff relied and pleaded international human rights instruments concerned with the rights of confined prisoners and those subject to some form of custodial regime.[57] In particular he relied and pleaded the *Standard Minimum Rules for the Treatment of Prisoners.*[58] At all material times the plaintiff had been housed in the Adelaide Remand Centre. The defendant, the State of South Australia admitted during the proceedings that there was 'doubling up' of prisoners but argued that this was a temporary measure. His Honour Justice Millhouse found as a matter of fact however:

> the assertion that this is a temporary measure is obviously wrong. "Doubling up" has been occurring at the Adelaide Remand Centre since 1994 and renovations in 1996 that were made to increase the "doubling up" capacity. How can "doubling up" be regarded as a temporary measure? Five years is not temporary. It is one thing, though, to state the problem. It is another to be able to grant relief at law.[59]

In relation to the first limb of the argument the Plaintiff argued that there existed a 'legitimate expectation' that when a person enters a correctional facility they will be subject to the treatment outlined in the *Minimum Rules.*[60] The plaintiff relied on the well-known dicta of Mason CJ and Deane J from *Minister for Immigration and Ethnic Affairs v Teoh.*[61] concerning the expectation that upon the signing by Australia of an international convention that there is an expectation created that decision-makers will act in accordance with the requirements of the treaty or convention signed. The difficulty for the plaintiff was that the *Minimum Rules* were, and are, not a convention, treaty or covenant and thus no international obligations arose. In addition, as the *Rules* had not been expressly incorporated into Australian law they would have no domestic application. Consequently, relief was denied to the plaintiff on this basis.[62]

The second basis or limb to the plaintiff's claim was that the actions of the defendant were in breach of the *International Covenant on Civil and Political Rights* and in particular article 10(1) and (2)(a).[63] In relation to article 10(1) the plaintiff stated simply:

> there is no respect for human dignity when one is made to go to the lavatory within one metre of the person in the bottom bed and in his full view.[64]

In relation to article 10(2) it was found by his Honour that the evidence disclosed that the defendant had consistently housed convicted and accused persons together at the Adelaide Remand Centre.[65] His Honour then found that on the evidence both article 10(1) and (2) had been breached.[66]

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57 *Collins v State of South Australia* (1999) 74 SASR 200, 206.

58 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by United Nations Economic and Social Council Resolution 663 C (XXIV) of 31 July 1957.

59 *Collins v State of South Australia* (1999) 74 SASR 200, 206.

60 In Australia there is a similar document titled *Standard Guidelines for Corrections in Australia* whose purpose 'was to set standards for the conduct of prisons in Australia' and was first produced in 1978. The *Standard Guidelines* were last restated in March 1995. The *Standard Guidelines* do not have the force of law. The *Standard Guidelines* can be found at http://www.aic.gov.au/research/corrections/standards/aust-stand.html.

61 (1995) 183 CLR 273 at 291.

62 *Collins v State of South Australia* (1999) 74 SASR 200, 207-208.

63 Art 10 of ICCPR provides as follows: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to treatment appropriate to their status as unconvicted persons. Although as Justice Gray noted in *Cabal v Secretary, Department of Justice (Vic)* (2000) 177 ALR 306 in relation to art 10 (2) (a) Australia has imposed and maintains a reservation that 'the principle of segregation is accepted as an objective to be achieved progressively' (at 314).'

64 *Collins v State of South Australia* (1999) 74 SASR 200, 209.

The further difficulty for the plaintiff was that although the ICCPR was in force at Commonwealth level by virtue of its status as a schedule to the Human Rights and Equal Opportunity Act 1986 (Cth) it would not be applicable in South Australia unless expressly adopted by the State of South Australia. It had not been. His Honour thus was compelled as he saw it to deny the plaintiff relief as there was no redress for the plaintiff arising under international law because it had not been incorporated into the domestic law of South Australia.[67]

His Honour's dissatisfaction with that state of affairs is clearly palpable as he notes that the effect of the South Australian Administrative Decisions (Effects of International Instruments) Act 1995 (SA) (which sought to avoid the implications of *Teoh's Case*) was 'to make Australia's involvement in international conventions "merely platitudinous and ineffectual"'.[68] In any event his Honour concluded that:

> Much as I regret it, as a single judge I am not able to give force to the basic human rights set out in these conventions.[69]

For his Honour the changes necessary to prevent prisoners from being confined in such deleterious and degrading conditions lay with the legislature and the political sphere of government. His Honour observed:

> I accept that the situation about which the plaintiff complains is undesirable, even wrong: it is a breach of the principles in the Standard Minimum Rules for the Treatment of Prisoners. I am not able, at law, to do anything to have it improved. I express the hope, though, that the Government will.[70]

Implications

The case of *Collins* demonstrates the vulnerable position of prisoners in Australia in terms of their ability to rely upon the protection of international law. It is clear that unless the state and territory governments expressly adopt the provisions of the *HREOCA* and the schedule relating to the ICCRP and other relevant instruments then the claims of prisoners are more appropriately made to the executive. In the interim, prisoners must continue to rely on administrative law remedies that are concerned more with the procedural aspects of imprisonment and not with substantive conditions of imprisonment. International instruments, of which there a number potentially applicable to prisoners in this country, are available to assist the legislature in determining on what principles correctional management ought to be based and the minimum requirements necessary to operate humane prisons.[71] However, the possibility of legislative activity in this area seems remote, as does the production of a Bill of Rights or other constitutional provisions to protect citizens in Australia.

The reasons for the reluctance of the legislatures throughout Australia are not readily apparent. It may be the principle of less eligibility,[72] or our unconscious feelings towards prisoners as 'filth'.[73] Alternatively, it may be

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65 *Collins v State of South Australia* (1999) 74 SASR 200, 209.

66 *Collins v State of South Australia* (1999) 74 SASR 200, 209.

67 *Collins v State of South Australia* (1999) 74 SASR 200, 209.

68 *Collins v State of South Australia* (1999) 74 SASR 200, 213.

69 *Collins v State of South Australia* (1999) 74 SASR 200, 213.

70 *Collins v State of South Australia* (1999) 74 SASR 200, 215.

71 International Covenant on Civil and Political Rights G.A res 2200A U.N.Doc. A/6316(1966)*;* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. res. 39/46 UN Doc. A 39/51 (1984)*;* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment G.A. res. 43/173,U.N. Doc. A/43/49 (1988)*;* Basic Principles for the Treatment of Prisoners G.A res 45/111, U.N.Doc. A/45/49 (1990)*;* United Nations Standard Minimum Rules for the Administration of Juvenile Justice G.A res 40/33, U.N Doc. A/40/53 (1985). For a comprehensive overview of the position of prisoners under international law see Rodley N *The Treatment of Prisoners Under International Law* (2nd ed) (Oxford University Press, 1999).

72 Melossi D 'Gazette of Morality and Social Whip: Punishment, Hegemony and the Case of the USA, 1970-92' (1993) 2 *Social and Legal Studies* 259, 262.

the dehumanisation of our prisons and the construction of the prisoner as 'other'[74] or perhaps even a collective denial as to the conditions of confinement that prisoners are forced to endure.[75] Or it may be, as suggested by Professor Hilary Charlesworth, due to a culture of complacency within Australia more generally to the desirability of entrenching human rights at the constitutional level.[76] Obviously, those matters will require further investigation at the socio-political and cultural level but it is obviously of concern when the learned editors of the United Kingdom text *Human Rights Law and Practice*[77] note that:

> The High Court of Australia has recently implied fundamental into the Federal Constitution, notably, the right to freedom of political expression as an essential attribute of democratic government. However, it seems unlikely that the opportunity will be taken centenary of the Federal Constitution, in 2000, to include a modern charter of fundamental rights in the amended instrument. With the coming into force of the Human Rights Act 1998 in the UK, Australia will be the only democratic Commonwealth country without such a charter.[78]

Conclusion

Imprisonment, despite the often euphemistic labels or justifications put forward to account for its use,[79] is in the final analysis about the infliction of pain and violence by the community ostensibly in the pursuit of socially designated ends.[80] Australia does not stand alone in that activity and indeed although the imprisonment rate has increased considerably over the last 15 years per person our imprisonment rate is comparatively low.[81] What is distinctive, in comparison to countries such as the United Kingdom and United States, is the paucity of the rights available to those who the community chooses to imprison in Australia and the probability that there will be widespread changes to remedy that situation. Thus, although like United Kingdom and United States, Australia traditionally operated prisons in a 'hands-off' manner and moved away from that policy the extent of that movement has been marginal, incomplete and impoverished.

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73 Duncan M *Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment* (New York University Press, New York, 1996) 121. For an application of Duncan's thesis to the problem of overcrowded prisons see Edney R 'Overcrowded Prisons, Degraded Prisoners: *Res Ipsa Loquitur*?' (2000) 5 *Deakin Law Review* 81, 89-91.

74 Douzinas C *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, Oxford, 2000) 343-370. Also see Opotow S 'Moral Exclusion and Injustice: An Introduction' (1990) 46 *Journal of Social Issues* 1.

75 Cohen S 'Human Rights and Crimes of the State: The Culture of Denial' (1993) 26 *Australian and New Zealand Journal of Criminology* 97.

76 Above n 38, 196.

77 Lord Lester of Herne Hill and Pannick D (eds) (London, Butterworths, 1999).

78 Above n 52, 3. For a critical analysis of the purpose of imprisonment see Mathiesen T *The Politics of Abolition* (Martin Robertson, London, 1974) 76-79.

79 Chrsitie N *Limits of Pain* (Martin Robertson, London, 1981) 5.

80 For instance, deterrence, retribution, rehabilitation, denunciation or combination of such ends.

81 The Australian Institute of Criminology found that 'between 1983 and 1997, the overall imprisonment rate has increased from 91.6 to 145.4 per 100,000 relevant population, an increase of 48%'. See *Australian Crime: Facts and Figures 1998* (Australian Institute of Criminology, 1998) 37.

Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia?

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From 'Reluctance' to 'Exceptionalism': the Australian approach to domestic implementation of human rights

Dianne Otto*

> The Committee [on the Elimination of Racial Discrimination] has apparently failed to grapple with our unique and complex history
>
> The Attorney-General, Daryl Williams[1]

The evidence is mounting that the present Australian government[2] has retreated from the infamous 'reluctance'[3] of its predecessors to domestically implement Australia's international human rights obligations, to the even less defensible position of Australian 'exceptionalism' with respect to these obligations.

This new low point in Australia's commitment to the international human rights system was confirmed by the Joint Ministerial Statement of August 2000, which announced that the government's future cooperation with the human rights treaty committees would be 'strategic', in the sense of maximising positive outcomes for Australia, and contingent upon unspecified reform of the system.[4] The announcement conveniently side-steps the fact that Australia is under a *legal* obligation, not only to domestically implement the rights enumerated in the treaties that are monitored by the committees, but also to periodically report to the committees on its progress, in good faith. There is no provision in the treaties, nor indeed in treaty law more generally, that would allow states to limit their interactions with the committees as they see fit, or to set preconditions for engagement with them.

By way of justifying its new approach, the government insists, like its predecessors, that human rights are already enjoyed in Australia and are protected by the Australian political process.[5] But, unlike earlier governments, it has reacted defensively and increasingly belligerently to any opinions to the contrary, dismissing them as ill-informed, misguided, wrong or even deliberately provocative.[6] Also unlike earlier governments, the current government has suggested that the committees do not take adequate account of its 'democratic'

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1 Reported in 'Statement Relevant to UN Report' (2000) 125 *UNity News* 6.

2 The conservative Liberal-National Coalition government, led by Prime Minister John Howard, was first elected in 1996 with a large majority in the Lower House of the Federal Parliament. It was re-elected in 1999 with a diminished majority in the Lower House, and the Australian Democrats holding the balance of power in the Upper House.

3 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195. Charlesworth has recently referred to the Australian record on human rights as 'one hundred years of solitude' in the Kathleen Fitzpatrick Lecture, which she delivered at The University of Melbourne, 17 May 2001, 'One Hundred Years of Solitude: Australia and Human Rights' (copy on file with author).

4 Joint Media Release, Australian Minister for Foreign Affairs, Alexander Downer, Attorney-General Daryl Williams, and Minister for Immigration and Multicultural Affairs, Philip Ruddock, *Improving the Effectiveness of United Nations Committees*, FA97, 29 August 2000.

5 Eg, Attorney-General Daryl Williams claimed that individual rights are protected by the Australian traditions of robust parliamentary debate in his Law Week address, Sunday 13 May 2001, referred to by Charlesworth, 'One Hundred Years of Solitude', above n 3, 9.

6 It is noteworthy that the government announced its whole-of-government review of the UN human rights treaty Committee system on 30 March 2000 only six days after the Committee on the Elimination of Racial Discrimination adopted its Concluding Observations and Recommendations on Australia's periodic report, which were critical of amendments to the Native Title Act 1993 and of mandatory sentencing laws in the Northern Territory and Western Australia. See (2000) 125 *UNity News* 1-6. Further, the results of this in-house review were announced in a Joint Media Release (above n 4) while the Committee on Economic, Social and Cultural Rights was drafting its Concluding Observations following its periodic review of Australia's performance.

credentials.[7] These actions have fostered a domestic political climate of growing hostility to the international human rights system, which has left human rights advocates with reduced scope for rights promotion in Australian political life. The situation demands ever more creative responses from the human rights community, which I hope this paper will help to inspire.

To claim 'exceptionalism' is not merely to assert a difference. It is a claim to a singular superiority or uniqueness that exempts the exceptional subject from the rules that apply to everyone else. As historian Daniel Rodgers has argued, 'exceptionalist claims pin one's own nation's distinctiveness to every other people's sameness — to general laws and conditions governing everything but the special case at hand'.[8] The term has long been associated with the United States of America (US)[9] where exceptionalism is deeply embedded in domestic narratives of American history. Its external manifestations have frustrated international lawyers for much of the last century[10], and the new millennium does not promise any abatement. Examples of American exceptionalism are legion, commencing perhaps with the failure of the US to join the League of Nations in 1919 and abundantly evident in the recent examples of the US refusal to countenance submitting itself to the jurisdiction of an International Criminal Court,[11] its continuing failure to pay its share of United Nations (UN) dues, its withdrawal from the Kyoto Protocol on Climate Change, and its ongoing refusal to ratify most international human rights treaties.[12]

There are strong echoes of American exceptionalism in the recent approach of the Australian government to its international human rights obligations. In response to a series of criticisms by human rights treaty committees — with respect to inadequate protection of indigenous rights, the practices of mandatory sentencing in the Northern Territory and Western Australia, and the treatment of asylum seekers — the government has maintained that its human rights record is unparalleled. It has accounted for the views of the treaty committees by accusing them of 'pursuing political agendas rather than fulfilling their "expert" objectives',[13] of making 'unwarranted requests' when asked to delay pre-emptive removal of unsuccessful asylum seekers,[14] and of making 'flawed recommendations' in relation to mandatory sentencing and detainment of refugee applicants.[15] In particular, it has accused the Committee on the Elimination of Racial Discrimination (CERD) of taking a 'blatantly political and partisan approach' and engaging in a 'polemic attack on the Government's indigenous policies'.[16] The Prime Minister has complained that Australia is being unfairly 'told what to do by *outsiders*'.[17] In the same vein,

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7 Joint Media Release, above n 4.

8 Daniel T Rogers, 'Exceptionalism', in Anthony Molho and Gordon S Wood (eds) *Imagined Histories: American Historians Interpret the Past* (1998) 21, 23.

9 Ironically, the term was first coined by Stalinist officials who branded party leaders of the American Communist Party with the 'heresy' of exceptionalism in 1929, when they argued that the American economy was lagging behind and did not fit with the Soviet pronouncement that a third period of 'collapsing stabilisation' in the development of capitalism had begun. The term was embraced by American historians only after the Second World War, although the seeds of the idea were already deeply entrenched in American narratives of nationhood by then. See ibid.

10 Edward C Luck, *Mixed Messages: American Politics and International Organization 1919-1999* (1999).

11 Monroe Leigh, 'The United States and the Statute of Rome' (2001) 95 *American Journal of International Law* 124, 126.

12 The US has not ratified the CEDAW, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights (ICCPR) or the American Convention on Human Rights. Ratification of the ICCPR in 1992 was accompanied by so many reservations, declarations and understandings that the domestic effect of the treaty has been severely restricted, arguably defeating the object and purpose of the Covenant.

13 Media Statement, Minister for Foreign Affairs, The Hon Alexander Downer, 30 March 2000.

14 Joint Ministerial Statement (2000), above n 4.

15 Minister for Immigration and Multicultural Affairs, The Hon Philip Ruddock, reported in 'Ministers Outline Reform Plans for UN Treaty Committees' (2001) 249 *UNity News* 2.

16 Ibid.

17 The Prime Minister, John Howard, *Canberra Times*, 19 Feb 2000, 1, cited in Charlesworth, 'One Hundred Years of Solitude', above n 3, 9.

the government has refused to sign onto the Optional Protocol to the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) because Australia already has a 'world class regime of legal and institutional mechanisms to protect women against discrimination'.[18] In short, the government claims an exemplary human rights record that exempts it from having to respond seriously to the concerns of an international system, which it considers biased and politically driven.

If this were the extent of the government's criticisms of the human rights treaty system, it would be more accurate to describe its position as isolationist, rather than exceptionalist. However, it is the second plank in Australia's special case argument that transports its response into the more extreme register of exceptionalism. This plank relies on the argument that the international system does not take enough account of its 'democratic' credentials.[19] This view brings Australia squarely into the company of those who argue against the universality of the present system, either because they consider that the system should treat democratic states differently to undemocratic states[20] or because cultural, historical and religious diversities preclude the possibility of universal norms.[21] Proponents of both of these schools of thought are, in my view, deeply antagonistic to the project of improving the effectiveness of the UN human rights system, and the views recently expressed by the government forge alliances, to some extent, with both ideological camps.

The first school assumes the superiority of democratic states, which revives the civilising mission of the colonial era and imagines the primary purpose of the human rights system as a curb on the activities of undemocratic (or uncivilised, or undeveloped) states. Australia's incredulity in the face of international criticism of its own human rights record can perhaps be explained in this light. A contemporary advocate of such democratic exceptionalism is Canadian Professor Anne Bayefsky, who has recently completed a major analysis of the problems facing the human rights treaty system, which was prepared in collaboration with the UN High Commissioner for Human Rights.[22] When the report was released, the Australian Minister for Foreign Affairs, Alexander Downer, was quick to claim that it validated Australia's criticisms of the system, drawing particular attention to Bayefsky's unfavourable assessment of CERD as adopting 'differential treatment' in relation to some states and having 'the least developed concluding observations'.[23] Bayefsky, when contacted by the *Sydney Morning Herald* for her response to the Minister's claim, strongly rejected his view that her report supported the government's questioning of the legitimacy of criticisms made of Australia's human rights performance.[24] In her view, '[i]f democratic countries like Australia don't take a leadership role in responding to the very findings of violations against them, then how can they expect other countries with much worse human rights records to do better?'[25]

Bayefsky's appeal to Australia as a 'democratic' state is reflective of her earlier critiques of the system[26] which characteristically select extreme examples of recalcitrant state behaviour in the human rights treaty system,

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18 The Minister for Foreign Affairs, The Hon Alexander Downer, 'Minister's Reply [to letter from Professor Maddocks] (2000) 147 *UNity News* 2.

19 Joint Ministerial Statement (2000), above n 4.

20 Anne Bayefsky, 'Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies' (1996) 9 *Ratio Juris* 42. This argument has often been included in US exceptionalist arguments. See Luck, above n 10, 23.

21 Bilahari Kausikan, 'Asia's Different Standard' (1993) 92 *Foreign Policy* 24.

22 Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (2001) see http://www.yorku/ca/hrights

23 'Canadian Report Criticises UN Committees: Downer' (2001) 255 *UNity News* 3.

24 Mark Riley, '"No excuse" for Howard's UN attack', *Sydney Morning Herald*, 23 June 2001.

25 Ibid.

26 Anne F Bayefsky, 'Making the Human Rights Treaties Work', in Louis Henkin & Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (1994) 229, 264; Panel discussion: 'The UN Human Rights Regime: Is it effective?: Remarks by Anne F Bayefsky' (1997) 91 *Proceedings of the American Society of International Law* 460, 466-472; Anne F Bayefsky, 'The UN and the International Protection of Human Rights', in Brian Galligan & Charles Sampford (eds), *Rethinking Human Rights* (1997) 74.

setting up a contrast, as Philip Alston describes it, 'between "us" (the liberal democratic states) and "them" (the "extreme delinquents" who have "no democratic aspirations")'.[27] This approach is deeply divisive and antithetical to the universalism of the present system. Despite her protestations, the democratic exceptionalist aspect of Bayefsky's views was substantially reflected in the most recent Joint Ministerial Statement of 5 April 2001,[28] which announced the measures the government plans to adopt to make the treaty system more effective. The statement describes Australia's overall goal as 'achieving a system that can better advance the cause of international human rights by *targeting offenders* ["them"] and engaging more constructively in dialogues with countries which, like Australia ["us"], take their obligations seriously' (brackets and emphasis added).[29]

Notably, none of the five 'key elements' of the government's reform plan focus on domestic issues. So there is no mention of the failure of the government to directly implement most of its international human rights obligations; its poor record on promoting human rights education in Australia; the lack of compliance of its reports with the committees' reporting guidelines[30]; and its extreme reluctance, perhaps more aptly described as refusal, to ensure that state and territory governments act consistently with Australia's international human rights obligations. Instead, the government's reform plans for the human rights treaty system firmly redirect 'the gaze' outwards, away from 'us' and back on 'them'. Its plans include seeking election to the Commission on Human Rights (clearly a role for someone like 'us'), and encouraging countries in our region to sign and ratify the six core human rights instruments and providing technical assistance to help them comply with their reporting obligations (a role for 'us' in relation to 'them').

Concomitant to the complaint that the treaty Committees pay too little attention to the views of democratic states, the Australian government has also protested that they take too much account of the views of non-government organisations (NGOs), failing to recognise their 'subordinate role'.[31] This complaint brings the government into the company of many states whose antagonism to the human rights system is surpassed only by their dislike of the involvement of NGOs, in the absence of whom, it must be remembered, the entire system would lack the information that it needs to operate credibly. This antagonism to NGOs is also consistent with the view of many right-wing North American think-tanks, that are increasingly targeting the human rights treaty committees, accusing them of reliance on 'special interest group' NGOs (like women's and children's rights groups). One such think-tank, the Heritage Foundation, recently referred to Australia's decision to no longer cooperate with the human rights treaty committees as a model that others should follow.[32] In this new company, Australia actually distinguishes itself from the democratic tradition. It also distances itself from the Geneva group of like-minded states who have been charting a careful course towards the promotion of treaty body reform for several years now, taking Philip Alston's 1997 report as their starting point.[33] In taking diplomatic initiatives of its own, the government appears to be making a break with its usual UN allies, embarking instead on a precipitous course that is highly vulnerable to cooption by conservative and fundamentalist forces that have little, if any, commitment to a universal and dynamic system of human rights.

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27 Philip Alston, 'Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective', in Philip Alston & James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 501, 503.

28 Minister for Foreign Affairs, Alexander Downer, Attorney-General Daryl Williams, and Minister for Immigration and Multicultural Affairs, Philip Ruddock, *Australian Initiative to Improve the Effectiveness of the UN Treaty Committees*, MPS 042/2001, 5 April 2001.

29 Ibid.

30 Susan Brennan, 'Having Our Say: Australian Women's Organisations and the Treaty Reporting Process' (1999) 5 *Australian Journal of Human Rights* 94, 96, referring to CEDAW's Concluding Observations on Australia's 3rd Report, CEDAW/C/1997/II/L.1/Add.8, 22 July 1997.

31 Joint Ministerial Statement (2000), above n 2.

32 Patrick F Fagan, 'How UN Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty', *The Heritage Foundation Backgrounder*, 5 February 2001, 5. See http://www.heritage.org/library/backgrounder/bg1407.html

33 Philip Alston, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, E/CN.4/1997/74, 27 March 1997.

In sum, what appears at first sight to be a petulant antipodean response to public criticism, is revealed, after some analysis, to be the same old story of democratic (western) exceptionalism; this time in the guise of concern for treaty body effectiveness, fuelled by the rage of having had the gaze meant for 'them' turned back on itself. The government's goal is to return the human rights gaze to those whom, in its view, it was intended for, to target *real* human rights abusers, elsewhere, in undemocratic, non-western states. In response, human rights advocates need to find new ways to defend the universal application of the system and to promote the utter importance of taking seriously the views expressed by the human rights treaty bodies about the shortcomings in Australia's record of human rights implementation.

The Australian system of human rights protection that the government claims to be working so well is, in fact, hard to pin down. Without exception, the treaty committees have not been convinced by the argument that the political system adequately protects human rights, and have urged successive governments to directly incorporate human rights into Australian law, but to no avail. In 1997, CEDAW recommended that the government 'design a long-term strategy aimed at the full implementation of the Convention,'[34] yet since then, the government has had no qualms about introducing additional limits to the scope of the Sex Discrimination Act 1986 (Cth), to enable state and territory governments to discriminate on the basis of marital status in regulating access to reproductive technologies.[35] Also in 1997, the Committee on the Rights of the Child recommended that the government 'create a federal body responsible for drawing up programmes and policies for the implementation of the Convention on the Rights of the Child, and monitoring their implementation'.[36]

In 2000, each of the other four treaty Committees indicated that the government had failed to reassure them of the adequacy of its indirect measures of implementation. In March, the Committee on the Elimination of Racial Discrimination expressed its concern over the absence of any entrenched guarantee against racial discrimination.[37] It reiterated an earlier recommendation that the government ensure the consistent application of the Convention at all levels of government, in accordance with article 27 of the Vienna Convention on the Law of Treaties, which prohibits the invocation of internal law as a justification for failure to perform a treaty obligation.[38] In July, the Human Rights Committee, after observing that the absence of constitutional protection of Covenant rights leaves 'a lacunae in the protection of rights in the Australian legal system', urged the government to 'take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy'.[39] In September the Committee on Economic, Social and Cultural Rights strongly recommended that the government 'incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in domestic courts'.[40] And finally, in November, the Committee Against Torture recommended that the government 'ensure that all states and territories are at all times in compliance with its obligations under the Convention'[41] and 'consider the desirability of providing a mechanism for independent review of ministerial decisions in respect of non-refoulement of asylum seekers.[42]

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34 *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia*. 22/07/97, A/52/38/Rev.1. Part II [398].

35 *Sex Discrimination Amendment (No1) Bill 2000* (Cth). Senate debate of the Bill was adjourned in May 2001.

36 *Concluding observations of the Committee on the Rights of the Child: Australia*. 10/10/97. CRC/C/15/Add.79, 10 October 1997 [24].

37 *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*. 19/04/2000. CERD/C/304/Add.101, 19 April 2000 [6].

38 Ibid [7].

39 *Concluding Observations of the Human Rights Committee: Australia*. 28/07/2000. A/55/40 [498]-[528] 28 July 2000.

40 *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*. 01/09/2000. E/C.12/1/Add.50, 1 September 2000 [24].

41 Conclusions and Recommendations of the Committee Against Torture: Australia. 21/11/2000. CAT/C/XXV/Concl.3, 21 November 2000 [7(a)].

42 Ibid [7(b)].

Clearly, it is no longer enough for Australian governments to simply assert, as they have, that they do not ratify human rights conventions unless domestic legislation, politics and practice already comply with their obligations[43] and, further, that the Australian system of responsible government and the traditions of the common law ensure adequate protection. The international pressure for comprehensible evidence that this *is* the case has plainly been mounting, yet the government has been unable to provide it. Its periodic reports to the committees are frustratingly general, making little effort to directly link Australia's specific international obligations to implementation by way of concrete domestic measures. In light of such dismal implementation efforts, it is hardly surprising that such a searing gaze has been directed at Australia. Further bluff and bluster about our 'unique and complex history' can only hope to temporarily divert this gaze, now that the myth of implementation has been roundly exposed.

The question is how to advance from the current low point of widespread suspicion and endemic misinformation about human rights in Australia. The task is to translate the gaze of the treaty Committees into meaningful domestic debate and heightened levels of human rights literacy in Australia. While human rights advocates are in general agreement about the need to build a grass-roots human rights culture from the ground up, it is not always clear how this could be done. Towards this end, Peter Bailey has made the very useful suggestion that we identify the scattered human rights 'standards', as he calls them, that are already incorporated into Australian law such as practices relating to a fair trial and elements of the right to an adequate standard of living, and make connections between them and international human rights norms.[44] Bailey argues that making such connections will mean that the principles which link the existing standards will come into focus, making it possible to develop the law on the basis of the underlying human rights principles, before the courts and in the course of parliamentary and public discussion. While I am not as optimistic as Bailey when he claims that 'Australia is not very far from being able … to move to immediate enactment of the most central incidents of an enforceable legal right to an adequate standard of living',[45] the kind of creative change to the Australian legal culture that he suggests is crucial.

However, I think we must go at least one step further, and try to make sense of Australia's meagre efforts at indirect implementation at the interface between Australian legal and popular cultures. It is at this interface, for example, that the effects of the occasional reference to rights in government policies and practices can be investigated and built upon. It is also at this interface that Bailey's hypothesis, that many human rights are not very far from being fully implemented in Australia, can be tested in a practical sense. We need to be more creative than ever before with the flimsy rights protections that exist in Australian law, and find ways to nurture a fledgling human rights culture in both the legal and popular realms. As uncomfortable as it may be, we must refuse the push to turn the gaze away from ourselves at least until we truly have an exemplary system of human rights in Australia and, even then, the gaze of exceptionalism, of 'them' and 'us', must be firmly rejected as antithetical to a universal system of human rights.

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43 As the government said in its 1st Periodic Report to CROC: 'Aust does not propose to implement CROC by enacting the Convention as domestic law. The general approach taken by Australia to human rights and other Conventions is to ensure that domestic legislation, politics and practice comply with the Convention prior to ratification', CRC/C/8/Add.31 [6] 1 February 1996.

44 Peter Bailey, 'Implementing Human Rights — The Way Forward' (1999) 5/2 *Australian Journal of Human Rights* 167, 172-174.

45 Peter Bailey, 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 4/1 *Australian Journal of Human Rights* 25, 50.

International Trade

The WTO Rules and the Environment: An Australian Perspective on the Use of Trade Measures to Promote Legal and Policy Change

Milton Churche*

The debate about the relationship between trade and the environment is a large and complex one. This paper will raise a number of issues about the terms on which a significant part of this debate has been conducted. In particular, it will examine two of the major perspectives that have informed much of the trade and environment debate. The first I will refer to as the 'clash of cultures' perspective, drawing on an expression used by Professor John Jackson in major expositions of this perspective.[1] The second I will refer to as the 'exercise of power' perspective. These are not the only perspectives that have shaped the trade and environment debate, but they have been two of the most influential.

The paper will focus on how these two perspectives have approached the three major sets of environment-related disputes in the World Trade Organization (WTO) or its predecessor, the General Agreement on Tariffs and Trade (GATT): the two tuna/dolphin disputes that saw GATT panel reports in 1991 and 1994; the reformulated and conventional gasoline dispute that saw WTO panel and Appellate Body reports in 1996; and the shrimp/turtle dispute that was addressed by WTO panel and Appellate Body reports in 1998 and an implementation panel report in June 2001. All three sets of disputes concerned environment-related measures taken by the United States.

A significant part of the literature on trade and the environment is organised, either explicitly or implicitly, around the theme of a clash between two cultures or regimes: a trade culture or regime and an environmental culture or regime. In this literature, two main types of clash between these cultures are identified. The first focuses on the interaction between domestic policy decisions on environmental issues and the trade rules, particularly the multilateral trade rules of the WTO and before it of the GATT. The second clash concerns the interaction between the trade rules and multilateral environmental agreements (MEAs). A central theme of the clash of cultures literature is the need for reform of the WTO rules to provide a greater accommodation of environmental concerns in relation to one or both of these two areas of potential conflict.[2]

One of the interesting features of much of the clash of cultures literature is a tendency to underemphasise the fact that international rules — whether the WTO rules or environmental treaties — are first and foremost defining rights and obligations between states. Surprisingly little of this literature makes a serious effort to understand the perspectives of the states involved in the three disputes, their respective interests or values, or how their governments have sought to use international law to advance these interests or values.

A consequence of this narrowing of perspective is a tendency to miss one of the most important aspects of both the tuna/dolphin and shrimp/turtle disputes. This has been the interaction between dispute settlement in the GATT and WTO and the engagement of the governments concerned in a range of parallel bilateral and plurilateral processes on the environmental concerns involved. Yet little of this interaction by governments in a range of forums comes through in much of the trade and environment literature. At times it seems almost as

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1 John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000) 414-48 (based on an article first published in 1992). Jackson, 'Greening the GATT: Trade Rules and Environmental Policy,' in J Cameron, P Demaret and D Geradin (eds), *Trade & the Environment: The Search for Balance. Volume I* (London: Cameron May, 1994) 39-51.

2 James Cameron, 'The GATT and the Environment', in Philippe Sands (ed), *Greening International Law* (London: Earthscan, 1993) 100-21. Daniel C Esty, *Greening the GATT: Trade, Environment, and the Future* (Washington, DC: Institute for International Economics, 1994) 205-24.

though the real actors are the trade rules on the one side, and the environmental measures on the other, rather than the governments who make use of them.

The turtle/shrimp dispute provides a significant example of the strong interaction between WTO dispute settlement and other intergovernmental processes. This dispute has involved a US import prohibition on shrimp from countries that were not certified by the United States as having national programs in place requiring the use of turtle excluder devices (TEDs) in shrimping vessels fishing in waters where marine turtles are present. A noteworthy aspect of the recourse to WTO dispute settlement in this case is the positive impact it has had in promoting stronger intergovernmental cooperation in the Indian Ocean region on marine turtle conservation.

In particular, the dispute provided the leverage on the United States that led it to put serious diplomatic effort, expertise and financing into these intergovernmental efforts, as part of an attempt to gain WTO legitimacy for its import prohibition. It has also seen regional governments actively seeking to engage the United States in these efforts as an alternative to its unilateral, trade restrictive measure for addressing marine turtle conservation.[3]

These intergovernmental efforts have led to the adoption of a *Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South East Asia* at a meeting involving 24 states in Kuantan, Malaysia in July 2000.[4] Australia was an active participant in these initiatives. It hosted a workshop in Perth in October 1999, as well as providing financing for the intergovernmental processes and offering to prepare a draft of the Conservation and Management Plan envisaged by the Memorandum of Understanding.[5]

It is still too early to say how effective this Indian Ocean initiative will be in addressing the problems faced by marine turtle conservation. However, it is worth emphasising three points. First, this initiative provides a forum for addressing the full range of threats posed to marine turtle conservation, including habitat destruction and direct harvesting as well as fisheries by-catch. By contrast, the US import prohibition was focused on only one of these threats, the issue of incidental catch by shrimp trawling. The regional initiative has the potential to be far more effective from a conservation perspective than the import prohibition in isolation.

Second, the history of the dispute points to the importance of governments involved in WTO dispute settlement being prepared to take a broader perspective. A single-minded focus by the United States on retention of the import prohibition, or by the complaining parties on its removal, and a correspondingly narrow approach to the handling of the dispute, would have made the impetus given to marine turtle conservation efforts in the Indian Ocean much less likely.

Third, the provisions of Article XX of the GATT 1994, as interpreted by the Appellate Body, are proving remarkably robust in forcing governments to take this broader perspective and to seek negotiated solutions to differences of view about what constitutes responsible state behaviour on trade and environment issues.[6] Particularly important has been the language in the chapeau to Article XX with its requirement that 'measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'.

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3 The actions of both the United States and regional governments are documented, with the differing views of major participants, in the report of the WTO implementation panel: *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, circulated 15 June 2001, especially paras 3.67-3.98, 4.1-4.26, and 5.79-5.88.

4 The Memorandum of Understanding was adopted as an agreement pursuant to article IV, paragraph 4, of the Convention on the Conservation of Migratory Species of Wild Animals. It is available at <http://www.wcmc.org.uk /cms/Turtles%20SEA-MOU_intro.htm>.

5 The final Conservation and Management Plan was adopted at a meeting held in Manila, 19-23 June 2001. This meeting also decided to establish a small secretariat to help coordinate activities under the Memorandum of Understanding.

6 See the report of the WTO implementation panel (n 3 above) for the arguments put forward by the United States, Malaysia and Australia.

Unfortunately, these dynamics have not been as well understood, or accepted, in the countries concerned as they might have been, and this has constrained the adoption of constructive positions by the governments involved. It is a disappointing reality that the domestic constituency in the United States on the marine turtle conservation issue continues to be too focused on maintaining the US import prohibition, and has either not understood, or not cared about, the opportunities that the shrimp/turtle dispute has opened for broader intergovernmental cooperation on this issue.[7]

It is also unfortunately the case that in some developing countries there is misplaced concern that active participation in a process such as the Indian Ocean initiative, in parallel with WTO dispute settlement, could compromise their WTO rights. Furthermore, there is a tendency by some developing countries to put a somewhat inordinate stress on WTO rights in seeking to influence United States policy, and to underestimate the importance of adequate engagement in the regional initiative. This engagement is vital in demonstrating that a viable alternative exists to unilateral action by the United States, and therefore in shaping the scope for the United States administration to gain domestic acceptance of any change in policy on shrimp import requirements. Findings of WTO inconsistency in WTO dispute settlement processes are likely to face an uphill battle in influencing United States policy, if such findings are viewed in its domestic policy circles as irreconcilable with an important environmental objective such as promoting marine turtle conservation.

Much of the clash of cultures literature sees the shrimp/turtle, tuna/dolphin and other GATT and WTO disputes relating to environmental measures as evidence that the trade rules and/or the dispute settlement procedures are biased against environmental interests. However, if one looks at these disputes from the point of view of interstate relations, a striking fact is that they have particularly involved resort by developing countries to GATT and later WTO processes to address grievances against the world's major economic power, the United States. The first tuna/dolphin dispute was initiated by Mexico, although the second dispute was taken by the European Economic Community and the Netherlands, acting on behalf of the Netherlands Antilles. The first environment-related dispute heard by the WTO, the US reformulated gasoline case, was initiated by Venezuela and Brazil. The initial shrimp/turtle dispute was taken by India, Malaysia, Pakistan and Thailand, and the implementation panel dispute by Malaysia.

In the light of this record, it is perhaps not surprising that developing countries generally have a very different view of the GATT and WTO experience with environment-related disputes to that found in the clash of cultures literature. This general view is, to a significant extent, informed by what I call the exercise of power perspective on the trade and environment debate. This perspective has focused on what it sees as the unilateral exercise of economic power by the United States in ways incompatible with its international obligations under the trade rules. This perspective has emphasised the desirability of the United States seeking to advance its concerns through cooperative, intergovernmental processes, including regional or multilateral initiatives, rather than through unilateral, trade restrictive action.

The relationship between the clash of cultures perspective and the exercise of power perspective in shaping much of the trade and environment debate has ebbed and flowed over the last decade. At times, it still seems to have something of the character of a dialogue of the deaf. However, it is not the points of difference between them that I want to emphasise. Instead, I want to point to two things that they have in common. One is the way in which these perspectives highlight the importance of moral and political legitimacy in the operation of international law. The other is the way they are grappling with the interaction between international law and the problem of defining and influencing responsible state behaviour — with the emphasis on the notion of 'responsible'.

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7 This is reflected, for example, in the focus on pursuing domestic court cases aimed at overturning a provision in the current United States' guidelines on shrimp import requirements that allows some imports of shrimp caught using TEDs even from countries that do not have a national regulatory program mandating TED use. As administered by the United States, this provision has, to date, only allowed shrimp imports from two fisheries (one each in Australia and Brazil). From a turtle conservation perspective, focusing on this issue would seem of marginal significance compared to the potential benefits of mobilising support for the Indian Ocean initiative, and carries the danger of further estranging efforts at cooperation between the United States and developing countries on marine turtle conservation.

The moral element in these two perspectives might seem most overt in the clash of cultures perspective. In much of this literature there often seems to be at least an implicit notion that the environmental concerns being raised in many of the perceived trade and environment clashes represent higher-order values to which the trade regime should accommodate itself. Indeed, the focus on a clash of cultures, and a tendency to underemphasise the conflict between governments with different national interests, views and power, has been important in keeping the moral element at the forefront of the debate.

But a moral perspective has also been a key factor in the exercise of power perspective.[8] The governments that have resorted to GATT or WTO dispute settlement action have used this action as a means of seeking to influence the behaviour of the United States, and have attracted significant support from other governments in this effort. This support has taken the form of many other governments voicing their concern about the United States' measures in GATT Council or the WTO Dispute Settlement Body, or participating as third parties in the disputes.[9]

Most of these governments have not had substantive trade interests in the disputes. But they have considered that important issues of principle were involved and believed that participation in collective action was important in helping to defend these principles. A key issue for many of these governments has been the importance of the moral and political legitimacy of the WTO rules as a means of ensuring their effectiveness in influencing the behaviour of the most powerful states. The involvement of so many governments in the tuna/dolphin and shrimp/turtle disputes reflected this awareness of the importance of moral suasion in the effectiveness of the rules.

It is important to remember that while the WTO dispute settlement provisions provide the possibility of recourse to trade retaliation or compensation in the event of non-compliance with rulings and recommendations of the Dispute Settlement Body, such recourse is unlikely to be of much value in a dispute taken by a less-powerful country against the United States or the European Union. The moral and political legitimacy of the law, and the interest of all states, including the most powerful, in its continuing vitality, will be significant factors in promoting compliance in such circumstances.

Another, related point of commonality between the two perspectives is the way they are grappling with the issue of defining the notion of responsible state behaviour, and developing appropriate tools to influence states to move in these responsible directions. For the clash of cultures perspective a key concern is the role that trade measures may play in promoting responsible state behaviour to address environmental problems — whether in regard to unilateral trade measures such as those adopted by the United States in relation to tuna and shrimp imports or multilaterally agreed trade measures to be found in some MEAs. From the point of view of the clash of cultures perspective, the main interest in the WTO rules is a concern that they may restrain the use of trade restrictive measures as a tool to promote environmentally responsible behaviour by states.

For the exercise of power perspective, a central concern is the role of international law, and particularly of the WTO rules, as a vehicle to provide some degree of restraint on the exercise of economic power by the major powers. For this perspective, the focus is on the challenge of promoting responsible behaviour in the use of economic power, for whatever purpose. This perspective tends to put a premium on ensuring that any resort to the exercise of economic power, such as trade restrictive measures, takes place within defined limits and in the context of balanced negotiations.

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8 Cf, the comments by Robert Hudec about 'the battle for the rhetorical high ground' in 'GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices,' in Jagdish Bhagwati and Robert E Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 2. Legal Analysis* (Cambridge, Massachusetts: The MIT Press, 1996) 107-110.

9 Eleven countries made third-party submissions or statements in the first tuna/dolphin dispute, seven in the second tuna/dolphin dispute, and two countries in the reformulated and conventional gasoline case. In the shrimp/turtle dispute, eleven countries made third-party submissions or statements at the panel stage, five at the Appellate Body stage, and eight at the implementation panel stage.

It would be misleading to see the division between the clash of cultures and the exercise of power perspectives as simply a developed/developing country divide. Australia participated as a third party in the two tuna/dolphin disputes and the shrimp/turtle dispute in putting forward many of the arguments that characterise the exercise of power perspective to criticise the US measures. Other developed countries including New Zealand, Japan and Canada have also participated in one or more of these disputes to share their concerns about the US measures. In many ways the divide is more between the United States on the one hand, where the clash of cultures perspective has been strong in academic and policy circles, and other less-powerful states, on the other hand, that have tended to draw more on the exercise of power perspective.

Significantly, while the European Union's position in the trade and environment debate has contained important aspects of the clash of cultures perspective, it has also supported elements of the exercise of power perspective, particularly in relation to concerns about unilateral measures taken by the United States. Indeed, it was a complainant in the second tuna/dolphin dispute. But as the other major economic power in the world, the European Union has itself exhibited some tendencies towards unilateralism. Furthermore, the clash of cultures perspective has probably been as strong in many European academic and policy circles as it has in the United States.

In conclusion, I would like to put forward two thoughts on the future direction of the trade and environment debate and the need for a greater dialogue between these two perspectives. First, if the clash of cultures perspective wishes to be taken more seriously in intergovernmental forums, such as the WTO, then it needs to move beyond its focus on a clash between a trade and an environmental culture and come to grips with the interstate dynamics involved. In particular, this requires a greater acknowledgment of the reality of the great inequities in the distribution of economic and political power in the international system and the importance that governments put on international law, including the WTO rules, as a vehicle to put some restraints on the exercise of this power.

Second, the exercise of power perspective needs to recognise that the greatest challenge that the trade and environment debate poses for the multilateral trading system is that it could contribute to a lessening of the moral and political legitimacy of the WTO rules in the two major economic powers, the United States and the European Union.[10] Governments in other countries need to accept the importance of engaging constructively on the issues raised by the trade and environment debate, including in the WTO. Furthermore, this engagement cannot be narrowly focused on maintaining the balance of WTO rights and obligations, but must be prepared to confront broader issues about reconciling economic growth and environmental protection within the context of sustainable development. Retreating from such an engagement is only likely to confirm the clash of cultures perspective in its beliefs. It could also promote the even greater influence of the clash of cultures perspective within policy circles in the two major economic powers, with its attendant dangers for the vitality of the WTO rules in shaping the behaviour of these powers.

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[10] A good discussion of the legitimacy issue is Daniel C Esty, 'Environmental Governance at the WTO: Outreach to Civil Society', in Gary P Sampson and W Bradnee Chambers (eds), *Trade, Environment, and the Millenium* (Tokyo: United Nations University Press, 1999) 97-117.

Australian Contributions to the Development of World Trade Organization Law

Gavin Goh*

Overview

The rules of the World Trade Organization (WTO) Agreements provide security and predictability for over 90 per cent of world trade and 140 markets, underpinned by an effective dispute settlement system. WTO rules have direct relevance to the day-to-day decisions of governments and international traders and cover not just traditional areas of customs and tariffs, but also industry development, agriculture, environmental protection, food safety, quarantine protection and intellectual property. These rules are underpinned by an effective dispute settlement system.

Since the inception of the WTO dispute settlement system in 1995, Australia has been actively involved in 28 disputes, including in four panel disputes as a principal party. Australia was also involved in 16 disputes in the previous decade under the General Agreement on Tariffs and Trade (GATT) system. This level of activity exceeds that in any other international legal regime, such as the International Court of Justice (ICJ). Australia's active participation provided it the unique opportunity — particularly in the immediate period following entry into force of the new *WTO Agreements* in 1995 — to influence the interpretation of WTO rules by panels and the Appellate Body.

This paper focuses on the four panel disputes in which Australia was a principal party and discusses Australia's contributions to the development of WTO law. The paper also examines the international and domestic implications of the disputes, such as on national government decision-making.

The WTO dispute settlement process

The WTO dispute settlement system underpins the rules-based framework of the *WTO Agreements* by providing for a system of compulsory and binding jurisdiction. Any WTO member may initiate a complaint under the WTO *Dispute Settlement Understanding* (DSU) against another member for failure to comply with WTO obligations. The rules and procedures of the DSU apply to all *WTO Agreements*, subject to special or additional rules and procedures contained in specific agreements. While it is beyond the scope of this paper to provide a detailed examination of the WTO dispute settlement system, a brief overview is useful.[1]

The dispute settlement process consists of four stages: initial consultations, the panel process, Appellate Body review and implementation. Consultations (or negotiation) is the preferred means of dispute resolution and the DSU declares that a mutually acceptable solution 'is clearly to be preferred'.[2] During the period 1995-99 for example, 77 disputes were resolved of which 41 were resolved without going to adjudication. In the event that consultations fail to settle a dispute, the complaining party may request the establishment of a panel to make legal findings on WTO-consistency of the measures at issue.

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1 For a more detailed discussion of the dispute settlement process and Australia's management of WTO disputes, see Gavin Goh and Trudy Witbreuk, 'An Introduction to the WTO Dispute Settlement System' (2001) 30(1) *University of Western Australia Law Review* 51.

2 Article 3.7 of the DSU.

Panels are the 'court of first instance' and perform the function of clarifying and applying the WTO rules to a specific dispute. Panels are usually comprised of three individuals from a range of backgrounds in law, economics and trade policy, and are selected by agreement of the parties. Panels follow standard working procedures which provide for *inter alia* two sets of written submissions and two oral sessions with the parties. Written submissions are the primary means of persuading the panel and address the factual aspects of the case and the legal arguments relating to the specific WTO obligations alleged to have been breached. A panel's reasoning and findings are set out in a panel report.

Where a party appeals a panel report, the matter is heard by the Appellate Body. This is a standing body comprising seven eminent persons, three of whom serve on any one appeal. The function of the Appellate Body is to hear appeals on issues of law covered in a panel report and legal interpretations developed by a panel. The Appellate Body cannot, as such, examine the panel's assessment of the facts of a case other than a claim that the panel failed to make an 'objective assessment of the facts' under Article 11 of the DSU.

Panel and Appellate Body reports must be adopted by the WTO Dispute Settlement Body (DSB) to have legal and binding force, and to give rise to obligations on the responding party to bring its measures into conformity.[3] Adoption of panel and Appellate Body reports is 'quasi-automatic', that is, a panel report must be adopted unless a party to the dispute notifies an intention to appeal the report, or if the DSB decides by consensus not to adopt the panel report.[4] There is no right of appeal from an Appellate Body report.

In the event of a finding of WTO inconsistency, the responding member has a 'reasonable period of time' to bring its measures into conformity with the WTO rules. Where the parties fail to agree on a reasonable period of time, this is determined by an arbitrator. The DSU provides accelerated panel procedures to examine implementation in the event of disagreement between the parties on the existence or consistency of measures taken to comply with the WTO rulings. The practice has also emerged among WTO members for an appeal to the Appellate Body from an implementation panel report.

Where a member fails to implement the WTO rulings within the reasonable period of time, the DSU provides for effective remedies in the form of compensation or WTO-sanctioned retaliation. Compensation is in the form of improved access to the responding member's market and must be extended to the products of all WTO members. Retaliation or the suspension of concessions is usually in the form of punitive 100 per cent tariffs applied by the complaining member on specific products of the responding member. This normally has the effect of wiping out trade in those products and is usually a highly effective means of securing compliance by the responding member.

Australia's participation in WTO disputes

Since the inception of the WTO dispute settlement system in 1995, Australia has been involved in 28 disputes as a complainant, respondent and a third party. Australia was also involved in 16 disputes in the previous decade under the GATT system. Australia's participation in GATT/WTO disputes exceeds that of any other international legal system, such as the ICJ.[5]

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3 The DSB is made up of all WTO members and has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorise retaliation in the event of non-implementation by a member.

4 It would be very difficult in practice for consensus not to adopt a panel or Appellate Body report to be reached, given this would require the successful party to join the other members to block the report.

5 This in part reflects the level of activity in the WTO dispute settlement system compared to other international legal regimes. Since 1 January 1995, there have been 231 complaints notified to the WTO (178 of which involve distinct matters) with 49 panel and Appellate Body reports adopted, 15 active cases and 37 settled or inactive cases. Since 1946, the ICJ has delivered 71 judgments and provided 24 Advisory Opinions since 1946: See *Overview of the State-Of-Play of WTO Disputes*, www.wto.org; and *International Court of Justice: General Information*, <www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>.

Australia has been successful in all four of the WTO complaints it has prosecuted to date. Two complaints: against India on quantitative restrictions on a range of agricultural and manufactured products, and against Hungary on agricultural export subsidies, were successfully resolved without resorting to full panel processes. Australia's complaints against Korea on its measures on imported beef, and against the United States on its safeguard measures on lamb meat, were both upheld by the panel and Appellate Body. Australia was a respondent in two panel disputes: the *Howe Leather* dispute and the Canadian *Salmon* dispute. While Australia's measures were found to be inconsistent with the WTO Agreements, both disputes have now been resolved without recourse to WTO-sanctioned retaliation against Australia.

In addition, Australia participated as a third party in 19 disputes. While third party participation does not give rise to rights of compensation or retaliation in the event of a finding of inconsistency against another member's measures, it served to secure access wins in markets where Australia has a commercial interests or to confirm the WTO consistency of existing Australian measures. On a systemic level, Australia's legal reasoning influenced the interpretation of WTO rules in areas such as agricultural export subsidies, the relationship between trade and the environment, and trade-related intellectual property. This paper focuses on the four panel disputes in which Australia was a principal party: *Salmon*, *Korea Beef*, *Howe Leather* and *United States Lamb*. For each of these disputes, the paper examines the contributions made by Australia to the development of WTO jurisprudence, and the international and domestic implications of the disputes including national government decision-making.

Australia: salmon

Measures taken by members to protect human, animal or plant life or health, such as quarantine and food safety measures, are subject to WTO disciplines where they have an impact on international trade. These disciplines are set out in the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the *SPS Agreement*), which builds upon Article XX(b) of *GATT 1994*. The *SPS Agreement* accords a member the basic right to determine its own appropriate level of health and quarantine protection, and to take measures necessary to achieve this level of protection. In applying SPS measures, members must satisfy a number of requirements, including: that the measures are scientifically justifiable by being based on a proper risk assessment or an international standard (Article 5.1); there is consistency in treatment between products having pests or diseases in common (Article 5.5); and that the measures are the least trade restrictive for achieving the appropriate level of protection, taking into account technical and economic feasibility (Article 5.6).

The Salmon dispute

In March 1997, Canada initiated a WTO complaint against Australia's long-standing quarantine ban on imports of fresh, chilled and frozen salmon. Australia had justified this ban on the need to protect against the introduction of exotic diseases through imported salmon. As part of its complaint, Canada claimed that: the 1996 Australian Quarantine and Inspection Service (AQIS) risk assessment on which Australia had based its ban was not a proper risk assessment; there were arbitrary and unjustifiable inconsistencies in the way Australia addressed disease risks in imported salmon as opposed to other imported fish such as bait fish and ornamental fish; and that the ban was more trade restrictive than necessary to achieve Australia's appropriate level of protection.

A panel and the Appellate Body upheld Canada's complaint (except in regard to the measures being more trade restrictive than necessary) and Australia was given until July 1999 to bring its measures into conformity. Following a new import risk assessment by AQIS, Australia replaced the original import ban with 11 new measures. Canada subsequently challenged Australia's implementation and in February 2000, an implementation panel upheld all but one of the replacement measures. An import ban introduced by the Tasmanian government in the course of the panel proceedings was also found to be WTO inconsistent. In May 2000, Australia and Canada reached a mutually satisfactory settlement which involved changes to the one measure found to be WTO inconsistent and an undertaking by Australia to continue to seek compliance by Tasmania of Australia's WTO obligations.

The panel and Appellate Body's findings were significant given this was the first dispute under the SPS Agreement on animal quarantine protection. To that end, Australia's legal arguments were instrumental in clarifying key provisions of the SPS Agreement, including on the conduct of a disease risk assessment and

consistency of treatment between different products. First, the Appellate Body affirmed the sovereign right of members to determine their own appropriate level of protection — which could be higher than that accorded by international standards — and to take scientifically justifiable measures to meet this level of protection. Nor was it necessary for the appropriate level of protection to be articulated in quantitative (eg, number of deaths per thousand) as opposed to qualitative terms.[6]

Second, Article 5.1 of the *SPS Agreement* imposes a very strict test on the requirement to base measures on a proper risk assessment. A risk assessment must: identify the diseases or pests whose entry, establishment or spread a member wants to prevent within its territory, as well as the associated potential biological and economic consequences; evaluate the likelihood (ie, probability) of entry, establishment or spread, as well as the associated potential biological and economic consequences; and evaluate the likelihood of entry, establishment or spread according to the measure which must be applied. The measure must also be 'based on' the risk assessment in the sense of a rational relationship.[7] The Appellate Body and the implementation panel agreed with Australia that a risk assessment need not be quantitative, and that a qualitative assessment of likelihood and consequences was equally valid.[8]

Third, the implementation panel accepted Australia's arguments that an approach based on simplistic comparisons of the measures applied for the same diseases in different products was not appropriate under Article 5.5 of the *SPS Agreement*: avoiding arbitrary or unjustifiable distinctions in levels of protection. Australia successfully demonstrated that different products gave rise to different disease risks, warranting the application of different measures. Nor could it be presumed that the same disease in different fish, or different diseases in different fish, posed the same risk.[9] The implementation panel also rejected Canada's quarantine contention that there should be symmetry in measures applied to protect against exotic diseases and those diseases that are endemic to certain regions of Australia.

International and domestic implications

The *Salmon* dispute highlighted the broad reach of WTO rules into areas of national decision-making traditionally held to be the exclusive preserve of national governments, such as human health and quarantine. Given their broad scope, Australia successfully argued for an interpretation of SPS provisions that took into account the scientific and practical realities of national quarantine decision-making. This was reflected, for example, in the WTO upholding Australia's arguments that the *SPS Agreement* did not require members to express their appropriate level of protection in quantitative terms, or to conduct a quantitative risk assessment. The dispute also highlighted the legal and scientific rigour applied by panels and the Appellate Body in examining compliance of national measures with SPS obligations. The 1999 AQIS risk assessment was subject to close scrutiny by three scientific experts advising the panel, including experts in fish pathology, quarantine management and import risk assessment.

On a domestic level, the dispute excited an unprecedented level of media and public interest, including a Senate inquiry, into the WTO and AQIS quarantine processes. This in part reflected the wide range of domestic stakeholders involved, including recreational fishermen, Tasmanian salmon growers, Victorian trout farmers, the Tasmanian government, the Western Australian lobster industry and South Australian tuna industry,[10] the imported ornamental fish sector, as well as those exporters targeted by potential WTO-sanctioned retaliation by Canada.

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6 WT/DS18/AB/R, [207].

7 WT/DS18/AB/R, [121].

8 WT/DS18/RW, [7.56]-[7.58].

9 WT/DS18/RW, [7.90].

10 These industries had a strong economic interest in the quarantine conditions applied on the importation of bait fish used as production inputs.

Importantly, the implementation panel upheld Australia's right to establish its own appropriate level of protection and to apply measures over and above the international standard. Throughout the dispute, Australia stated its appropriate level of protection to be 'a high or very conservative level of sanitary protection aimed at reducing risk to very low levels, while not based on a zero-risk approach'. The Appellate Body affirmed that Australia had determined its appropriate level of protection and had done so with sufficient precision.[11] The WTO findings are also relevant to the decision of successive Commonwealth governments not to apply a zero risk approach. The Appellate Body observed that while there was nothing in principle preventing a member from adopting such an approach, it would be difficult in practice to sustain this across a range of different products in a way that meets the consistency requirements of Article 5.5 of the *SPS Agreement*.

The implementation panel also upheld the 1999 AQIS risk assessment on salmon as meeting the strict tests imposed by Article 5.1, thereby affirming Australia's general disease-by-disease approach to risk assessment as set out in the AQIS Import Risk Analysis Handbook. The 1999 salmon risk assessment remains the benchmark by which other WTO members assess compliance of national measures against the relevant SPS provisions.

Finally, the dispute raised important constitutional legal issues regarding the Commonwealth's responsibility for state and territory actions. Following the lifting of the Commonwealth's import prohibition, the Tasmanian government introduced its own quarantine ban applying to Tasmania. Under customary international law, government signatories to international treaties are responsible for the actions of regional and other authorities within their territories. This general principle is given explicit recognition in Article 13 of the *SPS Agreement* deems WTO members 'fully responsible under this Agreement for the observance of all obligations set forth herein'.[12] Article 13 also requires members to 'formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies'. The Tasmanian government's action therefore placed Australia in the position of defending not only the Commonwealth measures, but also the Tasmanian measure which was clearly in conflict with the Commonwealth's measures.

The Tasmanian measure was found by the implementation panel to be WTO inconsistent, giving rise to potential retaliation by Canada. As part of the mutually agreed solution with Canada, Australia undertook to continue to seek observance of Australia's WTO obligations by Tasmania. The Tasmanian government's action nevertheless underlined the potential WTO implications of state and territory action, including possible retaliation against the exporters of other states and territories. Canada also sought to read down the WTO consistency of the Commonwealth's measure by claiming that 'Tasmania's new measure nullifies even such measures Australia has taken to comply'.[13]

Korea beef

The principle of National Treatment was one of the fundamental principles of non-discrimination in international trade established in *GATT 1947* and is reflected in many of the *WTO Agreements*. Article III:1 of *GATT 1994* sets out the basic principle that members must not discriminate against imported products in relation to internal taxes and charges, and laws, regulations and requirements affecting the internal sale, purchase, distribution or use of products.

Article III:4 imposes a specific requirement that internal laws, regulations and requirements do not, in their application, result in 'less favourable treatment' for imported products than for like domestic products. Panels and the Appellate Body have interpreted Article III as requiring 'equality of competitive conditions' for imported products vis-à-vis domestic products.

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11 WT/DS18/AB/R, [207].

12 Article 22.9 of the DSU also provides that the dispute settlement provisions of the *WTO Agreements* may be invoked in respect of measures taken by regional or local governments or authorities within the territory of a WTO member.

13 WT/DS18/RW, [7.16].

The Korea beef dispute

In April 1999, Australia and the United States initiated a complaint against Korea on a range of measures that discriminated against imported beef. These included a requirement that imported beef be sold separately from Korean beef, subsidies to Korea's beef producers, minimum wholesale pricing, limitations on which private sector operators can buy and sell imported beef, and discriminatory labelling and record-keeping requirements.

In July 1999, a panel upheld the complaint and Korea appealed only two findings: the dual retail system and subsidies. In December 1999, the Appellate Body upheld Korea's appeal on subsidies but ruled that the dual retail system discriminated against imported beef. Korea eliminated the majority of its restrictions in January 2001 and consultations are continuing between the parties on the outstanding implementation issues. Korea has until September 2001 to comply with the WTO rulings.

The case raised a number of WTO legal issues, including under Article III:4 of *GATT 1994*. Under the Korean dual retail system, a small retailer could either sell imported or domestic beef but not both. Stores selling imported beef were required to display a sign stating 'Specialised Imported Beef Store' and were subject to more stringent record-keeping requirements. Large retailers such as supermarkets and department stores could sell both imported and domestic beef provided they were sold in separate sales areas or display cabinets, and provided also that separate storage facilities were maintained.

The panel and Appellate Body upheld Australia's and the United States' claims that the dual retail system discriminated against imported beef under Article III:4 of *GATT 1994*.[14] The Appellate Body considered that the practical effect of the dual retail system was to exclude imported beef from the retail distribution channels though which domestic beef was sold to Korean households and consumers. This drastic reduction of commercial opportunity was reflected in the much smaller number of specialised imported beef shops (5,000 shops) as compared with domestic beef shops (45,000 shops).[15] Accordingly, imported beef was accorded less favourable treatment in terms of competitive conditions.

The Appellate Body rejected Korea's arguments on 'perfect regulatory symmetry' and that the dual retail system did not discriminate against imported beef since retailers were free to choose whether to sell imported or domestic beef. In the Appellate Body's view, the case was not one about private entrepreneurs making their own commercial decisions on differentiated distribution systems, but governmental intervention that forced retailers to choose to sell either domestic beef only or imported beef only.[16]

The panel and Appellate Body also rejected Korea's defence that its measures were necessary to prevent consumer fraud. Article XX(d) of *GATT 1994* provides a qualified exemption for measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to … the prevention of deceptive practices', provided they are not applied in a manner that would constitute arbitrary or unjustifiable discrimination or disguised restriction on international trade. The panel and Appellate Body considered that there were alternative WTO-consistent measures reasonably available to Korea to prevent deceptive practices. Accordingly, Korea had failed to demonstrate that the dual retail system was 'necessary' to prevent misleading practices.[17]

International and domestic implications

The panel and Appellate Body findings were useful in reinforcing the stringent non-discrimination provisions of *GATT 1994* and the dispute remains a textbook application of Article III:4. WTO members are free to maintain a regulatory system for imported and domestic product provided it does not discriminate against imported product

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14 This requires members to accord imported products of other members 'treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use'.

15 WT/DS161/AB/R, [145].

16 WT/DS161/AB/R, [147] and [149].

17 WT/DS161/AB/R, [182].

in terms of competitive opportunities. The Appellate Body also emphasised that the intervention of some element of private choice does not relieve a member of responsibility if its regulatory system resulted in less-favourable treatment for imported product.

In terms of domestic implications, Korea is Australia's third largest export market for beef. Implementation by Korea of the WTO rulings has the potential to increase exports by $200 million a year.[18]. The case highlighted the tactical use of the WTO dispute settlement system to enforce WTO obligations. Under its Uruguay Round commitments, Korea had undertaken to liberalise its heavily regulated imported beef market, including by eliminating a range of restrictions by 1 January 2001. Initiation by Australia of a WTO complaint in 1999 therefore served to secure WTO findings of inconsistency prior to this date.

The case demonstrated the effectiveness of the government-industry partnership approach in managing Australia's WTO disputes. Throughout the dispute, the Department of Foreign Affairs and Trade (DFAT) worked closely with the Department of Agriculture, Fisheries and Forestry (AFFA) and exporters such as Meat and Livestock Australia in gathering evidence on the Korean regulatory system, identifying areas of potential WTO inconsistency, preparing legal submissions and engaging in negotiations with Korea on implementation. Industry provided detailed market information on the application of the Korean measures, and advised the Australian delegation at oral hearings in Geneva. The conduct of the case remains a model for the management of future WTO disputes in which Australia is a complainant.

Australia: Howe Leather

The provision of subsidies by government to an enterprise or industry is subject to disciplines under Article XVI of *GATT 1994* and the *Agreement on Subsidies and Countervailing Measures* (the *SCM Agreement*).[19] The *SCM Agreement* defines a subsidy as a financial contribution by a government or public body, or any form of income or price support, which confers a benefit. A subsidy must also be 'specific' to be subject to the disciplines of the *SCM Agreement*, that is, it must be available only to an enterprise, industry, or group of enterprises or industries, within the jurisdiction of the granting authority.[20]

The *SCM Agreement* sets out three categories of subsidies. 'Prohibited' subsidies are subsidies contingent in law or in fact upon export performance or the use of domestic over imported goods. 'Actionable subsidies' are subsidies which cause adverse effects to another member, such as injury to the domestic industry of another member. 'Non-actionable' subsidies are either non-specific subsidies or specific subsidies comprising, for example, research and development assistance and assistance to disadvantaged regions.

The *SCM Agreement* provides remedies where a measure is found to be a prohibited or actionable subsidy. For prohibited subsidies, the member must 'withdraw the subsidy without delay'. For actionable subsidies, the member must 'remove the adverse effects of the subsidy or withdraw the subsidy'. Failure to comply with WTO rulings gives rise to the right for the complaining member to apply WTO-sanctioned countermeasures (retaliation) against the responding member. A non-actionable subsidy does not give rise to any remedy or retaliation rights.[21]

The Howe Leather dispute

The *Howe Leather* dispute involved a complaint by the United States against payments made by the Australian government, in the form of a grant and a loan, to the Howe Leather company. In May 1999, a panel found the grant constituted a prohibited export subsidy and requested Australia to 'withdraw the subsidy' as required under Article 4.7 of the *SCM Agreement*. Subsequent measures taken by Australia to implement the WTO findings

18 Minister for Trade, 'WTO: Korea Beef: Agreement Reached on Implementation', media release, 23 April 2001.

19 It is noted that agricultural subsidies are subject to their own disciplines under the WTO Agreement on Agriculture.

20 Articles 1 and 2 of the SCM Agreement.

21 For a more detailed discussion of the SCM Agreement, see <www.wto.org/english/tratop_e/scm_e.htm>.

were also found to be WTO inconsistent. In particular, the implementation panel ruled that Australia had failed to 'withdraw the subsidy' by failing to retrospectively recall the $30 million grant already paid to the company. In May 2000, Australia and the United States reached a mutually agreed solution settling the dispute and removing the threat of retaliation against Australian exporters.

In making its findings on remedy, the panel rejected arguments by all parties, including the United States, that 'withdraw the subsidy' did not have retrospective effect. In the panel's view, the remedy of 'withdraw the subsidy' was intended not merely to counteract future adverse trade effects, but also to enforce the absolute prohibition on export subsidies.[22] The panel considered that retrospectivity was necessary to provide an effective remedy for subsidies already paid in the past, for which there was no continuing export contingency.[23]

International and domestic implications

The implementation of the panel's findings on retrospective remedy attracted intense criticism by members at the DSB meeting of 11 February 2000. In the view of most members, there was no basis for retrospective remedies either in prior GATT practice, or under the WTO Agreements. Such remedies were inconsistent with the object and purpose of the multilateral trading system which was for securing of future trade opportunities rather than punishing members for past actions. If followed by future panels, the *Howe Leather* findings on retrospectivity would open WTO members to potential challenge on a whole range of historical measures. A subsidy paid 50 years ago, and subsequently found to be a prohibited subsidy, could now have to be repaid irrespective of whether or not the company or even the industry still existed.

The panel's findings raised important concerns on constitutional and democratic governance. There are significant legal constraints on member governments securing repayment of monies already paid to private companies legally and in good faith. Action by member governments to recall past subsidies could give rise to claims within their own internal legal systems for compensation or damages. While it is accepted under customary international law and in the WTO that countries cannot rely on domestic law to justify non-performance of international obligations, it serves no purpose of the WTO to enforce a remedy which a country could theoretically never be able to comply with, and to sanction retaliation in the event it fails to do so.[24]

The *Howe Leather* findings were subsequently examined in the Brazil and Canada – Aircraft Subsidies disputes. The complainants in both cases were at pains to criticise the *Howe Leather* findings and to emphasise that they were not seeking a retrospective remedy. Both panels considered it outside their mandate to make findings on remedy not requested by the parties and addressed only those claims made to them.[25] The cases highlight the marked reluctance of complainants — given the potential implications on their own measures — to claim retrospective withdrawal of subsidies. Canada's comments at the DSB meeting of 11 February 2000 may likely prove accurate. In the absence of an Appellate Body ruling, the *Howe Leather* findings on retrospectivity will be simply treated by members as 'a one-time aberration of no precedential value'.[26]

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22 WT/DS126/RW, [6.33]-[6.34].

23 WT/DS126/RW, [6.35].

24 The arbitrators in *EC – Bananas* considered that the authorisation to suspend concessions or other obligations (retaliation) is a temporary measure pending full implementation of WTO findings by the Member. This temporary nature indicates that the purpose of countermeasures is to *induce compliance* and not to provide a punitive remedy. The arbitrators also assessed the level of retaliation on the basis of *potential* or future trade opportunities as opposed to past injury: WT/DS27/ARB, [6.3] and [6.11].

25 WT/DS46/RW, fn 17; WT/DS70/RW, [5.46]-[5.48].

26 WT/DSB/M/75, at 8.

United States lamb safeguards

As part of their WTO obligations, members undertake to maintain tariff and other market access concessions as set out in their respective tariff schedules. Article XIX of *GATT 1994* and the *Safeguards Agreement* however permit members to take emergency safeguard action and temporarily restrict imports of a product where an unexpected surge in imports causes or threatens to cause serious injury to a domestic industry. These set out detailed requirements which must be satisfied for the application of a safeguard measure. Given the extraordinary nature of the remedy — the suspension of WTO concessions not dependent on any 'unfair' trade action — panels and the Appellate Body will narrowly examine compliance by members implementing safeguard measures with the WTO requirements.[27]

The United States: lamb dispute

In October 1999, Australia and New Zealand initiated a WTO complaint against a safeguard measure — in the form of a restrictive tariff rate quota and increased tariffs — introduced by the United States on imports of lamb meat from Australia and New Zealand. This was found by a panel to be inconsistent with the United States' obligations under Article XIX of *GATT 1994* and the *Safeguards Agreemen*t and the United States appealed the panel's findings. In May 2001, the Appellate Body upheld the panel's findings that the United States measure was WTO inconsistent.

In summary, the panel and the Appellate Body found that: the United States failed to demonstrate that imports were the cause of the injury to its industry; the United States' definition of the domestic industry was too broad; the United States failed to demonstrate that the increase in imports was unexpected; and that the data collected by the United States in its safeguard investigation was inadequate to support its conclusions. The Appellate Body also upheld Australia's cross-appeal claim that the United States failed to demonstrate a threat of serious injury.[28] The panel and Appellate Body findings were adopted by the DSB in May 2001 and the United States is now required to bring its measures into WTO conformity.

In terms of jurisprudence, the Appellate Body clarified a number of key legal issues on the application of safeguard measures, including on the definition of domestic industry under Article 4.1(c) of the *Safeguards Agreement*. This provides that in determining injury or threat of injury, the 'domestic industry' shall be defined as *inter alia* 'the producers … of the like or directly competitive products'. The definition of domestic industry is therefore relevant in determining the scope of a safeguard investigation and the application of a safeguard measure.

The United States' investigation report on lamb meat identified only one 'like product' (lamb meat) but went on to define the domestic industry of lamb meat as including growers and feeders of live lambs, as well as processors of lamb meat. The United States did not consider whether live lambs and lamb meat were 'directly competitive' products. The United States sought to justify its approach on the basis that there was a 'continuous line of production' between the live lambs and the processed product of lamb meat, and that there was a 'substantial coincidence of economic interests' between growers and feeders of live lambs and processors of lamb meat.

Australia and New Zealand argued that under the WTO rules, producers of an article are simply those who make *that* article. Accordingly, growers and feeders of live lambs produce live lambs, and processors of lamb meat produce lamb meat. The United States' approach would leave it to the discretion of importing members how far upstream or downstream the production chain of a given 'like' end product constitutes the 'domestic industry'.

Australia's and New Zealand's arguments were upheld by the panel and the Appellate Body. In the Appellate Body's view, the sole focus of a domestic industry inquiry is to identify the *products* at issue and whether they were 'like', rather than the *processes* by which those products were produced. Accordingly, the United States

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27 *Argentina – Footwear*, WT/DS121/AB/R, [93]-[94].

28 WT/DS177/AB/R.

acted inconsistently under Article 4.1(c) by including producers of live lambs in the domestic industry of lamb meat.[29]

International and domestic implications

The Appellate Body's findings on domestic industry, causation, unforeseen developments, data representativeness and threat of serious injury served to clarify the legal scope of these requirements. In narrowly construing these legal tests, the Appellate Body reaffirmed safeguard action to be an extraordinary remedy to be applied only in exceptional circumstances.

Together with the positive win on *Korea beef*, the Appellate Body's findings on lamb underlined the importance of the WTO dispute settlement system in protecting and advancing Australian trade interests. While the United States has yet to bring its measure into conformity, the rulings are a significant win for Australian industry which had estimated the cost of the safeguard measure to local industry to be some $30 million.[30] Industry has also assessed that elimination of the measure could also see a substantial expansion in Australia's $150 million export market in the United States.

Conclusion

The six-year period from the entry into force of the WTO in January 1995 has been described by many commentators as the high water mark of WTO jurisprudence. This period saw the gradual 'bedding down' of the new *WTO Agreements* as panels and the Appellate Body interpreted and applied new provisions covering areas not previously covered by the GATT. Australia's active participation in WTO disputes — both as a principal party and as a third party — placed it at the forefront of the development of WTO law.

In the *Salmon* dispute, Australia successfully argued for an interpretation of *the SPS Agreement* that reflected the scientific and practical realities of national quarantine decision-making. Similarly in *United States: Lamb*, Australia's legal reasoning was followed by the panel and Appellate Body in interpreting key provisions of the *Safeguards Agreement*, including on domestic industry and causation. Australia's participation as a third party in 19 disputes influenced the development of WTO rules in areas such as agricultural export subsidies, the relationship between trade and the environment and trade-related intellectual property.

Finally, the paper highlights the broad scope of WTO rules which cover not just traditional areas of customs and tariffs, but also industry development, agriculture, environmental protection, food safety, quarantine protection and intellectual property. WTO rules impact on a wide spectrum of government decision-making and, as demonstrated in the *Salmon* dispute, across all levels of government. Potentially any government measure with an impact on international trade can be subject to WTO scrutiny.

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29 WT/DS177/AB/R, [94]-[95].

30 *Australian Financial Review*, Thursday 3 May, 2001, p 3.

Australia as Defendant in the WTO: International and Domestic Law Intertwined

Daniel Lovric*

> [T]he domestic and international rules and legal institutions of economic affairs are inextricably intertwined. It is not possible to understand the real operation of either of these sets of rules in isolation from the other. The national rules (especially constitutional rules) have had enormous influence on the international institutions and rules. Likewise, the reverse influence can often be observed.
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> *John Jackson (1997).*[1]

The focus today has mostly been on antipodean contributions to World Trade Organisation (WTO) law in the international arena. In this talk I will move this focus towards the domestic arena. Domestic law, particularly constitutional law, has great significance for the implementation of WTO law.

This is especially noticeable in relation to trading giants like the United States and the European Community (EC). Domestic US legislation, whether on trade remedies, negotiating authority or otherwise, has a huge impact on WTO law, and vice versa.[2] The constitutional structure of the EC has also made a mark on WTO law, particularly in relation to European accession to the WTO through a mixed agreement including the Community and its member states.[3] But today I'll focus on Australian domestic law, and in particular, constitutional law.

My talk will cover a number of issues. First, it will identify some areas of the Australian Constitution that are of particular relevance to WTO rules. Second, I will discuss some of these rules in the context of WTO dispute settlement, and in particular, the compliance Panel decisions in the *Australia: Salmon*[4] and *Australia: Automotive Leather*[5] cases. In conclusion, I will draw some general points from this discussion about the way in which WTO and domestic law becomes intertwined.

Some areas of the Australian Constitution that are of particular relevance to WTO rules

The Australian Constitution contains many rules of particular relevance to Australia's WTO obligations. Perhaps the most prominent of these provisions are those that encourage a free market within Australia. Provisions such

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1 J Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1997) 26.

2 Ibid, at p.99, 256, 287, Jackson, J. & Croley, S., "WTO Dispute Procedures, Standard of Review and Deference to National Governments" (1996) 90 *AJIL* 193, also in Jackson, J., *The Jurisprudence of GATT and the WTO*, Cambridge University Press, (2000), at p.133.

3 Jackson (1997), op cit n 1, at p.103, Kuijper, P., "The Conclusion and Implementation of the Uruguay Round Results by the European Community" (1995) 6 *EJIL* 222, Pescatore, P., "Opinion 1/94 on 'Conclusion' of the WTO Agreement: Is there an Escape from a Programmed Disaster?" (1999) 38 *CML Rev* 387.

4 Australia: Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada [the "Salmon Compliance Report"], WT/DS18/RW, adopted 20 March 2000. The previous Appellate Body report in the dispute was Australia: Measures Affecting Importation of Salmon, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

5 Australia: Subsidies Provided to Producers and Exporters of Automotive Leather: Recourse to Article 21.5 of the DSU by the United States [the "Leather Compliance Report"], WT/DS126/RW, 21 January 2000. The previous Panel report in the dispute was Australia: Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R, adopted 16 June 1999.

as section 92: the prohibition of discriminatory barriers to interstate trade, commerce and intercourse; section 90: the prohibition of state and territory customs duties etc; section 99: the prohibition on discrimination or preference by the Commonwealth, all serve to discourage barriers to trade *inside* Australia. Other examples include section 117: prohibiting discrimination based on the residency of a particular state, and section 51(ii): prohibiting discriminatory taxation by the Commonwealth.

These provisions are generally limited to trade *within* Australia. Foreign goods (and perhaps services) can receive that protection once they have crossed Australia's border and become part of internal trade and commerce. For example, section 92 of the Constitution discourages barriers to interstate movement of foreign goods usually only after they have entered Australia.[6] Discriminatory barriers to the movement of such goods will have to meet the relevant tests for social justification — as set out by the High Court in the *Tasmanian Crayfish*[7] and *South Australian Bottles*[8] cases — namely, that the barriers are appropriate and adapted to addressing regulatory goals, and that the impact on interstate trade is incidental and not disproportionate to the achievement of those goals.[9] I will come back to section 92 again in the context of the *Salmon Case*.

So we can see, Australian constitutional rules relating to the internal free market can provide a useful way to encourage compliance with WTO rules, although that encouragement is rather limited. Contrast this example with other constitutional provisions that have the potential to conflict with WTO goals. One possible example is the acquisition of property provision. I'll talk about that later in the context of the *Automotive Leather Case.*

More significant in this regard is the federal balance of power set out in the Constitution. It is well recognised that the federal balance places certain practical limits on the extent of Australia's participation in treaty regimes.[10] The WTO is no exception in this regard: the difficulties become even more acute here because the WTO does not allow federal reservations,[11] and WTO federal clauses give federal states little room to move in resolving domestic constitutional disputes.[12]

For example, there have been suggestions that Australia has been reluctant to enter into the *Agreement on Government Procurement* because of concerns about the Commonwealth's power to implement relevant

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6 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

7 *Cole v Whitfield* (1988) 165 CLR 360.

8 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

9 Hanks, P., *Constitutional Law in Australia*, 2nd Ed., Butterworths, (1997), at p.524, Zines, L., *The High Court and the Constitution*, 4th Ed., Butterworths, (1997), at p.143.

10 Opeskin, B., "International Law and Federal States", in B Opeskin & D R Rothwell (eds.), *International Law and Australian Federalism*, Melbourne University Press, (1997).

11 Article XVI.5 of the Marakesh Agreement Establishing the WTO provides:

No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

In general, the Multilateral Trade Agreements make the consent of other WTO members a precondition for an effective reservation (for example, see article 15.1 of the *Agreement on Technical Barriers to Trade*, article 18.2 of the *Agreement on Trade-Related Investment Measures*, article 8.1 of the *Agreement on Import Licensing Procedures* and article 32.2 of the *Agreement on Subsidies And Countervailing Measures*).

12 The *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* confirms that GATT article XXIV:12 makes central governments "fully responsible" for the actions of sub-federal units. The *Australia: Salmon* dispute was one of the first opportunities for a WTO tribunal to apply a WTO federal provision (in the context of the *SPS Agreement*). The Panel dismissed arguments limiting the obligations of a federal government in relation to sub-federal units, placing particular reliance on the general rules of public international law; *Salmon Compliance Report*, op cit n 4, at paragraph 7.12.

obligations in relation to state governments.[13] Similarly, the federal balance might dampen Australia's enthusiasm to make GATS commitments for service sectors mainly regulated by the states, such as professional services.[14]

Of course, these difficulties are not necessarily a bad thing; that is what having a federal balance is all about. In any case, such difficulties can be resolved through Commonwealth-state consultative procedures. Nevertheless, the range of potential conflict is likely to increase. WTO subject coverage is expanding: to cover competition rules, investment, environmental regulation and the like.[15] To some extent, this expansion will be matched by an expansion of the Commonwealth's external affairs power.[16] But in many areas, the Australian Constitution will compel the Commonwealth and the states to reach agreements in order to achieve WTO goals.

Australian constitutional rules in the context of WTO dispute settlement: the compliance Panel decisions in the *Australia: Salmon* and *Australia: Automotive Leather* cases.

The *Salmon* and *Automotive Leather* cases provide good examples of how Australia's constitutional rules can interact with the WTO *dispute resolution* system. In both cases, aspects of Australia's compliance obligations were linked to constitutional rules: in the *Salmon Case*, there was some convergence between WTO norms and the Constitution. In the *Automotive Leather Case*, there was a potential conflict.

In the *Salmon Case*, a WTO Panel ruled against aspects of Australia's quarantine standards for Canadian salmon. Tasmania was dissatisfied with the ruling, and set up its own quarantine regime. There was then a *second* Panel decision, which held that the Tasmanian measures were also inconsistent with Australia's WTO obligations under the *SPS Agreement*.[17] This of course raised some federal issues for Australia: how was the Commonwealth government to resolve tensions between a WTO Panel ruling and Tasmanian law?

The relevant point here is that section 92 of the Constitution seems to provide at least some basis for challenging the Tasmanian measures under domestic law. For such a challenge to succeed, it would have had to be shown that Tasmania's measures could not reasonably be considered to be appropriate and adapted to achieving the professed goals of protecting animal health. I am not going to discuss here whether such a claim would have succeeded: that would require a detailed analysis of the social justifications for the Tasmanian measure. Rather, I'm just using this as an example of the way in which a domestic constitutional rule (such as section 92) could be used to *support* WTO goals.

This issue was avoided in the end by Australia and Canada agreeing to settle the case. But the principles remain, and the issue is likely to surface again.

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13 One commentator at Australia's 1998 Trade Policy Review asked:

… whether these [GATS] commitments had caused internal difficulties between the Commonwealth and States and whether it was an issue of concern in the ongoing negotiations on disciplines in accountancy and professional services. She also asked whether the federal structure was relevant to the fact that Australia was not a member of the Agreement on Government Procurement.

The Australian representative at the meeting replied that "Australia had not signed the *Agreement on Government Procurement* because it was felt that it lacked commercial benefits for Australian exporters in its current form". Minutes of Meeting, Trade Policy Review Body, WT/TPR/M/41, 30 June and 2 July 1998.

14 Ibid.

15 Schott, J. (ed.), *Launching New Global Trade Talks: An Action Agenda,* Institute for International Economics, (1998).

16 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416; *Tasmanian Dam Case* (1983) 158 CLR 1.

17 Agreement on the Application of Sanitary and Phytosanitary Measures. See the Salmon Compliance Report, op cit n 4,, at paragraph 7.161.

Contrast this example with the *Automotive Leather Case*. Here, a WTO Panel ordered Australia to stop providing an export subsidy to a particular company, and also to recover previous payments of subsidy.[18]

The constitutional issue here relates to acquisition of property under section 51(xxxi) of the Constitution: which prevents the Commonwealth from acquiring property otherwise than on just terms in many cases. Would the recovery of subsidies already paid amount to such an acquisition? Again, I do not propose to analyse the exact scope of section 51(xxxi) here (although I do note that High Court cases in the past few years have made the outcome of section 51(xxxi) cases rather difficult to predict).[19] Instead, I'll just point out the *Automotive Leather Case* as an example of an Australian constitutional rule possibly conflicting with WTO dispute resolution procedures. The European Communities appeared to think so. In its third party submission in the *Automotive Leather Case*, it argued that the Panel's ruling would be ineffective, because "interference with private rights could give rise to claims within the internal legal systems of the Members …".[20]

As with the *Salmon Case*, this constitutional issue was avoided through an agreed settlement to the dispute. And in any case, this aspect of the Panel's ruling came in for some heavy criticism, and may not be followed in later cases.[21] But the general point is made: there can be friction between WTO rules and the Australian Constitution.

I'd like now to draw a number of general points from this discussion.

General points: intertwining of WTO and domestic law

I think we are likely to see WTO jurisprudence being cited in domestic debates about trade in Australia. This will happen on the intergovernmental level and in the courts. Australian legislation will increasingly be interpreted in the shadow of international trade rules. We have already seen this in the *Blue Sky Case*, in relation to the Australia-New Zealand Closer Economic Relations (CER) agreement.[22] The relevant legislation in *Blue Sky* has now been amended to exclude the relevance of WTO law, but this has not seen the end of the issue.[23] Similar provisions are still on the statute book.[24]

We might also see WTO law influencing the development of *constitutional* doctrine in Australia. Section 92 doctrine is a case in point. Section 92 has many conceptual similarities with WTO law: both are concerned with preventing trade barriers. This raises the interesting question: to what extent could, or should, section 92 jurisprudence gain inspiration from WTO legal concepts? US and European scholars have dealt with similar issues under their own constitutions.[25] Perhaps we will see the same thing happening in Australia. This gives

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18 *Leather Compliance Report*, op cit n 5, at paragraph 6.39.

19 Lukeman, A., "Acquisition of Property on Just Terms: The Indeterminate Scope of Section 51(xxxi) of the Constitution", Paper presented to Australian Constitutional Law Conference, 8 March 2000 (on file with author).

20 *Leather Compliance Report*, op cit n 5, Annex 3-2**,** European Community's Answers to Written Questions of the Panel, (1 December 1999), at paragraph 7.

21 Goh, G., "Australian Contributions to the Development of WTO Law" (2001) advance copy of ANZSIL Conference paper (on file with author), at p.10, Davey, W., "The Authority of the WTO dispute settlement system" (2001) 4 *JIEL* 79 at footnote 17.

22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

23 Rothwell, D., "Quasi-Incorporation of International Law in Australia: Broadcasting Standards, Cultural Sovereignty and International Trade" 27 *Federal Law Review* 527 (1999), at p.530-535.

24 Ibid.

25 Goodman, R., & Frost, J., "International Economic Agreements and the Constitution", Institute for International Economics, Working Paper 00-2, available at www.iie.com, (2000), Schaefer, M., "Twenty-First Century Trade Negotiations, the US Constitution, and the Elimination of US State-level Protectionism" (1999) 2 *JIEL* 71. For a comparison between section 92 jurisprudence and EC law, see Smith, P., "Free Movement of Goods Within the EC and S92 of the Australian Constitution" (1998) 72 *Australian LJ* 465.

rise to interesting issues. What weight would the High Court give to a WTO tribunal ruling on the extent of WTO obligations? Would it matter if the ruling was only that of a Panel, rather than the Appellate Body itself?

I will finish off with some thoughts about the relationship between WTO and domestic law. We will see that this relationship is highly *dynamic* — where domestic rules influence the development of international rules which in turn influence the development of domestic rules — in an ongoing cycle. So we might see WTO cases discussed in Australian courts,[26] and likewise, WTO tribunals might cite Australian decisions in cases involving Australia. This is not too far-fetched. WTO tribunals sometimes do refer to domestic cases (eg, in the *Canada Dairy Case*[27] and the *Bananas Case*[28]).

Some commentators are suggesting that we are seeing the emergence of an "international trade constitution", a complex transnational system of intertwined domestic and international rules about trade.[29] If so, the relationship between WTO rules and the Australian Constitution will become even more important than it is today.

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26 In *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 129 ALR 401, at p.415 the Full Federal Court of Australia noted:

As the case law points out, an important consideration in examining legislation intended to implement international agreements is to give weight to the construction which the international community would attribute to the relevant instrument or concept: see *Queensland v Commonwealth* (1989) 167 CLR 232 at 240. In the present case the decisions of the European Court of Justice and the views of the GATT Panel should be accorded substantial weight in the light of this principle.

27 Canada: Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103/R, WT/DS113/R, 17 May 1999, at paragraph 7.77.

28 European Communities: Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 9 September 1997, at paragraph 174.

29 See the writings discussed in Cass, D., "The Constitutionalization of International Trade Law: Judical Norm-Generation as the Engine of Constitutional Development in International Trade" 12 *EJIL* 39 (2001); also Jackson (1997), op cit n 1, at p.26.

Live Fish, Dead Fish, Patagonian Toothfish: Law of the Sea and International Environmental Law Regarding Fisheries Conservation, Management and Dispute Resolution

Fish or Foul: Can the Law of the Sea and International Fisheries Co-Exist?

Kevin Bray*

Introduction

Two recent reports, one by the Commission on Fisheries Resources of the World Humanity Action Trust and the other by the Food and Agriculture Organization of the United Nations (FAO), paint a sombre picture.[1]

- World production from capture fisheries has plateaued at about 90 million tonnes a year since the mid 1980s, with growth since then due to aquaculture. Some 90 per cent of global capture fisheries production takes place in areas of national jurisdiction.

- Global demand for fish is projected to grow at almost three million tonnes a year in the present decade, with supply unlikely to match this, resulting in real price increases and increased stress on capture fisheries.

- Where fisheries management is inadequate, the sustainability of fisheries is at risk.

- Despite fishing being the most dangerous job in the world, with 24,000 deaths a year, the multilateral conventions on fishing vessel (and fishers') safety have not entered into force and are unlikely to do so. (This, incidentally, means that keeping illegal operators off the seas on grounds of poor safety or lack of pollution controls is not supported by effective international instruments.)[2]

- There is a compelling need to accelerate the move from open-access fisheries to fisheries with clear, defined property rights and effective global, regional and national conservation and management instruments, laws and regulations — yet key international elements are yet to enter into force and illegal, unreported and unregulated (IUU) fishing[3] has become an increasing threat to fisheries and their related marine eco-systems. IUU fishing is by no means a problem limited to fishing on the high seas.

- Related to these concerns are questions and uncertainties in areas such as the global trading system — with potential conflicts between World Trade Organization (WTO) rules and trade-related measures driven by environmental and sustainability objectives — and also in food health and safety and the environment — where, for example, the debate over genetic modification is far from over.

- Global aggregations of fish production have concealed the decline in high-value species, with world supplies increasingly dependent on low-value species with highly fluctuating productivity.

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1 'Governance for a Sustainable Future – II: Fishing for the Future'. Report of the Commission on Fisheries Resources (World Humanity Action Trust) (2000); and 'The State of World Fisheries and Aquaculture', FAO, Rome (2000) <http://www.fao.org/sof/sofia/index_en.htm>.

2 'Report of the Joint FAO/IMO *ad hoc* Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters', Rome, 9-11 October 2000 (FAO Fisheries Report No 937 and FAO document COFI/2001/Inf.10). See in particular paras 20, 27, 29 and 35-37, where the joint working group notes that fishing vessels are either explicitly excluded from the provisions of those international maritime safety conventions that have entered into force, or are included in the provisions of other conventions that have however not yet entered into force and are unlikely to do so.

3 Documents related to IUU fishing and the international plan of action ('IPOA') to combat it are at <www.affa.gov.au/ecoiuuf> and under 'fisheries' on the FAO web site at <www.fao.org/>.

- Around 60 per cent of global fisheries are either fully exploited or experiencing declining yields, yet few countries have effective control over fishing capacity. Urgent action is required to end over-fishing and the further depletion of already threatened stocks.

- These problems are particularly acute for developing countries, which account for around 95 per cent of those engaged in the fisheries sector.

To quote the Commission on Fisheries Resources:

> [S]ome three-quarters of commercial fisheries are in need of management to restrict access to the stocks. In some cases this is already happening. In most, however, it does not yet happen or the limitations are not adequate, in which case it is simply a matter of time before such stocks collapse.[4]

Fisheries and the Law of the Sea

Faced with these problems, one might expect a concerted, cooperative international effort to develop, bring into effect and fully implement a comprehensive regime of binding fisheries instruments. To a significant extent, this has indeed been the case in terms of *development*. Effective *implementation* is, however, another matter.

International fisheries law, based on the United Nations Convention on the Law of the Sea of 1982[5] and the associated set of global and regional fisheries agreements and arrangements[6] does in principle offer an effective regime for the responsible, sustainable conservation and management of marine living resources. (One may want to argue — justifiably — that this regime needs 'modernising', particularly from the viewpoint of the application of the precautionary principle and the better recognition of fisheries as elements in large-scale, complex, bio-diverse eco-systems. However, that is a topic for another paper!)

The regime of international fisheries law provides for coastal state sovereignty and jurisdiction over the marine living resources within the exclusive economic zone (EEZ)[7] and for qualified freedom of fishing on the high seas outside the EEZ.[8] The key feature of that qualification is that states have a duty to cooperate with each other in ensuring the conservation and management of the living resources of the high seas.[9] In particular, they have an

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4 Above n 1 [1.4.4].

5 United Nations Convention on the Law of the Sea, 10 December 1982, reprinted (1982) 21 ILM 1261, hereinafter '1982 UN Convention'.

6 The principal elements of the overall regime of international fisheries law, developed to elaborate and support the 1982 UN Convention, include the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* ('FAO Compliance Agreement'), FAO, Rome 1995; the Agreement for the Implementation of the Provisions of [the 1982 UN Convention] relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 December 1995, hereinafter '1995 UN Fish Stocks Agreement'; the Code of Conduct for Responsible Fisheries, FAO, Rome, 1995, hereinafter 'FAO Code of Conduct'; and the many regional and sub-regional fisheries agreements and arrangements and organisations established to conserve and manage specified fisheries in many regions of the world, such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention for the Conservation of Southern Bluefin Tuna (CCSBT), the International Convention for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission Agreement (IOTC), the Northwest Atlantic Fisheries Organization (NAFO) and recently established conventions related to designated fisheries in the south-east Atlantic (SEAFO), the western and central Pacific (CWCPO) and the south-east Pacific (Galapagos Agreement).

7 Above n 5, arts 61 and 62.

8 Ibid arts 116-119.

9 Ibid art 117.

obligation to negotiate and cooperate as appropriate with other states whose interests are affected to establish regional fisheries organisations for the conservation of high seas living resources.[10]

This regime is based squarely on the need to balance the interests of all states, with a particular focus on those of coastal states. It further qualifies the freedom to fish on the high seas by making that freedom subject to the rights, duties and interests of the coastal states with respect to specified categories of living resources that are not confined solely to the high seas. The most important of these in terms of international fisheries are the stocks which straddle the EEZ and the highly migratory stocks, such as tunas and billfish, that range through and beyond both EEZs and the high seas.[11] This component of the overall regime has been among the more recent to be developed at the global level — and is the element most responsible for the current international legal difficulties discussed in this paper, particularly as the global principles have direct implications for many of the regional agreements which encompass important regional fisheries.[12]

The 1995 UN Fish Stocks Agreement gives explicit effect to the 1982 UN Convention's provisions for straddling stocks and highly migratory stocks. Opened for signature in 1995, it is currently only two ratifications short of the 30 needed for entry into force. Its provisions have raised many legal questions, most of which are beyond the scope of this paper.[13] However, its provisions on entitlements to participate in a fishery that is being managed through a regional fisheries management organisation (RFMO) are central to the paper and are discussed below.[14]

Why the 'foul'?

To coin a phrase, 'a funny thing happened on the way to last year's UN General Assembly debate on Oceans and the Law of the Sea'. The result was that the General Assembly's annual resolution on large-scale pelagic drift-net fishing, unauthorised fishing in zones of national jurisdiction and on the high seas, fisheries by-catch and discards and other developments was forced to a vote, in which some 44 states abstained, while 103 voted for the resolution.[15] Previous resolutions on this subject over close to a decade have generally been adopted by consensus with little if any controversy. So what led to an unusual departure from practice in the adoption of resolution 55/8?

The immediate cause is easily identified. Two regional agreements, recently finalised through international negotiation, were referred to in resolution 55/8. These are the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (CWCPO) and the Framework Agreement for the Conservation of Living Marine Resources in the High Seas of the South-east Pacific (Galapagos Agreement).[16]

Refusal by the resolution's sponsors to delete these references — which appear in the preamble, not the operative paragraphs — led to wholesale abstentions by most European states, Japan, the Republic of Korea and Mexico. It seems likely that, but for the resolution's rather innocuous *noting* the adoption of the Galapagos

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10 Ibid art 118.

11 Ibid arts 63.2 (straddling stocks) and 64 (highly migratory stocks).

12 Eg, the SEAFO and CWCPO conventions import, directly or by cross-reference, many of the key fishery conservation and management provisions of the 1995 UN Fish Stocks Agreement.

13 For some aspects of this, see W Edeson, 'Closing the Gap: The Role of "Soft" International Instruments to Control Fishing' (2000) 20 *Australian Year Book of International Law 1999* 83, 87-90; E Francks, '*Pacta Tertiis* and the [1995 UN Fish Stocks Agreement]' *FAO Legal Papers On-Line* No 8 June 2000 <www.fao.org/Legal/default.htm>; and D Bialek, 'Australia & New Zealand v Japan: Southern Bluefin Tuna Case' (2000) 1 *Melbourne Journal of International Law* 153, 160-161.

14 See in particular arts 8, 9, 11 and 17 of the 1995 UN Fish Stocks Agreement.

15 GA Res 55/8, first adopted as res A/55/L.11 on 30 October 2000.

16 See above n 6.

Agreement, many Latin American states — who strongly oppose the 1995 UN Fish Stocks Agreement on which the CWCPO is based — would probably have also abstained. This would have been consistent with the outcome of the first session of the new UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), in June 2000, where these states refused to accept language which called for all states to ratify the 1995 UN Fish Stocks Agreement.[17]

Why the concern over these two regional agreements? For the Europeans, both agreements are seen as having been negotiated on an exclusive basis by states apparently determined to deny European nations a *bona fide* seat at the negotiating table as equal participants. In both agreements, European Commission and European Union member state participation as original signatories was expressly excluded.[18] In the CWCPO, subsequent accession to the convention by *inter alia* the European Commission or a member state of the European Union requires the consensus of all contracting parties. Among other things, this raises the question of 'real interest', arising from the 1995 UN Fish Stocks Agreement, to which the paper will return.[19]

European concern over the Galapagos Agreement would also have been related to the EU's long-running dispute with Chile over swordfish. It is of particular interest that the subsequent negotiated resolution of this dispute[20] — which has avoided a potentially risky dual-track settlement involving both the WTO and the International tribunal for the Law of the Sea (ITLOS) — requires *inter alia* the negotiation of a new more inclusive multilateral agreement. On the face of it, this would appear to be a major concession to the European Union and a *de facto* recognition by Chile of the inadequacy of the Galapagos Agreement.

Japan, with Korea in support, has refused to sign the CWCPO. Japan feels the convention is inequitable as between Pacific coastal states and distant water fishing nations, it opposes the inclusion of measures for boarding and inspection of its fishing vessels on the high seas by inspectors from another state (which provision is modelled on that in the 1995 UN Fish Stocks Agreement which Japan also opposes) and it is not in favour of the CWCPO's recourse to the compulsory dispute resolution provisions of the 1995 Agreement (which are in turn those of Part XV of the 1982 UN Convention).[21] No doubt the arbitral decision denying jurisdiction in the southern bluefin tuna case, which turned on the tribunal's view on the applicable dispute settlement mechanism

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17 Accordingly, the Latin American States which voted for resolution 55/8, did so despite its also calling on states that have not done so to ratify or accede to the 1995 UN Fish Stocks Agreement. At UNICPOLOS in June 2000, these states had insisted on deleting from the formal record of matters to be proposed to the General Assembly any specific reference to the 1995 UN Fish Stocks Agreement and on qualifying a general reference to the role of regional fisheries agreements by describing them as 'other relevant international conventions *for those States which accept them*' (emphasis added — see UN General Assembly document A55/274 (July 2000), Part A, paragraph 16 and Part B, paragraph 19).

18 See Galapagos Agreement, art 16 and CWCPO, arts 34 and 35.

19 The European Union's sensitivity towards these agreements would have been amplified by a similar reference in resolution 55/8 to the new convention establishing a South East Atlantic Fisheries Organisation ('SEAFO'). The EU was involved in the negotiations for that convention from the outset and described SEAFO as *'the first organisation of this type to be created with [EU] participation since the adoption of the 1995 [UN Fish Stocks Agreement]. For the EU, it represents an exemplary application of the implementation of the international cooperation foreseen in this Agreement.'* (EU Press Release, 25 April, 2001).

20 See European Union Press Release (IP/01/116) of 25 January 2001 and Press Release of 21 March 2001 of the International Tribunal for the Law of the Sea (ITLOS/Press 45).

21 Despite the CWCPO's not having been negotiated under the auspices of FAO and not having been discussed by the Committee on Fisheries of FAO at its 24th Session in February-March 2001, Japan took the extraordinary step of expressing its deep concern over the CWCPO at the 120th Session of the FAO Council in June 2001, where it described the convention as 'illegitimate, irresponsible and discriminatory'. Australia, New Zealand and the USA strongly disagreed with Japan's assessment and questioned the appropriateness of the matter having been raised in the FAO Council. Korea and Thailand supported Japan's views. Sweden, on behalf of the European Union, confined its comment to a general remark on the need for 'open [fisheries] organizations' and that FAO should not support those that are not open. The FAO Council refrained from any formal expression of an opinion on the matter.

in that case,[22] has given Japan all the more cause to hold out against the compulsory procedures of the 1982 UN Convention being given effect through the 1995 UN Fish Stocks Agreement and the CWCPO.[23]

What other signs are there of unease about the direction in which international fisheries law is developing? To summarise:

- The effective operation of the overall regime is, in some ways, a victim of its own success. We have now put in place all the elements: the 1982 UN Convention, the 1995 UN Fish Stocks Agreement, the FAO Compliance Agreement and a plethora of associated agreements, voluntary codes and plans of action.[24] But with what effect? Many RFMOs have not yet faced the hard decisions involved in implementing fisheries conservation and management measures and the difficulty of doing so should not be underestimated.[25] For the few that have, difficulties have been encountered. For example, the International Commission for the Conservation of Atlantic Tunas (ICCAT) has been attempting for several years, so far without success, to resolve major differences among its members over the allocation of the total allowable catch.[26]

- RFMOs are facing another major dilemma. On one hand, they rail against — and implement measures to deter — illegal, unreported and unregulated fishing by non-parties in their areas of competence. On the other hand, while they appear genuine in inviting such non-parties to join their organisations and adhere to their conservation and management measures, they are generally reluctant to offer those non-parties a reasonable share of the agreed total allowable catch.[27] This creates a strong disincentive to non-party participation in the RFMO and a corresponding incentive to non-parties to continue to fish outside and contrary to the RFMO's rules. Mexico is an example of a country which sees itself as a victim of this

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22 *Southern Bluefin Tuna Case (Australia and New Zealand v Japan), Jurisdiction and Admissibility* (Arbitral Tribunal constituted under Annex VII of the 1982 UN Convention), Award of 4 August 2000, on the internet at www.worldbank.org/icsid/bluefintuna/award080400.pdf). Also see D Bialek, above n 13 at 160-161.

23 Japan's general disaffection with certain regional fisheries agreements was particularly evident in the negotiations for the IPOA on IUU fishing, where it insisted on qualifying all references to RFMOs by inserting the word 'relevant' ahead of the words 'regional fisheries management organisation[s]'.

24 In addition to the international instruments mentioned at above n 6, several international plans of action ('IPOA'), concluded in the last two years under FAO auspices, provide soft law mechanisms for responsible fishing practices. In particular, an IPOA to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ('IPOA-IUU') was adopted by the Committee on Fisheries of FAO in March 2001 and endorsed by the FAO Council in June 2001.

25 For example, the new Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, to be established under the CWCPO, will have to resolve the disparate interests of a large number of members in multi-species fisheries. This would seem to be several orders of magnitude more complex than the (seemingly) relatively straight forward task of Australia, New Zealand and Japan agreeing a total allowable catch for a single species — southern bluefin tuna! Moreover, Japan's dissatisfaction with the terms of the CWCPO (see above n 21) and its refusal to date to sign it, does not augur well for satisfactory negotiations over conservation and management measures in the western and central Pacific ocean, where Japanese fishing vessels continue to take significant catches.

26 ICCAT established a working group on allocation criteria in 1998, but has to date been unable to agree to an effective new basis for allocating total allowable catches to ICCAT member states. ICCAT resolutions and decisions may be seen on the internet at www.iccat.org.es/.

27 The CCSBT has had an Action Plan since 1998, aimed at encouraging the three non-Parties taking significant quantities of southern bluefin tuna outside the SBT convention — Chinese Taipei (Taiwan), the Republic of Korea and Indonesia — to become Parties to the convention and/or fish in accordance with its provisions. Progress in the negotiations to this effect was very slow, primarily due to the non-Parties being unwilling to accept the catch allocations being proposed by the CCSBT, though agreement in principle was reached in recent months. In ICCAT, the imposition of trade-related measures against Panama, a non-Party, led eventually to Panama's accession on the basis *inter alia* of its deregistration of the bulk of its fleet of tuna fishing vessels. However, many of the fishing vessels that had fished outside ICCAT's conservation measures under Panamanian flags of convenience simply reflagged to other non-Party states when Panama decided to comply with ICCAT rules.

nature.[28] Gaining Mexican support for strong measures to combat illegal, unreported and unregulated fishing in the IPOA-IUU was made all the more difficult because of this perceived discrimination. One of the perverse results of the impasse over catch allocation rights is that, faced with the 'illegal' fishing of non-parties and their threat to the fisheries under the RFMO's jurisdiction, Parties come under strong national industry pressure to agree to catch levels that exceed sustainable limits — on the basis that 'if you can't beat them, join them'. This is a path to rapid collapse of the fisheries.

- Current practical application of the 'real interest' provisions in the 1995 UN Fish Stocks Agreement in restricting entry into RFMOs has a similar effect. Why should prior fishing history be regarded as the primary determinant of 'real interest' and the *sine qua non* of catch allocations? It rewards those fishers (and their states of nationality) who, often in a wholesale, unregulated race to exploit a new stock, ignore the requirements of responsible, cooperative fisheries conservation and management. It also has the potential to doubly reward opportunistic fishing operators who establish multi-state histories through re-flagging some of their vessels to other states, including states that operate open registries (flags of convenience).[29]

- International fisheries law has largely failed to address effectively the problem of flag state non-compliance.[30] Flagging or re-flagging fishing vessels to non-parties of RFMOs, usually under flags of convenience (FOC) and often associated with operators whose true identity is hidden behind a corporate veil, is ridiculously easy — in some cases no more than a few moments' work on the internet.[31] For all practical purposes, the international community has disregarded the 1982 UN Convention's requirement for a 'genuine link' between a vessel and the state whose flag it is flying.[32] Efforts by RFMOs to limit non-party fishing in their areas of jurisdiction through port state and trade-related measures have to date met with only partial success. The new international plan of action to combat IUU fishing (IPOA-IUU) gives particular attention to these measures, and it is to be hoped that they will be widely supported and implemented.[33]

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28 Mexican attempts, albeit late in the process, to gain a seat as a full participant at the CWCPO negotiating table were unsuccessful. Informal advice from Mexican officials in the margins of the negotiations for the IPOA-IUU was that Mexico was concerned at the possibility that, should it continue to be denied a right of accession to that convention and if it were to fish in the CWCPO area of jurisdiction, it would be regarded as fishing illegally and contrary to the CWCPO.

29 E J Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms', (2000) 15 *International Journal of Marine and Coastal Law* 475-531, suggests that convincing arguments on giving substantive meaning to 'real interest' are wanting, that state practice in the use of 'real interest' to limit participation in an RFMO has not been established and that, accordingly, the approach adopted in the CWCPO is 'an exception'.

30 The international community's failure to support a specific instrument to directly address the lack of effective flag state control of fishing vessels has been recorded by Gerald Moore, the former Legal Counsel of FAO, in G Moore, 'The FAO Compliance Agreement', in the proceedings of the international conference *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations*, Rome 16-17 March 2000 (co-hosted by FAO and the Center for Oceans Law and Policy of the University of Virginia School of Law), Kluwer Law International (2000), hereinafter 'COLP/FAO Proceedings'.

31 For example, Mr Eui-Ku Kang, a resident of Korea, claims to offer a vessel registration service as Honorary Consul or Deputy Registrar of Belize, Panama, Portugal, Honduras and Cambodia, with a turn-around of 24 hours or less (see www.cosmos@cosmoscom.co.kr). International efforts to achieve better compliance with flag state responsibilities by establishing more rigorous boarding and inspection regimes (such as in Articles 21 and 22 of the 1995 UN Fish Stocks Agreement) have been largely frustrated by a disposition by many states to avoid the entry into force of such mechanisms.

32 A consequence of the ITLOS award in the *MV Saiga* (No 2) case is that a flag state has absolute discretion in establishing the conditions for granting its nationality to a ship and these conditions are not opposable by any other state (see paragraphs 63-66 and 83 of the ITLOS award on the *MV Saiga* (No 2) case, on the internet at www.un.org/Depts/los/Judg_E.htm).

33 See IPOA-IUU, paragraphs 52-76, in Appendix E to FAO Council document CL 120/7 (FAO, Rome, May 2001).

Although soft law in the IPOA-IUU, they can be given binding effect through a combination of national and RFMO legislative and regulatory actions.

- In the current climate of heightened international sensitivity over the respective fisheries-related rights and duties of coastal states and distant water fishing nations, the negotiation of international instruments has become ripe for 'legal overkill'. To some extent, this is a positive sign of the strong interest countries are taking in international fisheries developments. However, it manifests itself mainly in terms of protective strategies, aimed more at guarding perceived national interest than at ensuring the long-term sustainablity of fisheries through responsible fishing behaviour. This was a feature of elements of the recent negotiations for IPOA-IUU, despite that plan clearly being a voluntary, soft law instrument.[34]

- Underlying some of these legal contortions is an emerging set of 'contradictions' in the 1982 UN Convention's fisheries regime. There are, for example, inherent difficulties in reconciling the sovereign rights of coastal states over the exploitation of fisheries within their EEZs with contemporary interpretations of their obligations in Part XII of the Convention to protect and preserve the marine environment.[35]

Other current developments affecting international fisheries are further complicating the climate of international cooperation that is central to the 1982 UN Convention. On one hand, for example, Japan is seeking to garner support for 'studies' of the interactions between marine mammals and fisheries and for a conference on more equitable access to the living resources of the Antarctic.[36] Both of these are thinly veiled attempts by Japan to promote its distinctive views on the need to catch more whales, ostensibly to restore the fish stocks they claim are being decimated through whale predation.[37] On the other hand many states are nervous about environmentally inspired actions, such as unilaterally imposed trade measures,[38] as in the tuna/dolphin case in the WTO,[39] and the largely non-government organisation-driven (NGO) efforts to have several important commercial fish species placed on Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[40] Among other things, these issues send the lawyers scurrying for protective clauses in relevant international instruments. This engenders a climate of 'legal protectivism' that is largely inimical to effective international cooperation based on an equitable balance of all interests.

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34 For example, a straight forward draft provision proposed by the European Union on coastal State measures to combat IUU fishing which read '[e]ach coastal State should implement measures to prevent, deter and eliminate IUU fishing in the exclusive economic zone' was, after extensive debate, elaborated to become '[in] the exercise of the sovereign rights of coastal States for exploring and exploiting, conserving and managing the living marine resources under their jurisdiction, in conformity with the 1982 UN Convention and international law, each coastal State should implement measures to prevent, deter and eliminate IUU fishing in the exclusive economic zone.'

35 For a refreshingly contemporary discussion by one international jurist on such 'contradictions', see R Wolfram, 'The Role of the International Tribunal for the Law of the Sea', in COLP/FAO proceedings, Kluwer Law International (2000).

36 See FAO Council document CL 120/7, paragraphs 39 and 119 (FAO, Rome, May 2001).

37 Japan's approach to this issue appears to be based on an erroneously simplistic 'linear' model of marine mammal/fisheries relationships that ignores the whole range of complex eco-system interactions affecting *inter alia* fish stocks.

38 Concern at this possibility gave rise to a (successful) Mexican-led campaign to ensure that the international plan of action On IUU fishing eschewed unilateral measures.

39 The official records on WTO disputes may be seen on the WTO internet site www.wto.org/.

40 States appear to have become wary of the possible use of CITES to proscribe trade in commercially valuable fish species, to the extent that CITES-based action against even clearly endangered species, such as the great white shark, was not approved by the CITES Conference of the Parties in Kenya in April 2000.

Restoring co-existence

In this climate of competitive non-cooperation, in which the existing legal framework is subject to the pressures described above, what scope is there for a genuine shift to responsible fishing practices as the norm for the conservation and management of global fisheries?

First, there are several practical approaches that could be taken within current legal instruments. These include incentives and sanctions. (It would seem both kinds of measures are needed since incentives alone are likely to reward both deserving and undeserving alike, while sanctions are notoriously difficult to target and implement effectively in an international context.)

Incentives worthy of consideration include:

- A more inclusive approach to interpreting what constitutes a 'real interest' in a fishery. From a purely pragmatic perspective, it is surely better to minimise the number of countries operating outside a regional fisheries organisation, if for no other reason than that they can be far more closely monitored and influenced from within than if they remain on the outside in an attitude of antagonism to the regional organisation.

- A reduction in the significance accorded to fishing history in the determination of catch shares in a regulated fishery. Allocations on the basis of fishing history are not necessarily equitable or responsible, particularly as they tend to reward the 'pioneer' fishers irrespective of the degree of responsibility they exhibited in initially exploiting the fishery. In effect, giving undue weight to fishing history establishes and legitimises through state practice a quasi-legal system that is not necessarily conducive to the sustainable development and long-term viability of a fishery. Other factors that could be given weight in allocating catch shares could include the prior standing of the state as a responsible fishing nation: in terms, for example, of its record in applying the precautionary principle, in avoiding re-flagging, in not licensing vessels with a prior history of non-compliance and in operating in a manner consistent with (for example) the principles of article 5 of the 1995 UN Fish Stocks Agreement[41] (or their equivalent in other global or regional instruments).

- Ensuring commercial fishing operators contribute directly to the costs of managing the fishery at a level commensurate with the benefits they derive. Apart from public policy equity, this will ensure the operators better understand the costs involved and the relationship between effective management and the sustainability of the fishery.

- Taking some pressure off capture fisheries by fostering new developments in sustainable aquaculture.[42]

- Providing developing countries with technical, legal and financial support to enable them to participate on a more equal footing in the implementation of measures to protect their own coastal fisheries and to deter foreign IUU fishing in their areas of national jurisdiction.

- Perhaps, more controversially, by examining the underlying causes of FOC operations, which are overwhelmingly undertaken by developing countries, and consider whether they may be receptive to economic incentives that would reduce or eliminate their FOC operations.

Disincentives that could complement and reinforce these incentives include:

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41 Article 5 sets out general principles for the conservation and management of straddling fish stocks and highly migratory fish stocks. It should be possible to elaborate reasonably objective benchmarks against which a state's performance in satisfying these principles could be measured. Moreover, the principles need not be limited to straddling or highly migratory fish stocks; they could have general application to the conservation and management of virtually any fish stocks subject to international law.

42 In this context, Australia has played a leading part in the recent establishment of a Sub-Committee on Aquaculture of the Committee on Fisheries of FAO.

- A concerted international effort to implement in full the new IPOA on IUU fishing. In particular, states should legislate, and RFMOs should adopt binding conservation and management measures, to implement more effective port state controls (including through the development of new regional agreements or memoranda of understanding (MOUs) on port state measures) and new forms of trade-related measures to prevent fish or fish products obtained through IUU fishing from entering markets. Other measures to be implemented include the state control of nationals and the adoption of new standards of transparency in the operations of fishing companies and the disclosure of corporate ownership structures.

- Other 'disincentives' in the form of more effective strictures against irresponsible fishing, arising from the more coherent and multi-faceted development and implementation of national, regional and global measures. In general, states and the international organisations they create, including UN bodies, are notoriously poor in ensuring coherence and consistency as between, for example, fisheries, environmental and maritime instruments. For too long, some outcomes of say FAO fisheries meetings on one hand and the Commission on Sustainable Development and the UN General Assembly law of the sea or environmental meetings on the other hand, have been dissonant due to the lack of effective consultation and coordination. Redressing this is almost entirely a matter for states.[43]

Fostering the progressive development of new norms in international fisheries

Much has been speculated in the literature on whether, and to what extent, the 1995 UN Fish Stocks Agreement has pushed international fisheries law beyond the norms of the 1982 UN Convention. In particular, some have argued that the Agreement's provisions on non-participants in an RFMO and on boarding and inspection on the high seas by inspectors authorised by a state other than the flag state of the vessel under inspection, do represent progressive development in international fisheries law, in particular by modifying the principle of *pacta tertiis*. Other writers, however, have argued, through careful analyses of these provisions, that they apply only as between parties to the 1995 Agreement. If this is so, as seems likely, then the well-known 'free-rider' problem remains as an impediment to responsible fishing and an incentive to FOC operations and IUU fishing.[44]

Normatively, the parlous state of many global fisheries and their associated marine eco-systems calls for the further progressive development of international fisheries law in several respects, including:

- Developing, through multilateral negotiations and/or by recourse to WTO and fisheries dispute resolution processes, clearer rules to address the current uncertainty as to whether present trade-related provisions in international fisheries law are or are not WTO-consistent.[45]

- Removing any legal doubt that measures to combat IUU fishing may be applied under international law against vessels which support IUU fishing activities.[46]

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43 The UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea was established specifically to address this problem by providing more coordinated coherent advice to the General Assembly on cross-cutting issues. Outcomes to date have been promising, though some states (particularly Iceland) have complained at what they see as unwelcome 'micro-management of fisheries' by the General Assembly.

44 More fully *'pacta tertiis nec nocent nec prosunt'* — treaties do not create obligations or rights for a third state without its consent. See E Francks, above n 13, and E J Molenaar, above n 29, for a detailed discussion of the extent to which the 1995 UN Fish Stocks Agreement represents the progressive development of international fisheries law.

45 Australia (M Churche, private communication) has argued strongly that it is possible to develop and implement multilateral trade-related measures aimed at the conservation and management of international fisheries that are WTO-consistent. The use of such measures is provided for in the IPOA-IUU and they are also being implemented by ICCAT, CCAMLR and the CCSBT, to date without any state's having sought to prevent their use through recourse to WTO dispute resolution processes. The negotiated settlement of the EU/Chile dispute, above n 20, has avoided the need to ascertain whether either parties' actions had violated either WTO rules or international fisheries conservation measures.

- By bringing into effect, through new instruments if necessary (since current instruments will almost certainly never enter into force) measures to enforce high standards of fishing vessel and crew safety and the prevention of pollution by fishing vessels (on the basis that many vessels engaged in IUU fishing are highly likely to violate such requirements).

- By giving explicit international legal force to the practice of some states party to certain RFMOs, to which some doubt has been raised, which implement port state measures on the presumption that fishing vessels entitled to fly the flag of states not party to or cooperating with the RFMO and which are identified as being engaged in fishing activities in the area of jurisdiction of the RFMO may be engaging in IUU fishing.[47]

- In time, an amendment (or its equivalent) to the 1982 UN Convention to the effect that non-compulsory dispute settlement procedures in RFMO instruments may, if they fail to resolve a dispute in a reasonable time, be over-ridden by the compulsory provisions of Part XV of the 1982 UN Convention.

- Perhaps through the convening of an international conference, the development of new ideas and legal approaches to eliminate or significantly reduce the incidence of free-rider behaviour: at least in cases where deliberate, sustained refusal to join an RFMO or comply with its conservation and management measures creates an economic advantage to the free-rider and causes real, quantifiable harm to the fishery or to associated species in the marine eco-system. (The concept of 'environmental crime' is not new, and perhaps it needs to be further considered in the specific context of irreparable harm to marine living resources.)

Conclusion

Despite the remarkable advances in the regime of international fisheries law that has developed through and under the 1982 UN Convention, many global fish stocks are at risk.

Many new or relatively new regional fisheries management organisations have not yet confronted the daunting task of agreeing total allowable catches for the fish stocks subject to their jurisdiction, much less that of allocating shares of the total catches among their members. As the pressures to do so, and to implement associated conservation and management measures, mount, we are seeing a significant build up of active opposition to effective adherence to crucial elements of the overall international fisheries management regime. This places states willing to adhere in a very difficult position: do they maintain strong measures and leave the non-adherents outside the RFMO and likely to engage in IUU fishing, or do they accept 'compromises' as the price for wider adherence?

The paper has suggested several areas where some reasonable compromises may be appropriate, and has canvassed other issues where further progressive development could be considered. Overarching all these matters, is the need for the international community to revisit the fundamental principles of the 1982 UN Convention, particularly the duty of all states to cooperate, in good faith and on the basis of equity and transparency, with all other states in taking such measures as may be necessary for the conservation of the living resources of the high seas. Also for coastal states to exercise their sovereign rights in their EEZs fully in accordance with the Convention, particularly in relation to fish stocks not confined solely to the EEZs.

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46 On this, see D H Anderson, 'The Regulation of Fishing and Related Activities in Exclusive Economic Zones', to be published in proceedings of the Colloquium on the Exclusive Economic Zone and the United Nations Convention on the Law of the Sea, 1982-2000: A first Assessment of State Practice, (10 November, 2000) Brussels, which discusses whether provisions a coastal state might enact to control certain kinds of foreign 'support' vessels, especially bunkering vessels, operating in support of foreign fishing vessels within the EEZ of the coastal state would violate the freedom of navigation provisions of the Convention.

47 The Northwest Atlantic Fisheries Organization (NAFO) currently applies this presumption and it has been written into the port state measures of the IPOA-IUU.

From Montreux to Washington: Australia and the Dispute Settlement Regime of the United Nations Convention on the Law of the Sea

Mark Jennings*

Introduction

Much has been written about the magnitude of the achievement represented by the United Nations Convention on the Law of the Sea ('UNCLOS').[1] Without doubt, it was one of the great exercises in treaty-making of last century. Indeed, UNCLOS rightly has been described as a 'constitution for the oceans'.[2] This paper focuses on a key element of that constitution: the UNCLOS dispute settlement regime and, in particular, Australia's involvement with that regime. The regime is established in Part XV of UNCLOS. A number of Annexes to UNCLOS also form integral components of the regime. For example, Annex VI contains the Statute of the International Tribunal for the Law of the Sea ('ITLOS'). I note that a special dispute settlement regime for sea-bed mining is provided for in Part XI of UNCLOS. I will not address that regime today.

The content of Part XV

Part XV is divided into three sections. Section 1 contains general provisions. Section 2 provides for compulsory procedures entailing binding decisions. Section 3 sets out limitations and exceptions to the applicability of section 2.

Section 1, through article 279, imposes an obligation on states parties to settle disputes between them by peaceful means in accordance with article 2(3) of the UN Charter. In discharging this fundamental obligation, states parties are given latitude as to the means they may adopt to resolve a dispute. Where states parties have agreed to seek settlement of a dispute by peaceful means of their own choice, article 281(1) makes clear that the procedures provided for in Part XV: 'apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure'.

I note that article 281 proved crucial in Australia's and New Zealand's efforts to sustain legal proceedings against Japan in the Southern Bluefin Tuna (SBT) dispute.

The application of section 2 is triggered where no settlement has been reached by recourse to section 1. In such a case, article 286 permits the dispute to 'be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction' under section 2. Article 286 makes such action subject to section 3.

At the heart of section 2 lies article 287. The negotiation of this article, which embodies the so-called 'Montreux Compromise', was one of the keys to obtaining agreement on the UNCLOS dispute settlement regime. Article 287(1) allows state parties to choose by written declaration one or more of the following means for the settlement of disputes:

- ITLOS;
- the International Court of Justice (ICJ);

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1 1833 UNTS 3; 21 ILM 1261.

2 Tommy Koh, 'A Constitution for the Oceans' in Myron Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (1985), vol I, 11.

- an arbitral tribunal established under Annex VII; or
- a special arbitral tribunal established under Annex VIII.

This has been described as the 'cafeteria' approach.[3] Instead of soup and the special of the day, a state party can select ITLOS and the ICJ.

Where a state party has not made a written declaration, article 287(3) deems it to have accepted arbitration in accordance with Annex VII. Article 287(5) also makes arbitration under Annex VII the default where the parties to a dispute have not accepted the same procedure for the settlement of disputes.

As Australia, New Zealand and Japan had not made written declarations under article 287(1), the SBT legal proceedings were conducted before an Annex VII arbitral tribunal.

ITLOS was also a venue for SBT legal action. Australia and New Zealand requested and obtained an Order for Provisional Measures from ITLOS under article 290. Subsequently, the Arbitral Tribunal revoked that Order, when it determined that it did not have jurisdiction to rule on the merits.

The negotiation of Part XV

Having outlined various key elements of Part XV, I now address aspects of its negotiating history and Australia's role in those negotiations. Preparatory work for the Third Law of the Sea Conference was undertaken in the United Nations Committee on the Peaceful Uses of the Sea-Bed ('the Sea-Bed Committee').

The Sea-Bed Committee operated through three sub-committees. The issue of dispute settlement was not the province of any one sub-committee. Sub-Committee I developed options for dispute settlement in relation to the sea-bed regime, while Sub-Committee II considered approaches to dispute settlement in the area of fisheries.

Key participants in Sub-Committee II, including the United States, the USSR and Japan, favoured some form of compulsory dispute settlement for fisheries disputes. The support of distant water fishing states, such as Japan and the USSR, for compulsory settlement of disputes was linked to concern about their position vis-à-vis coastal states which were pushing for additional rights through the concept of an exclusive economic zone.

Australia and New Zealand were also advocates in Sub-Committee II of compulsory dispute settlement. They submitted a working paper in 1972 that outlined principles for a fisheries regime, which in part argued:

> [i]t would be desirable that any disputes concerning the accommodation of competing uses within the [fishery] zone be settled by compulsory settlement procedures, unless some form of settlement [was] agreed upon by the parties within a reasonable period. [4]

In 1973 the United States sought to move beyond the sectoral discussion of dispute settlement by proposing draft articles for a chapter on dispute settlement in the proposed convention.[5] The draft articles provided for the establishment of a Law of the Sea Tribunal.

The work of the Sea-Bed Committee was taken forward to the Third Law of the Sea Conference.

The second session of the Conference was held in Caracas from 20 June to 29 August 1974. It was decided that the main committees would each deal with the settlement of disputes in so far as the subject was relevant to their mandates. However, the pressure of work on substantive issues in the main committees led delegations to meet

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3 Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', (1997) 46 *International and Comparative Law Quarterly* 37, 40.

4 A/AC.138/SC.II/L.11.

5 A/AC.138/97.

informally on the settlement of disputes.[6] A group of some thirty delegations came together for this purpose towards the end of the second session, taking as a starting point the US draft articles on dispute settlement submitted to the Sea-Bed Committee the previous year.

This group, of which Australia was a co-chair (and in which New Zealand participated), prepared a preliminary document containing alternative formulations of draft texts on 11 issues.[7] The document was introduced in the last Plenary meeting of the second session by Dr Galindo Pohl of El Salvador, who was co-chair of the informal group with Ambassador Harry of Australia. In light of Professor Karamanian's mention in her paper of Professor Louis Sohn, I should note that he acted as rapporteur for the group.

At the third session of the Conference held in Geneva from 17 March to 9 May 1975, the group of delegations doubled its size and became known as the Informal Working Group on the Settlement of Disputes.

The Informal Working Group held a weekend meeting in Montreux at which an effort was made to resolve one of the most difficult issues facing it: the choice of forum for the compulsory settlement of disputes. Some states favoured the ICJ, others advocated the establishment of a separate Law of the Sea tribunal, while some supported arbitration. There was also support for a functional approach that would involve technical experts in the settlement of disputes.

The 'Montreux Compromise' was put forward by Professor Riphagen of the Netherlands, who proposed that a state upon becoming party to the Convention would be allowed to choose which mechanism it would accept. This compromise laid the foundation for article 287 of UNCLOS.

After the Group completed its work at the session, the co-chairmen submitted a document encapsulating that work to the President of the Conference.[8] The document revealed that the Informal Working Group had been able 'to reach agreement on four articles (which, with some later changes, became articles 279, 280, 282 and 283 of the Convention)'.[9] The document also presented two alternative drafts on outstanding issues:

> one represented a comprehensive approach, with special annexes on conciliation, arbitration and a Statute of the Law of the Sea Tribunal; the other was based on a functional approach, with special provisions on fisheries, pollution and scientific research.[10]

The draft embodying the comprehensive approach contained provisions that were the precursors to a number of articles contained in Part XV, including articles 281 and 287. The precursor to article 287 was article 9, which was based on the 'Montreux Compromise'. It addressed, *inter alia*, the question of what should happen when a state party had not chosen a forum for the compulsory settlement of disputes. As I have already noted, where a state party has not made a written declaration, article 287(3) deems it to have accepted arbitration in accordance with Annex VII. It is interesting to note that article 9(2)(b), an ancestor of article 287(3), contained two alternatives in square brackets for the default mechanism: an arbitral tribunal or the Law of the Sea Tribunal. Had the latter alternative prevailed, and other factors remaining the same, Australia and New Zealand would have pursued the SBT legal proceedings before ITLOS and not an Annex VII arbitral tribunal.

The Informal Working Group document also contained a set of proposals put forward by Professor Elihu Lauterpacht on behalf of Australia, which advocated exchange of information and consultation between states

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6 Nordquist, above n 2, vol V, 7.

7 A/CONF.62/L.7.

8 SD.Gp/second session/No.1/Rev.5 of 1 May 1975, later reissued as A/CONF.62/Background Paper 1 of 6 August 1976.

9 Nordquist, above n 2, vol V, 9.

10 Ibid.

parties 'as first steps towards minimising the occurrence of disputes'.[11] I note that Professor Lauterpacht was later to appear as counsel for Japan before the Annex VII Arbitral Tribunal in the SBT legal proceedings.

After the end of the third session, the then President of the Conference, Ambassador Amerasinghe of Sri Lanka, prepared an informal single negotiating text on dispute settlement.[12] The text took into account the document prepared by the Informal Working Group.[13]

With the President assuming responsibility for the text on dispute settlement, the role of the Informal Working Group drew to an end. It had made a 'significant contribution' to the development of the UNCLOS dispute settlement regime.[14] Australia, New Zealand and the other members of the group had recognised that effective dispute settlement procedures would be, in the words of Ambassador Amerasinghe: 'essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention'.[15] Time does not allow me to trace the subsequent evolution of the text.

The SBTdispute

Having played important roles in the negotiation of Part XV of UNCLOS, Australia and New Zealand were to be amongst the first countries to have recourse to it, in the context of the SBT dispute with Japan.

Australia and New Zealand commenced arbitral proceedings against Japan under Annex VII of UNCLOS. Australia and New Zealand, *inter alia*, requested that the Annex VII Arbitral Tribunal declare that Japan had breached its obligations under Articles 64 and 116 to 119 of UNCLOS in relation to the conservation and management of the SBT stock.

In commencing arbitral proceedings against Japan, Australia and New Zealand also requested provisional measures pursuant to article 290, including the immediate cessation of Japan's experimental fishing, pending constitution of the Annex VII Arbitral Tribunal. ITLOS heard the request for provisional measures, granting the bulk of the measures sought by Australia and New Zealand.

Although successful before ITLOS, Australia and New Zealand failed to satisfy the Arbitral Tribunal, during hearings held in Washington in May 2000, that it had jurisdiction to hear the merits of the case. I note the robust dissent of Sir Kenneth Keith from the Tribunal's decision. The question of jurisdiction turned on the interaction of the wording of article 16 of the 1993 Convention for the Conservation of Southern Bluefin Tuna and article 281 of UNCLOS. Article 16 is the dispute settlement provision of the 1993 Convention. It does not provide for the compulsory settlement of disputes.

As I mentioned earlier, article 281(1) makes clear that, where states parties have agreed to seek settlement of a dispute by peaceful means of their own choice, the procedures provided for in Part XV apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

The Tribunal found that, in terms of article 281(1), article 16 amounted to an agreement by the parties to seek settlement of the dispute by peaceful means of their own choice.[16] The Tribunal went on to find that article 16 excluded any further procedure. This included the compulsory mechanisms for dispute settlement under

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11 A O Adede, *The System for the Settlement of Disputes under the United Nations Convention on the Law of the Sea* (1987) 44.

12 A/CONF.62/WP.9.

13 A/CONF.62/WP.9/Add.1, [16].

14 Adede, above n 11, 67.

15 A/CONF.62/WP.9/Add.1, [6].

16 Award of the Tribunal on Jurisdiction, [54] and [55].

UNCLOS.[17] Although the Tribunal found that article 16 did not contain an 'express exclusion' of any other procedure, it found such an exclusion by implication.[18]

Conclusion

I hope that I have given you some understanding of the role that Australia played in the negotiation of the UNCLOS dispute settlement regime. It is not easy to trace this role given that 'most of the substantive negotiations of the Convention were undertaken in informal meetings of the Conference Committees and special Negotiating Groups of which no formal records were produced'.[19] Australia's contribution stands to be judged on the texts produced by the informal group of states of which it was a co-chair.

The legal action taken by Australia and New Zealand against Japan in the SBT dispute put aspects of the dispute settlement regime to an early test. The outcome of the legal action is being dissected in the journals. The authors of articles, no doubt, will seek to draw conclusions about the effectiveness of Part XV. I do not think general conclusions on this point can be drawn on the strength of the result Australia and New Zealand obtained. More cases will have to be taken before judgment can be rendered on Part XV.

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17 Ibid [58].

18 Ibid [57].

19 Adede, above n 11, 4.

Democracy in International Law

The Democratic Reconstruction of State in Africa: with Special Reference to the Ethiopian Experience

Hashfin Tewfik*

> Africa has cornered itself into rejecting ethnicity as an organising concept in the process of nation-building. The challenge then is whether it is possible to reverse the mindset, so that ethnic groups which are African realities, could be seen in reverse light as resources or building blocks that can provide a sound foundation for a sustainable political and socioeconomic development from within.[1]

Ethnic self-identification is the key feature of most African societies.[2] While individuals strongly identify themselves with particular ethnic groups and such identification is reflected in their social, political and economic interactions, the diverse ethnic groups consider themselves as distinct communities and want to cultivate and maintain their respective identities. Since each ethnic community in Africa associates itself with, and is identified by, a given territory, ethnic self-expression is compounded with territoriality, 'a sense of place as a symbol of being and identity'.[3]

In the pre-colonial era, each ethnic community of African societies used to have its own indigenous system of government that was generally organised on the basis of kinship and ancestry.[4] Some ethnic communities existed as separate political entities and governed themselves independently whereas some existed as autonomous vassal polities or as assimilated subjects under the hegemony of kingdoms or empires of some ethnic communities.[5] But the advent of colonial rule in Africa in the 1880s stood in the way of the natural dynamics and development of the indigenous political structures and imposed alien political systems on the various ethnic communities of Africa. The colonial powers subdivided Africa among themselves without due regard to ethnic habitation, culture, language and native political institutions of African societies, delineating boundaries that arbitrarily joined communities of distinct political entities into one country and that divided others who had hitherto lived within shared political structures into different countries.

The impact of colonial rule on the indigenous political structures of African ethnic communities varied under the different colonial regimes. While under the British, the political institutions of indigenous African communities remained largely unaffected; they were disrupted under the other colonial regimes.[6] Even so, none of the colonial regimes were able to obliterate the indigenous political institutions.

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1 Francis M. Deng, the UN Secretary-General's Representative for Internally Displaced Persons, quoted in Sam G. Amoo, Senior Advisor, Emergency Response Division, UNDP, 'The Challenges of Ethnicity and Conflicts in Africa: The Need For A New Paradigm', New York, January 1997.[http://www.undp.org/erd/archives/cnflict.htm].

2 According to Encyclopaedia Britannica, the number of the ethnic groups constituting the basic units of African societies is estimated to be 3,000. 'Of its indigenous stock, Africa has about 2,000 tribes or ethnic societies, each of which has its own language or dialect, culture, and traditions.' Ayittey, George B.N, *Africa Betrayed*, (New York: Library of Congress, 1992), p. 3.

3 Josiah A.M. Cobbah, 'Toward A Geography of Peace in Africa: Redefining Sub-State Self-Determination Rights', in R.J. Johnston, David B. Knight and Eleonore Kofman, *'Nationalism, Self-Determinations and Political Geography'*, (New York: Croom Helm, 1988), p.73.

4 Ayittey, George B.N., *Indigenous African Institutions*, (New York: Transnational Publishers, Inc., 1991), pp.71-72

5 *Ibid.*

6 'Some old kingdoms, for example in Dahomey, were completely destroyed by the French. Chiefs were appointed and removed by the French, Belgian and Portuguese colonial authorities…' *Ibid, p.413.*

> Because of the small number of European personnel, limited financial resources, and an underdeveloped communications infrastructure, the colonial state had to rely upon the traditional African rulers, chiefs, and religious authorities to help govern the vast areas and populations under its control.[7]

Although the colonial political structure guarded and ensured its ultimate authority by the threat and use of its military and police forces, the indigenous political institutions had largely survived and continued to function.[8]

The independence of the various peoples of Africa from European colonialism in the late 1950s and 1960s seemed to have paved the ground for reinvigorating and maintaining the political institutions of the various African ethnic communities. But the leaders of the anti-colonial movements in Africa chose to succeed to the political structures that the former colonial powers imposed on the African societies and attempted to create a 'nation-state' in which various ethnic communities would be integrated, unified under one state and subordinated to the central authority of the state.[9] The recognition and cultivation of the diversities permeating the African societies and their corresponding native political structures has been thought to give rise to divisive politics, violence, instability and dismemberment. Thus, the establishment and organisation of the post-independence institutional arrangements of the newly emerging African states has been based upon the suppression of, and in disregard to, the diversities and political institutions of African societies.

Most of the emerging African states adopted a unitary and centralised system of governance, claiming its necessity for political stability, national unity, and development. The federal formula was considered as too expensive and inefficient to realise the objectives of national unity and development. Although some of the newly emerging states adopted both intrastate and interstate federal arrangements,[10] none of them, except that of Nigeria, had survived long after independence. In fact, these arrangements were not really federal. Not only because of the non-existence of 'a positive political or ideological commitment' to federalism as a principle of organising state power and authority[11] but also because they lacked the necessary popular base and political consensus to build real federal political arrangements. For instance, in the cases of Cameroon, Ethiopia-Eritrea and Uganda the adoption of federal formula was perceived and used by the stronger parties as a passageway to a unitary state.

What has really failed in Africa is the experiment with a unitary government. Despite its long span of life and adherence by several African countries, the unitary institutional arrangement has not been able to bring about the desired objectives of national unity, political stability and economic development to African states. Instead, it has become the breeding ground for one-party rule, authoritarianism and military dictatorships.[12] It is this failure that Olusegun Obasanjo, the current President of Nigeria, seems to have captured when he asserted Africa has

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7 Gellar, Sheldon, 'The colonial State,' in Martin, Phyllis M and Patrick O'Meara (eds.), *Africa*, (Bloomington: Indiana University Press, 1988), p.132.

8 'Through almost all of tropical Africa, the diplomats ''paper partitions' of the 1800s and early 1890s were followed by years and sometimes decades of relative inactivity. Only the most rudimentary, if any, administration was established outside the capitals, few roads and hardly any railways were built, and for most Africans life had hardly changed. The reasons for these hesitations were financial: private European investors were uninterested in Africa, metropolitan legislatures opposed major public expenditures on colonies, and even the Western commercial firms already established at coastal entrepots refused to move inland ahead of piecemeal government 'pacification'.' Austen, Ralph, *African Economic History*, (Portsmouth, NH: Heinemann, 1987), p.124.

9 Wunsch, J.S., and Olowu, D.(eds), *The Failure of the Centralised States: Institutions and Self-governance in Africa*, (Boulder, Colorado: Westview Press, 1990).

10 Uganda (1962), Ghana (1957), Congo, Cameroon (1962-1972) had intrastate federal structures. There were also inter-state federations in the case of French Cameroon and British Southern Cameroon; Senegal and French Sudan; Senegal and Gambia, Tanganyika and Zanzibar; East African Federation; and Ethiopia and Eritrea.

11 Thomas M.Franck, 'East African Federation', in Thomas M.Franck(ed.), *Why Federations Fail*, (London: University of London Press, 1968), p.178.

12 Francis M.Deng and et al, '*Sovereignty As Responsibility: Conflict Management in Africa'*, (Washington D.C: the Brookings Institution, 1996), p.25.

'squandered almost 30 years with ineffective nation-building effort (because) our policies were far removed from the social needs and development relevance'.[13] The experiences of post-colonial African states testify not just the failure of a centralised and authoritarian system of governance but the decomposition or near decomposition of state systems in Africa.[14] The state has been incapacitated in carrying out its basic functions of ensuring law and order, guaranteeing security and provisions to its inhabitants, and commanding the legitimacy, support and respect of its inhabitants.[15] Consequently, in many parts of Africa such as Sudan, Uganda, DR Congo, Sierra Leone, Somalia, Liberia, etc., internecine civil war, starvation and famine have ensued, the economic situation has degenerated, and states have collapsed or are becoming dysfunctional.[16]

In this paper, I argue that the root-cause for the paralysis or partial paralysis of post-independence African state systems lies in the fact that they were predicated on negating democracy and suppressing ethnic diversities. Although the independence constitutions of Africa proclaimed democratic rights, the nationalists that came to power while consolidating their political power soon denied them.[17] Under the guise of national unity and development, the proclaimed democracy was sacrificed and authoritarian rule took over. Since the authoritarian rule excludes and denies the people from taking part in the government and resources it controls, most post-independent African states have been undemocratic and ethnocratic (controlled by one or some ethnic groups and predicated on the subjugation of others). This has generated the political mobilisation of ethnic communities, giving rise to conflicts organised and waged along ethnic lines. Given this tendency, ethnic conflicts will likely escalate and lead to the break up of states into smaller units. Unless African states confront the issue of ethnicity, peace and stability will continue to elude them. Therefore, if African countries are to avoid massive human suffering, more instability, civil war and economic degeneration, they have to address the challenges of ethnicity by devising appropriate institutional framework that guarantees equality and political space for ethnic communities while facilitating the achievement of cooperation and compromise among them.

My argument is the demand of ethnic communities for equality, power and power sharing is a quest for democracy.[18] In order to address this issue, the undemocratic basis of African states should be reversed by resorting to a governmental institution that provides ethnic communities with the opportunity to participate and advance their interests in the political decision-making process. A resort to federalism is imperative not only because it provides the institutional framework for distributing and sharing political power but also because it allows and entrenches the participation of ethnic communities in the governance process.

Ethiopia is the only African country that attempts to confront directly on the challenges of ethnicity by adopting a federal political structure organised along the lines of ethno-territorial communities. Thus, an examination of the Ethiopian experience is of considerable relevance for many African countries and generates significant insights into the potential and difficulty of devolving state power on the basis of territorial ethnic groups.

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13 A speech given at the OECD Conference, 17 April 1990.

14 I. William Zartman (ed.), *'Collapsed States: The Disintegration and Restoration of Legitimate Authority'*, (Boulder: Lynne Riener Publishers, 1995), pp.2-5.

15 A state can be said to have collapsed when it no longer performs the functions of exercising sovereign authority, of operating institutions for decision making and identity formation, and of guaranteeing the security of its inhabitants. Ibid, p10.

16 Francis M.Deng and et al, op. cit., above, note 1, p.211.

17 Perter Anyang`Nyongò, 'Discourse on Democracy in Africa', in Eshetu Chole and Jibrin Ibrahim (ed.), '*Democratisation Processes in Africa: Problems and Prospects*', CODESRIA, 1995, p.29.

18 'There is a democratic side to the ethnic question in Africa. It concerns the right of each ethnic group to be treated equally with all the others, for their members to be secure in their lives and property, from arbitrary arrest and punishment, for them to enjoy equal opportunity in trade, business, employment, schooling and enjoyment of social amenities.' O, Nnoli, *Ethnic Politics in Africa*, (Vantage Publishers, Ibaddan, 1989), p.206.

Ethnic federalism: a typical feature of Ethiopian federalism

Federalism implies non-centralised multi-tiered government based on a constitutional sharing of power between general and component entities on matters of common concern and the self-rule of the component entities on their respective matters. Ethnic federalism refers to a non-centralised multi-tiered government that bonds autonomous ethno-territorial communities within a larger political union while preserving and promoting their respective distinct identities. Ethiopia's attempt to reorganise and distribute state power along ethno-territorial communities fits this description.

The Ethiopian constitution points out ethnic communities as its authors and beneficiaries. It starts out with the term 'We, the Nations, Nationalities and Peoples of Ethiopia … ratified the Constitution of the Federal Republic of Ethiopia.'[19] It defines this term to mean 'a group of people who have or share a large measure of common culture, or similar customs, mutual intelligibility of language, belief in common or related identities, and who predominantly inhabit an identifiable contiguous territory'.[20] This definition is an aggregation of objective and subjective components. The objective components are common culture or related customs, common language, and a contiguous territory and the subjective components are a sense of collective identity and common psychological make-up. Accordingly, a community that fulfils both components is a 'nation, nationality and people' that is the bearer of the right of self-determination. Since it represents a sense of collective identity that emanates from and based upon shared objective attributes such as language, culture, customs, common habitat, such a community could also be regarded as an ethnic community. Thus, the use of the term 'Nations, Nationalities and Peoples' in the constitution is to underpin the adoption of a binding compact by Ethiopia's diverse ethnic communities.

The Ethiopian federal political system is based upon the recognition of the right of ethnic communities to self-determination, including the right to secession. This right has three component and interrelated aspects: namely, the aspect of the preservation and promotion of linguistic and cultural diversity; the aspect of the right of every ethnic community to political autonomy and participation in the federal decision-making process; and the aspect of the right to secession.

The linguistic and cultural diversity aspect of the right of self-determination comprises the right of every ethnic community to use and develop its language, to express and promote its culture, and to preserve its history. In Ethiopia, as in most other African countries, ethnic self-definition, which is an ordinary aspect of selfhood and a basic social relation, has been deployed in the struggle for survival by cultural and linguistic groups that have been suppressed by the homogenising impulses of state-nationalism. The policies of the latter to homogenise and assimilate politically subordinated communities into the milieu of the dominant ethno-cultural community had obviously failed to obliterate ethno-cultural differences, rather generated internal conflicts. These experiences have made the recognition and promotion of ethnic diversity imperative for establishing sustainable peace and social harmony, and for building a political, social and economic community constituted by the free will of the ethno-cultural communities of the country.

The autonomy and participation aspect of the right of self-determination establishes the entitlement of every ethnic community to self-government and to proportional representation in regional and federal states. This aspect of self-determination ensures the devolution of state power to ethno-territorial communities and thereby makes it difficult for all power to be concentrated and centralised in one centre. In Ethiopia, as in several other African countries such as Nigeria, Cameroon, Uganda, Ghana, Sudan and Kenya, whose populations are divided ethnically into geographic territories, the devolution of power along ethnic lines becomes imperative not only to reduce ethnic competitions and conflicts for state power but also to provide the concerned communities with the opportunity to participate and advance their interests in the governance process. The participation aspect of self-determination is also aimed at developing common identity and unity among ethnic communities. As evidenced in history, the strategy of attempting to develop common identity premised on the denial and suppression of ethnic diversity among the heterogeneous populations of Ethiopia, as in much of other African countries, has failed, spawning centrifugal ethnic-based political forces. Unless the policy of suppression of

19 See the *Preamble* of the Federal Constitution of Ethiopia.

20 Article 39(5), the Federal Constitution of Ethiopia.

ethnic diversity is reversed by giving autonomy and sufficient cultural space to the politicised ethnicity, it is impossible to bring about sustainable peace, democracy and development, nor is it possible to create unity among the various ethnic communities. The entrenchment of autonomy and participation aspect of the right of self-determination is, therefore, a requirement of peace, democracy and development in accordance with which the participation of territorially based ethnic communities in the political process from the level of their respective habitats to the level of regional and federal state is ensured.

The implementation of the right of self-determination is manifested, at the grass-root level, by the establishment of self-governments of ethnic communities in their respective habitats, and, at higher level, by their proportional representation in the State and Federal governments.[21] Thus, while at the grass-root level every ethnic community is entitled to establish its own self-government, each has to be proportionally represented in all organs of the State and Federal governments. For instance, at the federal level, the constitution requires the representation of each ethnic community the House of the Federation by at least one member for each one million population.[22] Furthermore, although the representatives in the federal legislature, the House of Peoples' Representatives, are elected on the basis of single-member constituency plurality electoral system,[23] since electoral districts in Ethiopia are drawn within ethnically identified constituencies with the exception of the federal capital, they represent ethnic constituencies. The propensity of this mode of representation to perpetuate the representation of majority ethnic communities in the legislature is ameliorated by the constitution's requirement that at least 20 seats for minority ethnic communities in the legislature be reserved.[24] The proportional representation of the ethnic communities of Ethiopia in the federal state is not only to be limited to the two houses of the federal parliament, but it should also be reflected in the other branches of the government. The same holds true in the case of the constituent States.[25]

The aspect of secession is the most complex and highly controversial part of the right of self-determination under the Ethiopian constitution. Some argue vigorously against it on the ground that such a right is the exclusive right of nations under colonial domination and that its recognition leads the country to fragmentation.[26] It has also been objected to on the ground that 'the right of secession will stimulate a surge of nationalism, and it is inconsistent with competitive politics under federal arrangements: rather than practice the political art of compromise, some or most opposition parties will simply threaten to leave the state'.[27] Others hold that the constitutional inscription and recognition of the right to secession is not only a guarantee for respecting the right of nations, nationalities and peoples to self-determination but it is also an affirmation of the consensual basis of the federal union. Furthermore, the latter argue that the acknowledgment of the right to self-determination, including secession, might help in diffusing ethnic discontents, that its ready availability of will so colour Ethiopian politics as to make its exercise less likely and less violent.'[28]

Ethiopia's political history has proved that the unity of the peoples of Ethiopia could be achieved only through their mutual consent to live together in order to pursue their common interests. A unity that is based on the denial

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21 The English version of Article 39 (3) speaks of 'equitable representation' whereas the Amharic version reads as 'proportional representation'. I have used the Amharic version in my citation of Article 39 above.

22 Ibid, Article 61(2).

23 Ibid, Article 54(1) & (2).

24 Ibid, Article 54 (3).

25 However, to what extent that the constitutional provision guarantees the proportional representation of ethnic communities in all branches of the constituent States and the Federal State realised depends upon whether it is adequately ensured in the concerned electoral laws as well as the specific practices regarding the representation of ethnic communities in governmental branches other than their parliaments.

26 Abera Jembere, 'The Making of Constitution in Ethiopia' in New Trends in Ethiopian Studies, (1994), p.74.

27 Paul H. Brietzke, 'Ethiopia's Leap in the Dark: Federalism and Self-determination in the New Constitution', *39 Journal of African Law*, p.32.

28 Paul H. Briezke, 'Self-determination or Jurisprudential Confusion exacerbating political conflicts', *Wis. International Law Journal*, (1995).

of the right of self-determination could not be maintained for long by coercion, and instead of bringing about real and viable unity, it would become a breeding ground for ethnic discontent and secession, resulting in civil wars. Hence, Ethiopia's exclusion of any resort to violence in order to secure the unity of its peoples and its attempts to bring about consensual unity by devolving political power to its constituent people are not just bold but courageous attempts to tame the centrifugal forces engulfing the country. However, if and when a people might demand secession, the Ethiopian constitution attempts to avoid its potential for violence by providing a peaceful and democratic path for its realisation.

Some remarks

The political prevalence of ethnicity and conflict in Ethiopia is largely the consequence of the usurpation of institutions of self-governance and the consistent exclusion of ethnic minorities from the political process under the pretext of national integration and unity. The suppression of group identities has become ideological and mobilising factors against state nationalism. The state had collapsed as a result of the struggles of centrifugal ethnic movements.

The collapse of authoritarian, centralised and ethnocratic state does not necessarily lead to a successful transition to democracy. The long and dark history of centralisation of state power, authoritarian rule and the imposition of state nationalism that hitherto denied any political space to territorially based ethnic diversities other than that of the ruling elite, shades light on how not to make a state and build a nation. Ethiopia's transition to democracy and viable system of governance demands the adoption of ethnic federalism since it allows the effective participation of ethnic communities in the governance process.

Ethiopian political tradition that had long been the repository of denial of democracy, tyrannical authority and ethnic inequality had to be reversed and replaced by a new institutional setting that provides individuals and identity groups with the opportunity to participate and advance their interests in the governance process. This demands the recognition of the right of the various ethnic communities to self-determination up to, and including secession. Accordingly, it is their free will and agreement to live together for mutual economic, social and political benefits that underpins and sustains their union.

The advocacy of reconstructing the Ethiopian state on the basis of ethno-territorial federalism is reinforced not merely to maintain the union of Ethiopian peoples but to create sustainable peace that is essential for the mostly needed social and economic development of the country. Ethnic federalism would make ethno-territorial communities less prone to raise arms in conflicts against the central government. The entrenchment of their self-government institutions and their participation in the governance of the federal polity gives more leverage to settling disputes through negotiations and consensus than violence. In fact, the last ten years, since the devolution of state power along ethnic lines began to be undertaken, have been marked with relative internal peace and stability that were lacking earlier for more than two decades. Moreover, instead of generating internecine ethnic conflicts, the empowerment of ethno-territorial communities in the governance process has become a solid ground for maintaining their unity and pursuing their common interests. Thus, the use of ethnic federalism for sustainable peace and as a solid foundation for unity based on equality and mutual respect seems to have been taking roots.

In other African countries whose populations are divided along ethno-territorial lines too, a resort to ethnic federalism is crucial in order to promote and sustain democracy. Without entrenching the effective participation of ethno-territorial communities in the governance process, peace, political stability and development would continue to be elusive. Such African states need to come to terms with their sociological facts of ethnic cleavages by recognising the right of their respective ethnic communities to self-rule on matters of their own affairs and shared rule on matters of their common affair. After all, ethnic federalism provides the ideal institutional formula not only to preserve, accommodate and promote ethnic autonomy but also to create and sustain unity among ethnic communities for some purposes of common interest.

Globalisation Stories: a round table discussion

Techniques of Globalisation, Economics and Governance: The Example of Tax Reform

Miranda Stewart*

Introduction

I know most of you are not tax lawyers, but let me tell you a story about globalisation, discourse, institutions and, yes, tax. My research is on tax reform in developing countries, as influenced by international institutions, developed country governments and non-government 'technical experts'. My project, which is currently in its very early stages, will look at particular tax reform policies and projects.

My goal in this paper is to begin to establish a theoretical framework within which to critique tax reform policies and projects. To do this, I am using the framework of *discourse* and *stories* described by Diane Otto and Sundhya Pahuja earlier on the panel. My project also involves a close look at the nature of tax reform discourse as law and governance and as a particularly economic discourse.

Tax reform discourse and stories

I am inquiring into the politics or ideology of reformers, institutions, reform processes and plans. I do not suggest that there is a single grand story of capitalism or imperialism buried in tax reform discourse. Applying Foucault, I am investigating 'the politics of truth' or the relationships between specific knowledges, technical discourse, truth and power in the context of tax reform.[1]

I am asking the following questions:

- What are the 'truths' about tax law and policy, developing countries, the role of the state and the economy, tax administrations, taxpayers and citizens, international investment and economic growth, produced through the discourse of tax reform? I do not suggest that what tax policy says about tax laws or required reforms is wrong, but I characterise such 'truths' as stories to reveal their partial nature and to try to highlight the stories that are absent or untold.

- Is tax reform in developing countries simply one more way that the state becomes a vehicle for transmitting the global market discipline to the domestic economy?[2]

- How does tax reform fit with the possible 'withering' of the nation state mentioned by Sundhya Pahuja, when tax is such a core part of state sovereignty and funds its very operations?

- Tax reform efforts often appear to fail. I believe this failure is not simply the result of inadequate implementation. How is 'failure' produced through tax reform discourse?

Tax reform discourse often seems to place the country that is the subject (or object) of tax reform in an impossible position, closing off paths of investigation and denying the possibility of alternatives.

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1 Michele Barret, 'Preface' *The Politics of Truth: From Marx to Foucault*, (1991), vii.

2 Robert Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', *Millennium* 10(2) (1981), 126-55, at 139; cited in Ankie Hoogvelt, *Globalization and the Postcolonial World* (1997), 134.

A little more specific: tax reformers and tax reforms

I have identified two key 'historical' stories of development of tax systems in the tax reform literature. The first story is a naturalised account of evolution of tax systems from the primitive and simple to the modern and complex. This story arises out of an historical and comparative view of tax systems of developed countries. The second story is a tale of transition from a 'bad' or 'failed' system to a 'good' system; usually, the tale of transition from a socialist state to a market economy. Both are stories of progress toward economic growth and, implicitly, well-being of society. There is an assumption that developing country tax systems will evolve or develop along the lines of these stories.

Both transitional and evolutionary threads appear in the story of tax reform in a post-colonial nation state. This story sits within an overall evolutionary framework but it also requires the state to start afresh, discarding the tax system of prior colonial governments. The postcolonial story of 'becoming' a modern independent state includes a story of tax reform that is often highly 'technological' or complex. For example, it may entail the adoption of the most economically advanced and innovative tax system current in the tax policy discourse, as befits a country starting afresh. About 40 years ago, India and Sri Lanka experimented with a progressive expenditure tax, developed in theory by the economist Kaldor.[3] This tax had not then and has not since been implemented in any country. India and Sri Lanka soon abandoned the attempt; such a tax is suggested by many to be extremely difficult if not impossible to administer.

Neither the *evolutionary* nor the *transitional* story makes any direct reference to the role of external institutions, governments or experts in tax reform. Yet this international or globalised influence has had a large impact on tax reforms in developing countries. Tax reform moves along three trajectories:

- International institutions play a large part. These include the International Monetary Fund; the World Bank Group; the Organisation for Economic Cooperation and Development (OECD); the United Nations Economic and Social Council (ECOSOC) and the Commission of the European Union. Their influence includes tax reform as a condition of structural adjustment facilities, tax technical assistance which may or may not be accompanied by aid funds and the creation and dissemination of norms of tax policy through education and publications.

- Governments of developed countries historically influenced tax systems through colonial relationships. Today, developed countries including Australia play a significant role in tax reform through post-colonial reconstruction projects and tax treaty negotiations.

- Non-government technical expertise. Individual tax 'experts' and academic centres of tax expertise participate significantly in tax reform projects and in the creation and spread of norms of tax policy. One story that epitomises this role (which may be apocryphal) is the story that when an Indonesian government was seeking to reform its tax system in the early 1980s, it turned to a well-known American academic institution for help. More recently, under the auspices of the Harvard Institute for Development, two tax academics have developed a *Basic World Tax Code* that has been translated into at least ten (mostly eastern European) languages.[4]

Tax reform is a subset of fiscal policy reform. Fiscal policy means tax and expenditure policy but is also used to refer to a wide range of economic and structural reforms, including currency and interest rates, privatisation and monetary expansion.[5] The visibility of tax reform in fiscal policy is relatively recent. The first elements of fiscal

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3 This taxes expenditure (consumption) on the same graduated basis as a progressive income tax is imposed on income, at the individual level. See Nicholas Kaldor, *An Expenditure Tax*. London: George Allen & Unwin, (1955).

4 See <http://www.tax.org/International/BWTC/bwtcf.htm>.

5 One writer distinguishes between 'structural', 'macro' and 'meso' policies. A 'macro' aspect of tax policy is the overall level of taxation and public expenditure, while tax policy itself is part of 'meso' policy: the types of taxes, tax base and the allocation of public expenditures. Frances Stewart, *Adjustment and Poverty: Options and Choices* (1995), 13.

reform in a structural adjustment package very often have included privatisation — reducing the size of the state to fund a reduction in the budget deficit — and cutting so-called 'unproductive' public expenditures.

In fiscal reform, a clear alternative to cutting expenditures to reduce the deficit is to raise taxes, among other tax reforms. The options of a developing country to raise taxes are restricted because there must be taxpaying capacity — surplus — within a country. But they are also restricted through tax policy discourse itself. Higher taxes could lead to adverse 'supply side' microeconomic effects, that is, create a disincentive to working and saving and drive away valuable foreign investment that is essential to economic growth. Taxation must be *efficient* in that it must not obstruct the operation of the market.

Tax policy discourse not only limits choice in this way, but it also prescribes reforms that are congruent with other 'truths' of international economic development. Just one example: most developing countries rely heavily on tariffs on imports (and sometimes on exports) to raise revenues. In the evolutionary tax development story, countries in the early stages of development rely on tariffs and excises, for example, these were central to Australian government revenues until the First World War. This is because tariffs are relatively simple to administer and are effective revenue raisers for developing country governments. Yet, in spite of this, tax policy discourse, building on economic theories of growth and trade, describes tariffs as inefficient and wasteful taxes. Vietnam was praised in 1998 by the Asian Development Bank for increasing its tax level (from 11 per cent GDP to 20 per cent GDP in 1996), but was criticised because a large amount of this increase was attributable to trade taxes.

Tax reform and 'development'

I aim to locate and critique tax reform and reformers in the context of a wider global project of development. Tax reform is not normally framed as part of the development process, although the evolutionary and transitional tax reform stories fit into a development narrative.

Clearly, tax reform in developing countries is not 'development' in the sense of having the specific goal of increasing access to water, food, housing and so on. Tax reform also does not directly provide infrastructure for ending poverty. The tax system is indirectly crucial, however, as it is a means for collection of revenues for purposes of the state: whether that be redistribution, investment in necessary infrastructure or (and this too is important) paying down international debt. Increasing this revenue-raising capacity is central to tax reform efforts in many countries.

Yet tax reform — unlike spending — is perceived as neutral in the sense that it does not require reformers to make substantive choices for the people. It is constructed as *apolitical*. This is a stark contrast to the intensely political nature of tax reform — our heated public discussions about tax — in developed countries.

Instead of being part of a continuum of 'development', tax reform is framed as a technical economic reform which at most facilitates economic growth through *other* development initiatives. Most detailed tax reforms are 'machinery' or technical assistance projects. One key difference between technical assistance and development projects, even in the new climate of transparency in institutions such as the IMF, is the continued secrecy of technical assistance.[6]

Tax reform, economics, law and governance

My project investigates the power of 'economic' tax discourse but I do not address that in detail now. Instead, I will focus on two aspects: first, the possibility of considering tax reform within the expanding discourse of 'governance', and second, a problem in the way that economic policy makers think about tax law.

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6 Vito Tanzi & Howell H Zee, "Tax Policy for Emerging Markets: Developing Countries", *IMF Working Paper* WP/00/35, note 4: 'Much of the material from which the present paper is drawn is contained in confidential IMF technical reports prepared at the request of country authorities. Most of the country-specific references have, therefore, been suppressed …'

The Asian Crisis of 1997 accelerated a discussion which had already begun about governance structures and institutional frameworks required for a market economy including stock market regulations, insider trading, bankruptcy and lending regimes, general corporate law structures and so on.

Thinking about tax reform as 'governance' has the merit of encompassing laws in their broad concept and micro detail, institutions and administration. It also enables thinking about domestic tax reforms in a wider context of 'global' governance, encompassing international institutions and policy-makers in developed countries. It requires lawyers to rethink our understandings of law and to broaden them beyond the words of a statute or case, to administrative processes, policies and self-regulation by the community. It could also be a means to encourage economists to think about law and processes of regulation.

Yet the notion of 'governance' has some problematic managerialist, top-down connotations. One of my goals is to locate tax reform in developing countries in a political context in relation to the actual citizens in a country, always with an eye to the other end of fiscal policy; public expenditures. The language of 'governance' is apolitical but in its dominant form, I suggest it has very clear goals. It refers to the need for institutions to facilitate effectively particular kinds of capital investment and economic development: to provide the regulation necessary for *deregulation* (as suggested by Ankie Hoogvelt). In this sense, it is congruent with economic tax reform discourse, rather than allowing a critique of it.

My second observation here, regarding economic tax policy discourse, is the extent to which tax laws are perceived simply as a technology or an instrument for the implementation of reform. Tax reform efforts are often discussed as technical applications of the best economic thinking of the day to imperfect conditions. Tax laws are vehicles for economic policy, or for raising revenues. They have no content or effects in themselves.

Even some tax reformers with a legal background have this instrumental view of law. Yet from the perspective of most tax lawyers in a developed country, this view is bizarre. Perhaps more than in any other area of law, the inconsistencies, complexities, unintended consequences and many dead-end paths of tax law are plain to see. How could tax law be considered to be a transparent vehicle for policy?

A consequence of this view is that in the fiscal policy framework, it is expected that tax policy goals are able to be implemented and that outcomes will reflect goals. This expectation is particularly important in institutions like the IMF and the World Bank. It is evidenced, for example, in Letters of Intent that make bald statements such as 'introduce a value-added tax (VAT)' as part of the conditions of a structural adjustment package.

A more specific aspect of this problem is an ignorance of the operation of the law of a particular country within its social and legal culture; of the history of a country's tax system; and of the complexity of its economic and legal history. The lack of understanding with respect to the operation of legal systems and of local economies can produce significant problems with tax reforms. The approach of a Model Tax Code, such as the *Basic World Tax Code*, assumes that a legal framework can fit various contexts and operate effectively. This is a familiar issue of comparative law and there has been some critique of model codes and discussion of Model Laws and other approaches to tax reform within the tax reform literature itself.

Conclusion

I have no conclusions from this project yet, only strands of stories about tax reform policy and projects. I am seeking to tell these stories: to find them, I am mapping tax reform actors, institutions, projects and policies (and I am at risk of mixing my metaphors). I think these stories will show, for the example of tax reform, the ways in which truths about legal systems, the role of the state in a globalised economy, citizens, wealth and income distribution within and between countries, are constructed through discourse and practice, in ways that reinforce privilege and power. As I look more closely, these stories will also show sites of resistance and redistribution and the complexities of reform processes across borders. Many similar stories exist, I suspect, in other arenas of globalisation and development projects.

The Year in International Law in Review

The Year in International Law in Review: A New Zealand Perspective

Julian Ludbrook*

The international legal framework is very important to a country like New Zealand. Subject to the extent of their universality and acceptance, it establishes clear sets of rules governing the behaviour of the international community, applying to all regardless of size. And it provides mechanisms for seeking and increasingly securing redress.

I will therefore use this as an underlying theme in highlighting some particular developments in which New Zealand has been involved over the last year in the international legal area:

- review of United Nations treaties in relation to last year's UN Millennium Summit;
- ratification of the Rome Statute of the International Criminal Court and an initiative on the crime of aggression;
- action in support of the international framework to combat international terrorism and transnational crime;
- ongoing involvement in several international dispute settlement processes, particularly the WTO;
- strengthening our process for the involvement of Parliament in the review of international treaty actions; and
- ongoing activity in relation to the handling of complaints under the Optional Protocol to the International Covenant on Civil and Political Rights.

The agenda of issues of interest to us is much broader, but the above are all relevant to the ongoing development of the international legal framework and the increasing flesh which over time it is acquiring. Part of that flesh is the network of legal instruments being developed across a broad range of areas; part is institutional.

The Millennium Summit

Relevant to the first, last year, was the UN Secretary-General's initiative in encouraging members leading into the Millennium Summit to review their adherence to a set of 25 core UN treaties and a collection of 500 others. We like others did so and manifested our support for this international framework by moving ahead with a number of new treaty actions. This initiative usefully illustrated the way in which such treaties are over time establishing a broad set of international rules across a range of subject areas, reflecting countries' common interests in achieving agreed rules where their interests intersect at the international level.

Rome Statute of the International Criminal Court

One of our most significant treaty actions at the Summit was ratification of the Rome Statute of the International Criminal Court. For the Statute represents a major step forward by complementing the International Court of Justice in its role in relation to state-to-state disputes and establishing an International Criminal Court able to hold to account individuals guilty of grave international crimes. This is a bold and positive new development in the international arena.

There was, however, one difficult issue that was put to one side in the negotiation, for further work, namely definition of the crime of aggression and the associated jurisdictional preconditions for an ICC prosecution for such

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a crime. Discussion has commenced on this difficult issue in the Preparatory Commission of the ICC but progress is slow.

Some countries argue that only the Security Council has power to determine the existence (or otherwise) of an act of aggression and that, unless the Security Council makes a determination, there should be no prosecution of an individual in the ICC. Others suggest that, if the Security Council does not determine whether or not a particular act constitutes a crime of aggression within a specified period, the ICC should be able to proceed to make its own determination.

We, along with Bosnia and Romania, have put forward a proposal which seeks to find middle ground and recognises the important role of the International Court of Justice in making international legal determinations. The proposal would provide for an advisory opinion to be sought from the ICJ in the event of a failure by the Security Council to make a determination within a specified period of time.

While there are issues relating to our proposal still to be worked through, there was sufficient interest in it for us to be asked to revise it in light of the discussion so that it can be discussed further at the next meeting of the Preparatory Commission in September.

We consider that establishment of a jurisdiction for the crime of aggression is an important component of what the ICC should encompass if it is to be effective, and if we are to learn from the lessons of the Second World War and the Nuremberg Trials. Hence our interest in trying to move the debate forward and, in doing so, drawing appropriately on other parts of the international legal and institutional architecture.

Terrorism and transnational crime

We also signed at the Summit the International Convention for the Suppression of the Financing of Terrorism, and announced our intention to move ahead with final treaty action on it and the International Convention for the Suppression of Terrorist Bombings, once our domestic processes were completed. This reflects our support for the development of an effective international framework to combat international terrorist activity. Events in the region last year, while having a largely domestic character, highlighted the potential importance of instruments of this kind in combating international terrorist acts in all their forms, recognising that our region is not necessarily itself immune from such acts.

We are also participating in current discussions on a possible Comprehensive Terrorism Convention. We are supportive of such an instrument if it will contribute to the strengthening of the existing network of treaties in this area. Our concern will therefore be to ensure that any such instrument does not undercut existing, more subject-specific, instruments but rather builds on and ideally enhances their scope and coverage.

We have also moved quickly to signature of the UN Convention against Transnational Organised Crime and the associated Protocols on Trafficking of Persons, especially Women and Children, and the Smuggling of Migrants. These are examples of new international instruments seeking to deal collectively with areas of international concern which have emerged over recent years. They address forms of activity from which, like international terrorism, our region is not necessarily immune.

Use of international dispute settlement mechanisms

The obverse side to new international legal instruments to safeguard our collective interests is the existence of legal mechanisms to resolve any problems arising under them. The dispute settlement mechanism of the World Trade Organisation has continued to illustrate the substantial value for us both of a body of rules to facilitate freer trade between member states and of a body equipped to resolve any disputes between members.

In the last 12 months or so, we have taken two further cases to the WTO. We were successful in our case against Canada concerning subsidised exports of certain dairy products in breach of WTO export subsidy disciplines. The Panel's decision in our (and the United States') favour was upheld on appeal to the Appellate Body. We have just had a further case before a panel on steps taken by Canada to implement that decision which were considered by the

US and ourselves also to be in breach of WTO requirements. Separately, we and Australia took a case against the US on their safeguard action against lamb imports and the Panel's decision in our favour was substantially upheld at the Appellate Body level in March.

We also took action with Australia against Japan in respect of their fishing of southern blue fin tuna. While successful in securing interim relief from International Tribunal for the Law of the Sea (ITLOS), the Law of the Sea Arbitral Tribunal last year determined that it had no jurisdiction.

These cases all illustrate the value for our countries of robust dispute settlement mechanisms through which we can seek relief where we consider that the actions of other states breach their international obligations to us.

Strengthening of involvement of parliament in review of international treaties

International treaties, both through their increasing numbers and through the greater range of their subject-matter, have increasing relevance and potential impact domestically. This has generated increasing parliamentary interest in them. Responding to this, New Zealand in 1997 introduced a system requiring all multilateral treaties and bilateral treaties of particular significance to be submitted to Parliament for consideration. This new mechanism, similar in quite a few respects to the Australian procedure, was reviewed by a Parliamentary Committee in 1999 and found to be working well, subject to a number of suggested improvements. The new system was in consequence made permanent early last year, along with some adjustments to the procedures to take on board the recommendations made.

A private member's Bill was introduced in October last year which proposed that the new procedure be embodied in statute, be extended to require all treaties (ie bilateral as well as multilateral) to go through the process and to require also Parliamentary approval before any treaty actions were taken. This Bill is currently before the Foreign Affairs and Defence Select Committee which has called for and is currently considering public submissions on it. The Committee will need to weigh the competing arguments put before it. Some favour a Parliamentary approval role in order to make the process more democratic. Others argue that an approval role would represent a very significant constitutional change. Other aspects raised have been the possible implications for efficacious treaty action, including the risk of extraneous issues being introduced as a condition for approval.

What the Bill does illustrate is the increasing level of interest domestically in international treaty actions and the way in which treaties can impact domestically. This is reflected not only in parliamentary but also wider public interest in the treaty-making process.

Human rights and individual complaint procedures

Another area of significant development for the international legal framework has been in relation to international human rights instruments and the provision of individual complaints procedures to international human rights bodies. We have in the last year signed the two new Protocols to the Rights of the Child Convention and are about to ratify the International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

We also last year ratified the Protocol to the Convention on the Elimination of Discrimination against Women which allows individual complaints to the CEDAW Committee. This will supplement the complaint procedure already available to New Zealanders under the relevant Optional Protocol to the International Covenant on Civil and Political Rights. We have in the last 12-18 months been involved in the preparation of responses to eight complaints under that Covenant though a number of these have subsequently been withdrawn. The complaint procedure is nevertheless regarded by us as an important one through which individuals can seek redress for alleged breaches of their human rights provided that they have first exhausted all their domestic remedies.

Conclusion

The above outline of developments of interest in the international legal arena from a New Zealand perspective underlines how important the international legal framework is for us. Our commitment to continuing to work to support the rule of law internationally is underpinned by our promotion of Bill Mansfield as a candidate for election to the International Law Commission in elections to be held later this year. For we recognise that the international legal framework can be strengthened not only through the development of new instruments in areas of common concern in negotiations between states but also through the expertise and independence of the work of the ILC in developing new rules in areas of a more systemic kind. The value of this is illustrated in the work of the present Australian member, James Crawford, on State Responsibility.

The international legal agenda is multifaceted and constantly evolving to meet new needs. I would like in closing to thank ANZSIL for the opportunity for us to come together and reflect together on developments affecting that agenda in which we in Australasia have a common interest and concern.

Judicial Review of Extradition Decisions: Recent Developments

Sukhpal Singh*

Introduction

Extradition is the process by which one country surrenders to another a person sought for criminal prosecution or for the imposition or enforcement of a sentence. The extradition process seeks to balance two interests: first, the interest in ensuring that persons legitimately sought for criminal prosecution are returned to the jurisdictions seeking them, and, second, the interest in ensuring that persons are not returned to countries on the pretext of criminal justice requirements when in fact the person is really sought for a reason connected with their race, religion, nationality or political opinions, that is, the interest in ensuring that a fugitive's human rights are protected.

In attempting to strike this balance, the Australian extradition process, promulgated by the Extradition Act 1988 ('the Act')[1] establishes roles for the Courts and for the Executive arm of government. It could be observed that the Act provides the Executive with a greater role than the Courts given that it appears to place much of the discretions in the extradition process in the Attorney-General,[2] and, indeed, this aspect of the legislation has been criticised.[3] The observation could also be made that the High Court's *Kainhofer*[4] decision in 1995 was followed by court decisions indicating a (further) reduction in the role of the Court in the process established by the Act.

The *Kainhofer* decision has been followed by an increasing number of cases of judicial review of extradition decisions by Ministers. This paper argues that such cases are an inevitable result of Australia's current extradition regime which, according to some observers, has shifted powers and responsibilities in extradition from the courts to the executive. The paper also examines responses by Australian courts to recent claims by fugitives of alleged political and racial motivation on the part of countries seeking their extradition from Australia and concludes that the Courts are taking a pragmatic approach to such claims.

The Australian extradition process: a brief overview

The Act establishes a process by which a Magistrate determines a person's eligibility for extradition following which the Executive (currently the Minister for Justice & Customs ('the Minister')) determines whether the eligible person should be surrendered to the requesting country.[5] The process commences with the 'provisional arrest' of a person under section 12 of the Act. There is a presumption

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1 Section 3(a) of the Act: Principal Objects of Act.

2 The Attorney-General's powers under the Act are currently delegated to the Minister for Justice & Customs and the delegation upheld in *Attorney-General (Cth) v Foster* 161 ALR 232.

3 See, eg, Toohey J in *DPP(Cth) v Kainhofer* 185 CLR 528 at 541 where His Honour refers to Professor Shearer's comment that a feature of the Act is 'a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion'.

4 *Kainhofer*, ibid.

5 The stages of the extradition process are set out in *Harris v Attorney-General* (1994) 52 FCR 386 at 389, also referred to by Gummow J in *DPP v Kainhofer* 185 CLR 528 at 547.

against bail in the Act[6] and most persons provisionally arrested are remanded in custody. The next stage is the issuing of a notice by the Minister under section 16 of the Act certifying that an extradition request has been received from an 'extradition country' in relation to the person for specified offences. If a section 16 notice is not issued within the statutory period, the person is discharged. The section 16 notice clears the way for a Magistrate to hold a hearing under section 19 of the Act to determine eligibility for extradition. If ruled eligible for extradition by the Magistrate, and if the person declines to review or appeal the Magistrate's decision under section 21 of the Act, the person is remanded in custody to await the Minister's surrender determination under section 22 of the Act. Indeed, the Minister has no power to intervene in the extradition process until such time as the section 21 review/appeal process is completed.[7]

Human rights protections, referred to as 'extradition objection' are considered at the section 16, 19 and 22 stages, as well as at the review/appeal stage in section 21.[8] The Minister cannot issue the section 16 notice (to enable the extradition process to continue after provisional arrest) if he/she is of the opinion that there is an 'extradition objection' in the matter.[9] At the section 19 eligibility hearing before the Magistrate, the person sought may attempt to satisfy the Magistrate that there are substantial grounds for believing that there is an 'extradition objection' in the matter.[10] This aspect can be reviewed at the section 21 stage.[11] At the surrender stage, the Minister must again be satisfied that there is no 'extradition objection' in the matter before making a surrender determination in respect of a person found eligible by the Magistrate for extradition.[12]

The High Court's *Kainhofer* decision and subsequent decisions

The *Kainhofer* case in 1995 is a watershed decision on the role of the Magistrate in the extradition process. The case came before the High Court following a Full Federal Court ruling that an Austrian arrest warrant describing the person sought as 'strongly suspected' of committing the crimes for which extradition was sought was not properly 'accused' as required by the Act.[13] In allowing the prosecution's appeal, Gummow J ruled that a fair reading of the Austrian extradition materials indicated that the respondent 'is wanted for prosecution' and did relevantly accuse the person.[14] In coming to this decision, the court noted that in examining foreign documents in extradition situations, it was important not to interpret the term 'accusation' in the way it was interpreted in the Australian common law system.[15]

More significantly, the High Court ruled that the function of the Magistrate at the section 19 hearing is a limited one. The Court ruled that once the person has been arrested under section 12 and the Minister's notice issued under section 16, these matters cannot be raised before the Magistrate at the section 19 eligibility hearing. The Court noted that the different stages in the extradition process 'are exercisable

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6 Section 15 (6) of the Act: Magistrate to refuse bail 'unless there are special circumstances'.

7 Section 22 (1) of the Act: Meaning of 'eligible person' and 22 (2) of the Act: Minister shall, 'as soon as is reasonably practicable…after a person becomes eligible person, determine whether a person is to be surrendered'.

8 Section 7 of the Act: Meaning of 'extradition objection'.

9 Section 16(2)(b) of the Act.

10 Section 19(2)(d) of the Act 'Determination of eligibility for surrender'.

11 The review process is essentially a hearing *de novo* limited to material before the Magistrate: Section 21(6)(d).

12 Section 22 (3)(a) of the Act 'Surrender determination by Attorney-General'.

13 An arrest warrant issued under the law of the requesting country accusing the person sought for extradition is a prerequisite in the Australian extradition process: section 6 of the Act: Meaning of 'extraditable person'.

14 See 185 CLR 528 at 568-569.

15 A 'reasonable cosmopolitan interpretation' is called for in such situations: Gummow J in 185 CLR 528 at 564.

by different repositories in sequence, but none of them authorises the repository of a power to review the exercise of a power by another repository earlier in the sequence'.[16] After *Kainhofer*, it was clear that the Magistrate's role in the extradition eligibility hearing at the section 19 stage is essentially confined to (i) an examination of whether the 'supporting documents' from the requesting country are 'duly authenticated' (ii) if so, whether those documents satisfy the 'dual criminality' test and (iii) if raised by the fugitive, whether 'extradition objection' is made out to the 'substantial grounds' test.[17]

Kainhofer was followed by a number of decisions consistent with the proposition that the Magistrate's role at the section 19 eligibility hearing is a limited one. In *Papazoglou v Republic of the Philippines*,[18] the Full Federal Court ruled that whether or not extradition proceedings constituted an abuse of process and should therefore be stayed was not a matter for consideration by the Magistrate or the Court on review under the Act but, instead, was a matter for determination by the Attorney-General.[19]

In *Cabal v United Mexican States*[20] the Full Federal Court, in conducting a section 21 review of a Magistrate's eligibility ruling, agreed with *Papazoglou* and cases which followed it in holding that:

> There appears to be some doubt as to whether the Court may intervene in the extradition process in circumstances where it can be demonstrated that there has been an abuse of process, or that the Commonwealth Director of Public Prosecutions (who has the carriage of extradition proceedings in this country) has acted fraudulently or in bad faith. We doubt that s39B of the *Judiciary Act* can properly be invoked in order to bring about indirectly a result which, by reason of the line of authority set out above, cannot be achieved under the provisions of the Act.[21]

Other recent cases such as *McDade v United Kingdom*,[22] *Timar v Republic of Hungary*[23]and *Rahardja v Republic of Indonesia*[24] reinforce the proposition that the Magistrate's examination of the extradition supporting documents during the eligibility hearing (to establish dual criminality) should be conducted fairly and not in an overzealous manner aimed at finding deficiencies caused, for example, by use of language 'not strictly in conformity with the Act or which is inelegant or inappropriate'.[25]

Possible post-*Kainhofer* shift: judicial review of ministerial decisions

In the view of this writer, the limited role of the Magistrate when conducting extradition eligibility proceedings and that of the review Court under sections 19 and 21 respectively of the Act may be expected to lead to increasing instances of judicial review of executive decisions in the extradition process by those opposing extradition. Specifically, Ministerial decisions to issue notices under section 16 of the Act (enabling the case to proceed to the Magistrate's eligibility hearing) and surrender

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16 See Brennan CJ, Dawson and McHugh JJ, ibid, at page 538 and Gummow J.

17 The 'dual criminality' test requires that the criminal conduct alleged against the fugitive in the requesting country constitutes crime(s) against Australian law punishable (usually) by at least 12 month's imprisonment if that conduct occurred in Australia. See, generally, section 19 (2) of the Act, in particular, section 19(2)(c).

18 (1997) 74 FCR 108.

19 *Papazoglou* appears to have been followed in *Dutton v South Africa* (1999) 84 FCR 291 and *Bennett v UK* (2000) FCA 916.

20 [2001] FCA 427.

21 *Cabal v United Mexican States* [2001] FCA 427 at paragraphs 302-304.

22 *McDade v United Kingdom* [1999] FCA 1868.

23 *Timar v Republic of Hungary* (Unreported Federal Court 5/11/99).

24 *Rahardja v Republic of Indonesia* [2000] FCA 1297.

25 *Rahardja*, ibid, at paragraph 77.

decisions under section 22 of the Act may be expected to become increasingly the focus of judicial review pursuant to section 39B of the Judiciary Act 1903 ('39B').

Some indications of this possible shift may be discerned in the recent high-profile *Cabal* and *Foster* cases. The *Cabal* litigation has included 39B challenges to Ministerial decisions under section 16 of the Act, on grounds that the Minister's discretion miscarried for reasons ranging from alleged invalidity, in the requesting country (Mexico) of some of the arrest warrants upon which extradition was sought, to improper political motives on the part of the Mexican authorities. In upholding the Minister's decisions, the Full Federal Court ruling, in the opinion of this writer, was illustrative of the degree of difficulty faced by an applicant attempting to establish that the Minister had acted unreasonably in forming opinions as to matters such as 'extraditable person'.[26] In *Foster*, a majority of the High Court ruled that the Minister, in making a determination under section 22 of the Act to surrender the appellant to the United Kingdom, was not bound to take into consideration the likely penalty that could be imposed upon him there.[27] 39B challenges to the Minister's surrender determination on the grounds of the fugitive's health have also been made.[28]

Extradition objection claims: a pragmatic response by the Courts?

The recent *Cabal* and *Rahardja* cases are examples of attempts by fugitives to satisfy the Magistrate at the section 19 eligibility hearing that there is an 'extradition objection' on the basis of alleged political and racial motivation by the requesting country. In *Cabal* the fugitive argued that an 'extradition objection' existed because Mexico's extradition requests were allegedly motivated by opposition to his political views and that he would be prejudiced at his trial or punished in Mexico on account of his political views. Rahardja, an Indonesian citizen of Chinese ethnicity, argued that entrenched and widespread anti-Chinese sentiments in Indonesian society meant that there were substantial grounds for believing that he would be prejudiced at his trial or punished in Indonesia by reason of his race. Both fugitives presented the Magistrate a considerable body of material in support of 'extradition objection' .

Both fugitives' claims were rejected by the Magistrate at first instance and subsequently by the Court on review essentially because they failed to establish, to the requisite degree, how their claims could amount to prejudice at *their individual* trials if they were to return. In *Rahardja*, the Full Federal Court noted:

> However, even if it is true that Indonesian authorities are more disposed to decide not to prosecute a non-Chinese Indonesian than a Chinese Indonesian, that fact does not establish there are substantial grounds for believing that Mr Rahardja may be prejudiced **at his trial** or **punished** by reason of his race.[29]

A similar approach was taken by the Full Federal Court in *Cabal*, when the Court ruled:

> Whether the Mexican criminal justice system affords adequate protection to those charged with the commission of offences may be a matter for debate. There may be serious deficiencies in the way in which the criminal justice system of that country operates. The existence of such deficiencies does not, of itself, provide a basis for concluding that an extradition objection under s 7 (c) has been made out. The critical issue as far as this Court is concerned is whether the specific conditions set out in that section have been made out. In the present case, that means prejudice at trial, or prejudice, detention or restriction in his or her personal liberty "by reason of his or her … political opinions". It does not mean prejudice at trial, or prejudice,

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26 *Cabal v Vanstone* [2000] FCA 1306.

27 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442.

28 Stone J, 14 June 2001 in *Chan v Minister for Justice and Customs*, Federal Court of Australia.

29 *Rahardja v Republic of Indonesia* [2000] FCA 1297 at para 56.

> detention or restriction in his or her personal liberty because the system of criminal justice in that country is far from perfect.[30]

The *Cabal* and *Rahardja* rulings were made notwithstanding acknowledgment by the Courts that the criminal justice systems of the respective requesting countries were far from perfect.[31] In the view of this writer, the *Cabal* and *Rahardja* decisions are indicative of a pragmatic approach adopted by Australian Courts in applying the 'substantial grounds' test to claims by fugitives of alleged political or racial motivation on the part of the requesting extradition country. In my view, the pragmatism underlying these decisions can be attributed to two factors. The first factor would appear to be recognition by the Courts that matters raised by a fugitive in opposition to extradition, other than those falling within the scope of the extradition eligibility hearing and any subsequent review, are properly matters for consideration by the Executive at the surrender determination stage.[32] The second factor would appear to be recognition by the Courts that the propriety or otherwise of Australia's extradition arrangements, that is, whether or not it is proper for Australia to conduct extradition business with certain countries, are properly issues for consideration by the Executive and not ones for adjudication before the Courts.[33]

Conclusions: have we got the balance right?

The current state of Australian extradition law is that the Australian Courts would arguably appear to have a comparatively minor role in the extradition process compared to that of the Executive. So long as the Magistrate is satisfied that the 'dual criminality' requirement is satisfied and is not satisfied there are substantial grounds for believing there is an 'extradition objection', the matter is essentially one for determination by the Executive. Matters such as whether the extradition proceedings constitute an abuse of process; whether Australia should be doing extradition business with the particular requesting country; assertions of innocence by the fugitive;[34] and whether extradition is oppressive or unjust are matters for consideration by the Executive before any surrender determination is made.

In the view of this writer, the current state of the law accurately reflects the balance struck in the Act between the interests of the fugitive and those of the requesting foreign country. The current balance was struck in the mid-1980s, when it was considered that Australia's extradition laws and its extradition arrangements, based as they were on the presentation of *prima facie* evidence by the requesting country, were too cumbersome.[35] The present balance was struck with a view to facilitating extradition as part of the fight against organised crime.

Whether the balance that has been struck is the correct one, especially in cases where an Australian citizen is the subject of an extradition request, is a different matter altogether. The current balance has been the subject of some criticism during an inquiry into Australia's extradition law by the Commonwealth Parliament's Joint Standing Committee into Treaties ('JSCOT'). Perhaps it is indeed time for the balance to be reviewed.

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30 *Cabal v United Mexican States* [2001] FCA 427 at para 280.

31 Indeed, in *Rahardja*, the Full Federal Court appears to have accepted the Magistrate's findings that the Indonesian justice system is 'dysfunctional' and 'in a deplorable state': *Rahardja*, ibid, at para 54.

32 *Papazoglou v Philippines* 144 ALR 42 at 71; *Cabal*, ibid, at para 305.

33 See *Cabal*, ibid, para 279.

34 Section 19 (5) of the Act: Person not entitled to adduce, and Magistrate not entitled to receive, evidence to contradict allegations.

35 S Sukhpal, *Recent Developments in Australian Extradition Policy and Practice* in Proceedings of the Third Annual Meeting ANZSIL 1995 page 167.

The Year in International Law in Review: An Australian Perspective

Bill Campbell*

The problem with making the very last presentation of the conference, particularly in a session entitled 'The year in international law in review', is that most of the important matters have already been reviewed. Therefore, for the most part, I propose mentioning some matters that have had a lower profile.

Human rights committees

However, to begin with, I will make some personal observations borne of the experience of being involved in the presentation of Australia's reports to two human rights committees:

- the Human Rights Committee in relation to Australia's Third and Fourth Reports under the International Covenant on Civil and Political Rights (ICCPR)[1] in July 2000; and

- the Committee Against Torture in relation to Australia's Second and Third Reports under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[2] in mid-November 2000.

The latter presentation occurred after the release of the government's review of the human rights treaty-body system.

Scope does exist for bringing commonality to the procedures of human rights committees. Let me compare the practice of the two committees just mentioned. The Human Rights Committee conducted consultations with non-governmental organisations (NGOs) well before Australia's presentation of its report and provided a list of questions to Australia well in advance. This advance notice assisted in the gathering of information from within Australia, including from the states and territories, in order to be able to answer the questions.

In contrast, the Committee Against Torture held consultations with NGOs on the day immediately preceding the meeting. It did not provide an advance list of questions, other than a list of general issues that were usually canvassed with states presenting reports to the committee. That list was not addressed specifically to Australian circumstances. The committee asked over 40 detailed questions on the first day of its consideration of Australia's report that had to be answered in the next appearance before the committee, 24 hours later. Obviously, this caused difficulties when the information has to be sought from states and territories as well as the Commonwealth. Nevertheless, it was a challenge that was met.

Second, the degree of NGO involvement in the process is striking. NGOs are present during the consideration of the reports, they discuss aspects of state responses with members of the committee, and the committee asks questions based upon those discussions. In the case of the Committee Against Torture, it received detailed written and oral material from the Aboriginal and Torres Strait Islander Commission (ATSIC) and Western Australian Deaths in Custody Watch the day preceding the hearing to which the Australian representatives were asked to respond to in detail the following day.

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1 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, ATS 1980 No 23.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, ATS 1989 No 21.

A third point is that the communication time between Geneva and Australia is becoming ever shorter. The comments made by a Minister in Australia a few hours before a committee meets in Geneva can be the subject of questioning by the committee. In summary, the actors in presenting a report to a committee are not confined to persons in Geneva and the focus of the committees is on the immediate and not just the reports that may have been lodged some years preceding the presentation.

Human rights — communications by individuals

A related aspect of Australia's human rights practice concerns communications from individuals to human rights committees. The Office of International Law within the Attorney-General's Department is responsible for responding to communications by individuals made under the ICCPR, the CAT and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[3]

Currently, there are 12 communications concerning Australia under the ICCPR. Australia has responded to, and is awaiting the response from the Human Rights Committee in relation to 11 of those communications. There are nine communications under the CAT. All of these are from unsuccessful refugee applicants who allege that they will be subjected to torture or cruel, inhuman or degrading treatment, if returned to their country of origin. Australia has provided its submissions and is awaiting the views of the Committee against Torture on seven of those communications. There are no current communications outstanding under the CERD.

Law of the sea and maritime matters

Moving from human rights to maritime matters. A number of relatively high-profile maritime matters are ongoing. I will not dwell on these but they include the Timor Gap negotiations with United Nations Transitional Administration in East Timor (UNTAET)/East Timor,[4] various fisheries initiatives mentioned today and yesterday and the delineation of the outer limits of our continental shelf, both in relation to the mainland and in relation to the Australian Antarctic Territory. However mention will be made of a couple of important but perhaps not so well-known International Maritime Organization (IMO) negotiations and two issues relating to Australia's maritime zones.

As reported in the last edition of the Australian and New Zealand Society of International Law's newsletter,[5] an international Convention on Liability and Compensation for Bunker Oil Pollution Damage was adopted by a Diplomatic Conference in March of this year. Bunker oil is the fuel used to power ships. Pollution by bunker oil was the major remaining gap in the suite of IMO Conventions dealing with marine pollution. The Convention imposes strict liability for bunker fuel spills with no defences. Compulsory insurance will be required to be carried by all ships over 1,000 tonnes. Also, direct action will be permitted against the insurer of any ship. This was an Australian initiative and its adoption fulfils one of the goals set in Australia's Oceans Policy.[6]

Another matter, the subject of IMO consideration at the present time, is the creation of a so-called 'third-tier fund'. This would raise the level of funds currently available to pay for oil pollution damage under the 1992 Civil Liability and Fund Conventions. The need for an additional level of funding became apparent following a number of major incidents, including that involving the 'Erica' off the coast of France. It is anticipated that the tier will be created by a Protocol to the 1992 Fund Convention. Only parties to the 1992 Fund Convention, which provides the second tier of compensation, could be

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3 Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195, ATS 1975 No 40.

4 See Timor Sea Arrangement, initialled in Dili on 5 July 2001 <http://www.austlii.edu.au/au/other/dfat/reports/infokit.html>.

5 ANZSIL Newsletter No 1 (2001) <http://law.anu.edu.au/anzsil/ANZSILNewsletterApril2001.pdf>.

6 < http://www.oceans.gov.au/aop/main.htm>.

parties to the Protocol. A Working Group to progress the Protocol meets later this month. The existing limit under the first two tiers is SDR 203 million. This will rise to SDR 300 million in 2003. The proposal for a third tier would substantially increase that limit.

The two other maritime matters concern Australia's maritime zones. First, in August 2000, the outer limit of the territorial sea in the southern part of the Gulf of Carpentaria was extended to include a roadstead near the port of Karumba. Roadsteads are areas of the sea that are used for the loading, unloading and anchoring of ships, that would otherwise be outside the 12 nautical mile territorial sea. Article 12 of the United Nations Convention on the Law of the Sea (UNCLOS) allows those areas to be included in the territorial sea. The particular roadstead in the Gulf of Carpentaria is used for the loading of a product of the Century Zinc mine. By way of aside, an interesting question of interpretation arose in relation to the roadstead, that is, whether the area in question could be declared part of the territorial sea before its actual use as a roadstead. This question of interpretation arose out of the use of the words in article 12 'roadsteads which are normally used'.

The Australian Surveying and Land Information Group (AUSLIG) officially launched its Australian Maritime Boundary Information System on disk. This contains a digital representation of the territorial sea baseline around Australia's mainland and islands forming part of states and mainland territories. The baseline is used to measure all of Australia's maritime zones. Also AUSLIG is conducting a review of the 1983 straight baselines which were declared in areas of fringing islands and in relation to areas of the coastline that are deeply indented and cut into. It is not intended that that review will wholly redraw Australia's system of straight baselines. Rather, its principal purpose is to take account of physical changes in the coastline, particularly in the north-west of Australia, and modern mapping technology.

Comprehensive Framework Convention on Tobacco Control

Two final matters concern the negotiations for an international Tobacco Convention and recent international law developments in Australia's quest for a space launch industry.

In May 2000, the World Health Organization (WHO) Assembly resolved unanimously to launch negotiations for a comprehensive Framework Convention on Tobacco Control.[7] The purpose of the Convention is to reduce tobacco-related death and disease globally. The negotiations commenced in October 2000 and the aim is to adopt a Convention by May 2003. Australia has been elected to one of the six positions on the Bureau of the Intergovernmental Negotiating Body. The Negotiating Text of the Convention addresses the international and domestic components of a comprehensive tobacco-control program, including tobacco trade and smuggling, tobacco taxes and subsidies, content and packaging requirements, regulation of tobacco sales and tobacco advertising and promotion. The difficult issue of compensation and liability has been referred to a special Legal Experts Group. The next round of the negotiations will be held in November.

Outer space co-operation

The Space Activities Act 1998 provides a regulatory framework for space activities and paved the way for the signing, on 23 May 2001, of an Agreement with the Russian Federation on space cooperation. This Agreement provides the legal framework for the transfer of rocket and other space-related technologies and expertise to Australia. It provides also for collaboration in scientific research, technology development and commercial cooperation. Further negotiations are now underway on a Technology Safeguards Agreement that is intended to ensure protection of sensitive Russian technology in Australia for space launch operations.

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7 <http://lists.essential.org/intl-tobacco/msg00286.html>.

Conclusion

The topics covered in this paper are a little disjointed and some may be considered obscure. Nevertheless, they do form an important part of the overall fabric of Australia's participation in, and its implementation of, international law.