



ANZSIL

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Australian New Zealand Society of International Law

International Governance and Institutions: What significance for international law?

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International Governance and Institutions: What Significance for International Law

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Friday 4 July

International Trade: Global and Regional Perspectives

Welcome

Professor Matthew Palmer (Dean, Faculty of Law, Victoria University of Wellington)

Keynote Addresses

The Honourable Phil Goff (Minister of Foreign Affairs and Trade) 'International Institutions and Governance: A New Zealand Perspective'

Dr Hans van Loon (Secretary General, Hague Conference on Private International Law) 'Private International Law: Balancing global and regional perspectives'

PANEL 1: The WTO in the 21st Century: Challenges and Prospects

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Mr Crawford Falconer (Ministry of Foreign Affairs and Trade, Wellington) 'The Doha Development Round and Lines of Tension'

Mr Ravi Kewalram (Department of Foreign Affairs and Trade, Canberra) 'The WTO DSU: Australian/New Zealand Implications'

Dr Brett Williams (Faculty of Law, University of Sydney) 'The 'Trade...' Debates and the Nature of WTO Obligations and Remedies'

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Justice Bruce Robison (High Court Judge, President of New Zealand Law Commission) Chair

Mr David Williams QC and Ms Elizabeth Gellert (New Zealand Bar, Auckland) 'The Use of Arbitration for Investment Treaty Disputes'

Dr Kent Anderson (Faculty of Law, Australian National University) 'The Limits of Soft Law Harmonisation: A Case Study of Australia, Japan and Others' Experience with the UNCITRAL Model Law on Cross-Border Insolvency'

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Mr Bill Mansfield (Adviser on International Law, Ministry of Foreign Affairs and Trade, Wellington and Member, International Law Commission, Geneva) Chair

Professor Benedict Kingsbury (School of Law, New York University and NZ Law Foundation Distinguished Visiting Fellow for 2003) 'Indigenous Peoples and International Trade and Investment Agreements'

Dr Justin Malbon (Faculty of Law, Griffith University) 'Article 27 of TRIPS: Not Patently Obvious'

Ms Jacqueline Peel (Faculty of Law, University of Melbourne) 'Impact of WTO SPS Rules on National Quarantine Standards'

Ms Caroline Foster (Faculty of Law, University of Auckland) 'The Delineation of International Adjudicatory Competence in International Trade Disputes involving Scientific Uncertainty'

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Mr David Goddard QC (New Zealand Bar, Wellington) 'Trans Tasman Legal Coordination'

Mr Paul Schofield & Stephen Bouwhuis (Office of International Law, Attorney-General's Department, Canberra) 'Even Closer Economic Relations'

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Mr Henry Burmester (Chief General Counsel, Australian Government Solicitor, Canberra)
Chair

Mr Bill Campbell (Director, Office of International Law, Attorney-General's Department, Canberra) 'The Year in Review: Australia'

Mr David Lewis (Department of Foreign Affairs and Trade, Canberra) **and Mr Richard Fairbrother** (Attorney-General's Department, Canberra) 'Unarmed Peace Monitors and Post Conflict Situations: Practical Lessons from the Bougainville Peace Process'

Mr Nigel Fyfe (Director, Legal Division, Ministry of Foreign Affairs and Trade, Wellington)
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Ms Virginia Hardy (Crown Law Office, Wellington) 'New Zealand'

PANEL 10: 'Unilateralism v Multilateralism: Is there Hope for International Institutions?'

Associate Professor Donald R. Rothwell (Faculty of Law, University of Sydney, ANZSIL President) Chair

Professor Andrew Byrnes (Faculty of Law, Australian National University) 'Unilateralism v Multilateralism: Is there Hope for International Institutions?'

Ms Treasa Dunworth (Faculty of Law, University of Auckland)

The Rt Hon Justice Sir Kenneth Keith (New Zealand Court of Appeal, Wellington)

Mr Geoff Skillen (Office of International Law, Attorney-General's Department, Canberra)

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Opening Address by Hon Phil Goff, Minister of Foreign Affairs and Trade International Institutions and Governance: A New Zealand Perspective

Introduction

Tena koutou nga mana karanga maha. Tena koutou.

It is my pleasure to address this 11th annual conference of the Australian New Zealand Society of International Law, and to welcome you all to Wellington.

Could I first congratulate the New Zealand Centre for Public Law and ANZSIL for the tremendous work they have put into organising this conference.

I acknowledge also the support given by the ANU Centre for International and Public Law, Fonterra, the International Law Association, the Law Foundation, NZAID, and the Ministry of Foreign Affairs and Trade.

You are meeting at a time when attention is focused on international law and multilateralism.

How effectively does the architecture that we have built over the last 60 years allow us to meet the challenges of the 21st century - the impact of globalisation, terrorism and regional conflict, and problems which do not stop at national borders?

These questions will be a driving force in your discussions over the coming days.

Importance of international law to New Zealand

First, a comment on the importance of international law and its supporting institutions for New Zealand.

If the law of the jungle rather than the rule of law were to prevail, small nations such as New Zealand inevitably lose out to the interests of larger and more powerful countries.

International law however is not only significant to small countries.

The security of all states is ultimately dependent on an international framework of rules that are designed to ensure the safety and security of their populations from threats such as terrorism.

The growth of international law and these institutions over the last 60 years has fundamentally changed the way countries relate to each other, and has increased both the stake and voice of smaller countries in international affairs.

For New Zealand that change has been for the better.

We have invested, and continue to invest, a large amount of effort in seeking to ensure that the international system delivers.

There are, from a New Zealand perspective, four fundamental aspects underpinning international legal order.

These are:

- the UN Charter and UN system,
- internationally agreed legal norms and rules,
- effective international dispute settlement and judicial bodies, and
- regional integration and cooperation.

The UN Charter and UN system

The most fundamental pillar of the international order is the United Nations.

The United Nations was built on a determination after the Second World War to repudiate the use of force by providing for the peaceful settlement of disputes and an internationally agreed legal order for the maintenance of peace and security.

In nearly sixty years the United Nations has played a crucial role in the development and maintenance of international law.

The tools within the UN system have shown themselves fit for this purpose, as long as members choose to use them.

The International Law Commission has played a critical role in the analysis and codification of complex legal challenges. It has been an honour for New Zealand to have recently had Bill Mansfield, who is here today, elected to the membership.

The great exercises in codification under the UN's authority – the Vienna Convention on the Law of Treaties, the Convention on the Law of the Sea – to take just two examples, serve to underscore the UN's success as a law making institution.

The wider UN system has itself also supported the development of a broad range of instruments in areas such as human rights, social and gender equality, environmental protection and resource management.

But in its most important, and most difficult, area of responsibility, the maintenance of international peace and security, there will always be limitations on what the UN can achieve.

The effectiveness of the United Nations depends on the political will of its members, and in particular of course, its leading members.

We witnessed in March, in relation to Iraq, an inability to achieve agreement in the Security Council on the appropriate way forward.

While there was agreement on the goal of securing Iraq's compliance with Security Council's resolutions, there was no agreement over means, and if and when the ultimate sanction of force available under the UN Charter should be used. A pivotal issue became what constituted appropriate authorisation under the UN system for the use of force.

There was disagreement over whether existing Security Council resolutions provided sufficient authorisation for the action ultimately taken.

After effort over a number of months, a common will proved elusive, including on this legal issue.

The question which remains is if and how we can avoid the sort of stalemate reached in the Security Council over Iraq from occurring again in the future.

Following the intervention in Kosovo there was considerable reflection on a set of principles that might govern any right of humanitarian intervention, including the crucial role of the Security Council in any such situations.

What we need to do now is similarly think about the lessons for the future for the United Nations and international law flowing from the events in Iraq.

How does the United Nations deal effectively and consistently with a member state which is failing to comply with Security Council resolutions? Are there improvements in the way that the Security Council can undertake the diplomatic process?

There also needs to be a renewed commitment by member states to the UN's principles and the importance of acting in accordance with international law.

It is reassuring in this regard that Security Council Resolution 1483 gave prominence to the need for all states to comply fully with their obligations under international law, including the Geneva Conventions and the Hague Regulations. It also affirmed the important role which the United Nations has to play in the reconstruction of Iraq and the restoration of democratically-based institutions.

Iraq represented a failure of the United Nations as its detractors have pointed out. However, this needs to be seen in the context of other successes in such places as Bosnia, Namibia and East Timor and in its efforts to combat terrorism.

Internationally agreed legal norms and rules

Anyone disputing the relevance or usefulness of international law need only look at the broad range of daily activities it now encompasses. Aviation, shipping, fishing, postal services, trade in goods and services, intellectual property, plant varieties, weights and measures, work conditions, telecommunications and meteorology are all examples of areas of activity now regulated by public international law.

International law encompasses standards for environmental protection, disarmament, war crimes and other international crimes, human rights, trade and international peace and security.

And in the private international law field it covers important areas of mutual co-operation relevant to individual private activity. I am very pleased the Secretary-General of the Hague Conference, Dr Hans van Loon, is present here, given the important contribution the Hague Conference makes to the development of new instruments in this area.

The range of areas now governed by international rules has grown exponentially.

Important new instruments for which we have recently enacted implementing legislation include the Conventions on Terrorist Bombings and Terrorist Financing and Security Council Resolution 1373, the UN Convention against Transnational Organised Crime and its protocols on Migrant Smuggling and People Trafficking.

New Zealand is also currently working on becoming party to the Conventions on the Protection of Nuclear Material and Marking of Plastic Explosives, the Framework Convention on Tobacco Control, the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on Prior Informed Consent.

While the scope of international norms and standards has grown, many are still far from universally accepted.

Not all states are party to all treaties.

Measures to address global problems like terrorism or environmental degradation will not be fully effective in achieving their objectives if they are implemented unevenly.

States must continue to be persuaded of the benefits of international law and international institutions for solving global problems.

In that respect all societies are grappling with the challenge of reconciling the principles of state sovereignty with the reality of globalisation.

Viruses, like HIV/AIDS and as we have seen most recently, SARS, do not respect national borders. Nor can one country acting alone effectively protect its population from their threat.

Combating terrorism, and other transnational crime such as trafficking in women and children or preventing the commercial sexual exploitation of children through the internet, all require highly developed cooperation mechanisms that transcend national borders.

Sovereignty may continue to be strongly defended as a fundamental principle of the international legal order, but it must increasingly be understood to exist within a framework of internationally agreed rules that constrain state action inside, as well as outside, its borders.

The sovereign decision to be bound by international standards in areas such as human rights should be rightly regarded as one of the most appropriate manifestations of sovereignty, not as subjugation to some foreign legal order.

Elaboration of norms and standards is only the first step. A key challenge lies in achieving their full implementation by the states that sign on to them. Small and developing countries face particular challenges in this respect.

Both the UN and other international institutions, as well as civil society, have a key role in ensuring that states have the technical capacity to implement the obligations they have undertaken.

For New Zealand, building such technical capacity is an important aspect of our development assistance programmes. As an example, we are, with Australia, helping with the drafting of model counter-terrorism and transnational crime legislation for countries in the Pacific region to use as appropriate.

Further challenges lie in securing the international enforceability of agreed international norms and standards and in ensuring consistency in the application and adherence to international law across the range of areas it now encompasses.

Effective dispute settlement and specialist judicial bodies

One of the most commonly heard criticisms of international law is the absence of a means to enforce it.

While international rules have always been a point of reference for peoples and communities arguing for domestic change, the ability of governments to hold other governments accountable for breaches of international law has been limited, and for individuals to hold governments to their international legal obligations even more so.

Fortunately this situation is slowly changing.

More and more focus is shifting from standard-setting and rule-making to enforcement and implementation.

There has been growing acceptance by states of the need to give teeth to their international commitments through adopting enforcement mechanisms, and establishing specialist judicial bodies that can address international wrongs.

New Zealand has seen major benefits from an enforceable rules-based international trading system. And this is a sea change from the situation that we faced in the trading world of two decades ago.

If we had a problem then with a trading partner the only answer was to pursue all political levers in the knowledge that the international legal avenues for resolving such problems were minimal.

The WTO dispute settlement system has fundamentally changed this.

To date we have been successful in utilising the WTO dispute settlement system to protect access to Europe for our butter, to remove unjustified tariffs on our lamb exports to the United States and illegal subsidies on Canada's dairy exports.

At the same time we must acknowledge its limitations - rulings on fundamental differences between the major players such as the EC and the US have in some cases not succeeded in resolving those differences.

This is perhaps not surprising, but what may be more surprising is that such fundamental differences have not toppled the system, nor have they discouraged states from further rule making and continuing to negotiate to resolve those differences within the system.

In the UN there has also been progress in giving human rights treaties more teeth. Four of the six core human rights treaties have complaints mechanisms.

But there is still resistance to international accountability. Individuals continue to have a limited ability to hold their governments to international human rights standards and there continues to be impunity for many human rights violations.

A further significant development in recent years has been the creation of the International Criminal Court.

Years of effort by governments and civil society, and the terrible modern-day experiences in Rwanda and the Former Yugoslavia, have culminated in the creation of a new international institution, which aims to put an end to impunity for the most grievous crimes in international law and so deter their commission in the future.

We hope that the International Criminal Court, which will soon be fully operational, will become one of the pre-eminent instruments of international justice.

The support given to the establishment of the ICC accords with the growing recognition that robust mechanisms for dispute settlement and enforcement, and international justice, can have an important place and ultimately serve all states' interests.

In particular, I hope that the quality of the new Court and safeguards against misuse of its procedures will persuade the United States and other countries to embrace it rather than seeking exemption from its jurisdiction.

New Zealand's experience on international dispute settlement to date, whether in relation to WTO disputes, nuclear testing in the Pacific, the Rainbow Warrior case, or fisheries issues such as southern blue fin tuna, has been very positive.

We have not always secured all aspects of the redress that we were seeking. But the institutions we have had recourse to have acted with deliberation and fairness in weighing the issues and delivering rulings.

It is important to continue to build on and strengthen the mechanisms available for the resolution of differences between states, and the ability to enforce the resolution once reached.

Regional integration/cooperation

The final area I would like to address is how regional integration and cooperation can support the rule of law and the work of international institutions.

Regionalism can be both a catalyst for wider multilateral developments and complement action and institutions at the multilateral level.

Working together at the regional level can help small states, like New Zealand, identify and pursue shared objectives in the international law making process.

Working collectively, South Pacific states have been able to achieve a voice and visibility at the multilateral level that they could not have achieved individually.

A good example of this is the way Pacific Island countries banded together during the Law of the Sea negotiations in the 1970s to defend their coastal state interests in fisheries and other marine resources.

That cooperation was repeated in relation to the global challenge of driftnet fishing in the late 1980s and remains essential in regional and multilateral fisheries discussions. It has been demonstrated most recently in the concluding of the Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific.

I would like to take this opportunity to acknowledge the presence here today of Ambassador Satya Nandan, the Secretary-General of the International Seabed Authority, who has worked closely with the countries of the South Pacific on fisheries and law of the sea matters throughout his distinguished career.

The Pacific Islands Forum, which will be hosted this year by New Zealand, is a valuable institution for enabling Pacific States to pursue issues of key concern to the region in a diverse range of areas including trade, good governance and regional security.

International law and cooperation through international and regional institutions is fundamental to New Zealand's approach to the situation in the Solomon Islands.

The Solomons is on the verge of becoming a failed state with the collapse of the rule of law, the failure of its economy and its loss of ability to provide basic social services.

The Solomons government has sought assistance from the Pacific through a police-led deployment to control criminal elements, backed by armed peacekeepers.

Our participation will be undertaken collectively with members of the Pacific Forum under the framework of the Biketawa Declaration and with the approval of the Commonwealth and the UN.

Regional cooperation also has a crucial role to play in the trade and economic area.

Both New Zealand and Australia have benefited greatly from the CER experience, which celebrates its 20th anniversary this year.

Long before NAFTA or the WTO, New Zealand and Australia created one of the most open and comprehensive trade agreements in the world.

The integration of our two economies and the benefits that has brought is underpinned not only by close ties of friendship and commerce, but increasingly by a comprehensive framework of international legal rules that continues to evolve.

Conclusion

In conclusion, what are the key lessons that we should carry forward from our past experience into the future?

First, the framework of international law and institutions must continue to be dynamic and adapt to new global challenges. This includes the areas such as terrorism, transnational crime, humanitarian intervention, and the economic, social and human rights areas.

Second, we must achieve a greater commitment by states to invest in and work with the international legal system to make it better, rather than to operate outside it. Countries need to realise that to secure their national interests they must act multilaterally.

Third, commitment can only be effective if you adhere to all aspects of international law rather than those aspects that may be convenient.

It is a contradiction to suggest that international law is fine in one context, such as the WTO, but not so fine in another one, such as the UN.

Our security and the protection of our interests will not be guaranteed through such a selective approach to the challenges of globalisation.

Fourth, more than just creating new instruments of international law, what we need is wider and better adherence to existing ones.

Finally, I believe international law and its institutions remain the best means for addressing the challenges of globalisation and harnessing its benefits both for New Zealand and all states.

I wish you well over the next few days in your discussions, and for a successful conference and a safe trip home.

International Governance and Institutions: What Significance for International Law? Balancing Global and Regional Perspectives

Hans van Loon*

Introduction

Let me begin by thanking you most sincerely for affording me, as your antipode, the privilege of addressing this Eleventh Annual Meeting of the Australian and New Zealand Society of International Law. Since this is my first visit to New Zealand, I would like to seize this opportunity to express the enormous satisfaction of the Permanent Bureau* about the fact that New Zealand on 5 February 2002 became a member state of the Hague Conference on Private International Law. I would also like to pay tribute here to all those friends of the Hague Conference, both in New Zealand and Australia, who have worked so hard for many years to make this possible.

Our hope is that its new status as a member of the Conference will bring many new benefits to New Zealand in the various fields of transnational activity that are covered by the Hague Conventions.

What significance do these Conventions have to the theme of this Annual Meeting? In answer to this question, I would invite you to pause for a moment, and try to visualise what globalisation means for New Zealand these days: a continuous stream of thousands of New Zealanders travelling overseas, and of foreigners to New Zealand; the settlement of 400,000 New Zealanders in Australia and their continuing contacts with families and businesses here; large-scale transnational movements of assets, products and services; flow of capital and information across borders; and large investments overseas.

Building a secure regional and global environment which favours trade and investment requires not only rules for state conduct, but also predictable, low cost rules for the conduct and relationships of individuals, families and business across borders.

Private international law is an important vehicle by which these requirements may be met. Uniform approaches to these effects require treaties and there we arrive at the role of the Hague Conference on Private International Law and its Conventions: they assist in bringing the rule of law to cross-border situations.

Since the adoption of the latest Hague Convention in December last year, the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, there are now 35 of these Conventions, not counting those that were adopted before the Second World War. At this point, New Zealand is a party to three of these instruments: the Hague Conventions of 25 October 1980 on the Civil Aspects of International Child Abduction and of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption and, relevant not only to families but also to traders and investors, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Australia, which has been a member of the Conference for thirty years now, is also a party to these three Conventions. In addition, Australia has joined the Conventions on the Form of Wills, Recognition of Divorces, Enforcement of Maintenance, Recognition of the Validity of Marriages, International Protection of Children and, more directly relevant to commercial law, Taking of Evidence

* Secretary General, Hague Conference on Private International Law. The Conference Committee expresses its gratitude to the New Zealand Law Foundation for its support of this speaker.

* “Permanent Bureau” is the statutory name of the Secretariat of the Hague Conference on Private International Law.

Abroad and on the Law Applicable to Recognition of Trusts.¹

A history of balancing differing perspectives

I will be highlighting some of the existing Conventions, as well as some of our current work on new Conventions, important to the field of trade, investment and finance, but before doing so, allow me to quickly brief you on where the Hague Conference comes from and what makes it a rather unique organisation in its specialised, but at the same time broad, field.

In terms of global and regional perspectives, the Hague Conference's 110 year-old history started as a regional European and indeed civil law endeavour. This was so not because its founders wanted it to be exclusive in this way – on the contrary: their aspirations were undoubtedly universal – but because common law countries – the United Kingdom, the United States and also the Latin American countries – declined to join. The Latin American countries feared that their participation would imperil their well-considered regional codification efforts. The United Kingdom and the United States were simply not interested. Indeed, the first non-European state to join, in 1904, was Japan, whose legal system was very much influenced by continental Europe.

After the Second World War things began to change. The United Kingdom co-founded the new organisation that was created to give a permanent structure to the work of the Hague Conference. Ireland followed in 1955. The United States joined in 1964, Canada in 1968, Australia in 1973, and so on.

It is no exaggeration to say that, from the 1950s on, most of the Conference's intellectual and diplomatic efforts have been put to bridging the differences between the civil law and the common law worlds. English was added to French as a second official language, and from 1960 on Conventions were drawn up in both English and French. But the bridge-building exercise also required sustained extensive research and continuing cross-cultural dialogue and diplomatic work. There is no question that this massive investment was extremely fruitful for the Conference and in fact indispensable to prepare it for a more universal role. The work on international co-operation in civil proceedings provides a good example. The Convention of 1 March 1954 on Civil Procedure, like its predecessors of 1896 and 1905, never attracted any ratification from common law countries because it was mainly based on the civil law tradition of legal co-operation through official channels. With the participation of the common law countries, the Convention was revised in three stages. This led to the Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and of 25 October 1980 on International Access to Justice, which have successfully accommodated the needs of both systems; the Service and Evidence Conventions, in particular, have been widely ratified by countries of both traditions.

This period of intense dialogue between the civil and the common law countries was essential to prepare the Hague Conference for its growth towards a more universal organisation, a process which quite recently accelerated: since early 2001 the number of member states of the Hague Conference has grown by a third to its present 62, including, in addition to New Zealand, such countries as Malaysia, Sri Lanka, South Africa, the Russian Federation, Brazil, Panama and Peru. In this new setting, the building of bridges between the civil law and the common law remains of undiminished importance.

In addition, there are new developments which require other forms of dialogue. I will mention three of

¹ The full titles are as follows: *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* and the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*.

them: the special position of the US within the common law tradition; the emergence of regional organisations such as the European Community; and the increasing significance of Islamic law.

First, it has become increasingly apparent recently that, within the common law tradition, the legal system of the United States has in some respects developed in its own way. It is the legal variant of Bernard Shaw's famous statement that America and England are "two countries divided by a common language". In an early sign of these divergencies, the 1970 Evidence Convention contains an optional clause, Article 23 – included at the last minute at the request of the United Kingdom – to stop aggressive pretrial discovery, "fishing expeditions", practised in the United States. Unfortunately, the too-broad wording of this provision has caused misunderstandings, which were addressed in an experts' meeting on the operation of the Convention – a special feature of the Hague Conference – held in 1978. Differing views between the United States and other countries on adjudicatory jurisdiction in general, on how to balance freedom of speech and other human rights, how to protect consumers, workers and other weaker parties, have complicated our efforts to negotiate a global Convention on judgments. The enormous expansion of the Internet and e-commerce have now led us to reduce the scope of these negotiations. I will return to the Hague Judgments Project later on in this talk.

Secondly, recent years have seen an acceleration of economic integration in various parts of the world, including in this region. Regional organisations have been set up, which, in some cases, have also availed themselves of legislative procedures to accelerate the integration process: Mercosur in South America is an example; OHADA, the Organisation for the Harmonisation of Business Law in Francophone Africa, another. The most striking example of course is the European Community. As an effect of the Amsterdam Treaty, the European Community has since 1999 acquired legislative powers in the field of private international law. It has already used these powers and issued regulations, for example on service of documents abroad, on jurisdiction in matters of divorce and child protection and on the taking of evidence, all largely based on Hague examples. It follows from the case law of the European Court of Justice that in so far as the Community has made use of its internal legislative powers, it also has external competence. The Community may, in other words, itself conclude international agreements. Such external competence may even be exclusive of that of individual member states. This raises a number of important questions for the Hague Conference and I can only briefly touch upon two aspects. The first relates to the Hague Conventions, the second to the Organisation itself.

With the exception of the most recent Securities Convention, all Hague Conventions are open to ratification by states only. But if the Community has exercised its internal competence in an area covered by such a Hague Convention and, as a consequence, has acquired external competence, a catch-22 situation may result: under EC law, individual member states may no longer on their own ratify, but under the Convention the Community has no standing. One solution that was recently applied, with regard to the 1996 Hague International Child Protection Convention, is that the Council of the European Community decides that the member states will collectively sign in the interest of the Community. That would seem to be the most pragmatic approach for existing Conventions.

The second question relates to the position of the Community within the Hague Conference. So far, the Community has been able to participate as a very active observer in the negotiations. But having become a new actor in the field of treaty-making in private international law, it is understandable that the European Community has, by a letter sent in December last year, expressed a desire to become a full member of the Hague Conference. We are presently preparing the modalities of such an admission. One of the difficulties is, of course, the same as exists for treaties, namely that the Statute of the Hague Conference only refers to member states and not to membership of regional organisations. It is likely that an amendment of the Statute will not be limited to the European Community but anticipate the possibility that organisations from other regions of the world will follow the European example. That is also the thrust of the new clause in the Hague Securities Convention which, following the example of the Cape Town Mobile Equipment Convention developed by Unidroit allows for accession by any Regional Economic Integration Organisation that has competence over matters governed by the Convention.

In any event, the Hague Conference, and other treaty making organisations, will be confronted with a growing significance of regional presence and needs.

Thirdly and finally, and of a somewhat different order, in a sense more comparable to its bridge-building work between the civil and the common law traditions, the Hague Conference is increasingly attentive to the needs of Islamic states. The Conference's interest in Islamic law is not new. Indeed, it goes back to long before "September 11". Already the 1970 Divorce Convention deals with the recognition of divorces according to Islamic law, provided they have been obtained following judicial or other official proceedings. In the preparations of the Trust Convention special attention was given to the Islamic *wagf* (or *wakf*), which is the Islamic law equivalent of the trust, mostly used for family and charitable purposes. In October 1998 we co-organised with the University of Osnabrück in Germany a two-day colloquium on "Islamic Law and its Reception by the Courts in the West". The papers presented, and collected in a remarkable publication, discussed the essentials and varieties of *Shari'a* not only as regards family and inheritance but also, extensively, banking. This prepared, in a way, the very interesting discussions on Islamic Securities that took place during the negotiations on the Securities Convention. The main characteristic of Islamic financial instruments is that interest is prohibited but trade is allowed – so these instruments are based on sale/lease, sale/buy back or profit participation. As the explanatory report will explain, Islamic securities are covered by the Securities Convention.

Hague Conventions relevant to regional and global trade and investment

Against this background, let me now highlight a few Hague instruments which may have particular relevance in the context of the theme of this Annual Meeting. In leaving aside our many Conventions in the field of international family law and child protection, I should emphasise, however, that a global legal environment which favours trade and commerce also needs to offer persons who form part of the mobile workforce and business community some minimum degree of stability and security with regard to personal and family relations. That is why it is important that both New Zealand and Australia are parties to Conventions such as the Child Abduction Convention and that New Zealand consider following the Australian example of ratifying the 1996 Convention on Protection of Children.

I will then, first of all, say a little more on two Conventions on international co-operation in civil procedures which I have already mentioned, the Service and Evidence Conventions; then on two Conventions more particularly relevant to international finance and investment, the Trusts and Securities Conventions; and I will conclude my presentation with our current work on Judgments.

The service of process and the business of obtaining evidence abroad are related and often arise as consecutive stages in the management of an international case. The New Zealand Law Commission, in their November 2000 Report on International Trade Conventions recommended both the Service and the Evidence Conventions for accession by New Zealand. In the civil law traditions, the service of process to assist in foreign proceedings is permitted only through official channels, and sometimes only on a treaty basis. Accession to the Service Convention will enable New Zealand process to be served in almost fifty other contracting states, including the EU countries (with the exception of Austria), Russia, the United States and many Latin American countries, Egypt and Israel, Kuwait, Sri Lanka, Japan, Korea and China. The Convention provides for service through Central Authorities in place of the more cumbersome diplomatic and consular channels, and also for more direct modes of service, such as service by post subject to any objection by the requested state. There are helpful provisions on languages, forms and costs. The Convention provides for proof of service and for due process protection of the defendant in case of inadequate service, for which the Convention defines an international standard.

In a similar manner the Evidence Convention reconciles differences between the common law and the civil law traditions for obtaining evidence. In a common law jurisdiction, the preparation of a case for trial is the private responsibility of the parties. In many civil law countries, on the other hand, the obtaining of evidence is part of the judicial function, and official permission is needed before the evidence can be taken privately. As a consequence, civil law countries may object to direct requests for evidence from a New Zealand party, and may not permit a New Zealand court official to take evidence or to administer an oath on its territory. Similar to the Service Convention, the Evidence Convention establishes a channel of Central Authorities for the transmission of a Letter of Request to the competent court which will then execute the request in the same manner as it would in internal proceedings, including by compulsion of unwilling witnesses to appear. In addition, the Convention will make it

possible for New Zealand diplomatic officers, consular agents, or commissioners appointed by a New Zealand court to take a deposition in foreign contracting states. At this point there are almost forty contracting states, including Australia, Singapore, Sri Lanka, South Africa, Israel, Kuwait, most of the states of the European Union, Russia, the United States and many Latin American countries.

I will also mention that from 17 October until 4 November 2003 we plan a one week meeting of experts of our member states and of all the states parties to the Service, Evidence and Legalisation Conventions, to discuss their practical operation. We will present to this meeting a new, revised, draft edition of our Practical Handbook on the Service Convention, with updates on implementing legislation and case law. We will also pay particular attention to the impact of new technology, both as regards the transmission of process, and new ways of giving evidence, for instance by a video link.

In the area of banking investment and finance, there are two Conventions that I would like to mention. The New Zealand Law Commission in its Report published in April 2002 on “Some problems in the law of trusts” has recommended that New Zealand should follow the example of the United Kingdom and Australia, and join the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition. The history of this Convention is interesting and has once again everything to do with bridging the common law and the civil law traditions. Whereas trusts are common ground in the common law, and are used for all kinds of purposes, they are an unknown species in most civil law countries. Of course these countries are able to achieve most of the same results through other legal devices: corporate, contractual, property and other arrangements. But while these provide functional equivalents they are not structurally equivalent to the trust. When the Brussels Convention, now Regulation, on jurisdiction and recognition and enforcement of judgments, introduced the concept of “domicile of a trust” as a basis for jurisdiction, the question arose, in particular in the civil law countries, according to what law that domicile was to be determined. This led the Permanent Bureau to its proposal that common rules of applicable law on trusts should be developed. This is what the Convention does. It provides that the law chosen by the settlor will govern the trust – Its validity, construction, effects and administration. Where there is no such choice, the law with which the trust is most closely connected governs, for which the Convention provides some criteria. In order to assist the civil law countries, the Convention lists the basic characteristics of a trust, in particular the very important notion that the assets of the trust constitute a separate fund and are not part of the trustee’s own estate. Other provisions of the Convention also help to ensure that trusts will not be distorted in their effects in countries that ignore them. Although the Convention does not deal explicitly with fiscal matters, the experience of the Convention in the Netherlands for example, shows that it may also have a beneficial effect on the tax treatment of foreign trusts. The Convention applies in Australia, Canada, Hong Kong, Italy, Malta, the Netherlands and the United Kingdom. A number of other countries are studying its ratification.

The latest Hague treaty, the Hague Securities Convention – the full title is the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary – is central to the financial market. The Convention provides a uniform rule for determining the law governing proprietary aspects of a disposition of indirectly held securities. It will bring very important benefits to both investors and moneylenders, and hence to the financial system as a whole, which is perhaps one of the most integrated global systems.

One of the key questions for moneylenders is how to ensure that they obtain a valid interest in securities they take as collateral. That depends on the applicable law. In the old days that law was easy to determine: one looked to the place of the location of the (certificate of the) securities. Nowadays, with modern systems of technology, securities are much more difficult to locate as they are dematerialised. They are actually most often held through a tier system of intermediaries. A new approach has therefore been adopted in some jurisdictions, including the United States, Belgium and Luxembourg, which is to look to the location not of the securities but of the intermediary who maintains for the banker or investor the account to which the securities are credited. The advantage is that this leads again to the law of *one* jurisdiction, which can be easily determined. That brings back legal certainty and predictability, reduces risks and costs and allows for easier access to international capital. Under the Convention, the account holder and his direct intermediary may expressly agree, in their account agreement, on the law governing proprietary issues relating to the securities. This freedom is only limited by a “reality test” to prevent the parties from choosing the law of a jurisdiction where the

intermediary is not conducting any relevant business. For example, a Swiss bank should not be able to agree with its New Zealand account holder that Cayman law applies without that Swiss bank having any operations relating to the maintenance of securities accounts in the Cayman Islands. The Convention goes out of its way to make sure that the applicable law can be determined in all foreseeable circumstances, thus giving maximum foreseeability to a huge financial market, worth hundreds of billions of US dollars a day. The Convention has already been widely welcomed, including by such influential groups as the G30. The European Community, the United States and Japan, among others, are preparing for its signing in the near future. We hope that New Zealand and Australia will be among the first countries to sign.

Currently, the Conference is working on two new global Conventions: one on the recovery of child support and family maintenance, the other on jurisdiction and recognition and enforcement of judgments in civil and commercial matters. I will only comment on the latter project except to say that Judge Jan Doogue from Auckland, New Zealand has been elected Chair of the Drafting Committee for the Maintenance Convention.

After preparatory work, which started following a proposal made by the United States in 1992, negotiations, on what has become known as the “judgements project” started in 1997, originally with the ambition to establish a scheme with a scope as broad as the Brussels Regulation which covers most of the field of civil and commercial law. The recent enormous growth of e-commerce transactions and new possibilities for torts via the Internet caused us to pause for a moment and concentrate on an area which is less affected by these new developments, choice of court in business-to-business (B2B) situations. As a recent survey by the International Chamber of Commerce has confirmed, choice of court clauses are widely used in commercial contracts. But whereas the Brussels Regulation provides that such clauses are presumed to be of an exclusive character, unless the parties have agreed otherwise, this is not the practise in other jurisdictions, such as the United States and New Zealand. So there is a need for uniform rules on jurisdiction respecting the parties’ agreement, as well as a need for uniform provisions on recognition and enforcement of the resulting judgments. That need becomes particularly apparent if one realises that the 1958 UN New York Arbitration Convention provides businesses with the certainty that arbitral awards will be enforced in over 130 countries, but that no such scheme is available for ordinary judgments worldwide. The ICC study shows very clearly that businesses would welcome such an alternative for a variety of reasons. This is true in particular for small and medium-sized enterprises but also for larger companies, where the matter in dispute is of comparatively low value and would probably not be taken to arbitration anyway.

An Informal Working Group has drawn up a draft which will be submitted to a Special Commission in December 2003 with the task to prepare a preliminary draft Convention. If all goes well, it should not take us too long to produce a Convention, which would constitute for ordinary judgments the equivalent of the 1958 New York Arbitration Convention. At the same time we will continue our work on jurisdictional and enforcement issues other than relating to choice of forum, possibly, as David Goddard QC – a Member of the Informal Working Group – has suggested by way of a uniform model law. We are very much counting on the input by New Zealand and Australia in this project.

Outlook

As the recent, sudden impact of ICT on our work on judgments has shown very clearly, technological developments are taking place with such speed, and sooner rather than later with worldwide effect, that they may easily overtake even the best prepared legislative efforts. Work at the global level, such as that in UNCITRAL, Unidroit and the Hague Conference, ensures that countries are continuously aware of the latest developments and that local, regional and global needs are all considered and balanced. This also applies to differing legal traditions: civil and common law, western and Islamic law.

It may well be that we will be seeing rapid economic integration movements in various parts of the world, stimulated by the expansion of the European Union. But we humans share one Earth only, and unless regional integration efforts keep the global picture constantly in mind, tensions between regions may easily grow. That is why we would invite New Zealand, and Australia, to consider using the body of Hague work as a basis for future common work in the field of private international law.

Once again, welcome New Zealand to the Hague Conference: we look forward to mutually-inspiring, productive and joyful co-operation in the years ahead!

The Review of the WTO Dispute Settlement Understanding

(Edited notes of presentation)

Ravi Kewalram*

Introduction

Good morning ladies and gentlemen.

I am delighted to be back in Wellington after four years, and very pleased to be part of the discussions today on international trade law.

My comments this morning are based on my experience in dealing with one or the other aspect of the WTO Dispute Settlement Understanding (or DSU) and the DSU Review itself. My comments draw on a range of views, but of course all opinions expressed by me are not necessarily to be attributed to the Australian government.

What is the DSU?

For the benefit of those who do not follow WTO issues closely, I thought I would just take a step back and put in context why the DSU is critical to the functioning of the WTO.

The DSU is Annex 2 to the Marrakesh Agreement Establishing the World Trade Organisation and is an integral part of that Agreement. While the rules of international trade are regulated by the WTO Agreement as a whole, it is the DSU that regulates the settlement of disputes between members about the WTO rules themselves.

The DSU is more than just about setting out process between two disputing parties; it sets out substantive rights and obligations between the disputants, and between the disputants and the rest of the WTO membership. It is the component of the WTO that sets out how and when trade retaliation, in the event of non-compliance, can be put in place. In other words, the DSU gives teeth to the entire system of rights and obligations that is the WTO package.

Briefly – a WTO dispute has four distinct phases under the DSU. A consultation phase – during which members must seek to resolve differences informally. A panel stage – during which a panel examines and makes findings in relation to a dispute. An appeal phase – which allows members to have the Appellate Body review findings of law arising from the panel stage. Finally, there is also an implementation, compensation and retaliation phase – which determines the time that members have to implement outcomes, and processes that take effect where a member does not implement findings of the panel or Appellate Body – or is claimed not to have implemented.

* Australian Department of Foreign Affairs and Trade. The author is grateful for the assistance of Maria Young in the preparation of the paper on which the presentation is based, as well as to colleagues in the WTO Trade Law Branch of DFAT. The views in this presentation are the author's and should not be attributed to the Australian Government.

What is the DSU Review?

So what is the DSU Review all about? Even if you have not been following WTO issues closely, the Minister outlined developments in the current round of multilateral trade negotiations – namely the Doha round. Part of the round – but not part of the single undertaking that will constitute the rest of the outcomes of the round – is the Review of the Dispute Settlement Understanding (DSU Review).

I should note that the current review is not the first attempt to revise the WTO dispute settlement procedures. A full review of the WTO dispute settlement rules and procedures was to be completed by 1 January 1999 (four years after the entry into force of the WTO Agreements).¹ This review commenced in 1997 but was never completed, although it came close.

At the Fourth Ministerial Conference in Doha in November 2001, Ministers agreed to the negotiations to improve and clarify the DSU. It was agreed that these negotiations would be based on work ‘done thus far’ (namely, work from the DSU Review commenced in 1997) and any new proposals put forward by members. Australia and New Zealand are active participants in the DSU Review, which was due to be completed in May 2003.

Everyone wants the outcome of the Review to be a dispute settlement system that is more effective, transparent and accountable. However, behind the stream of seemingly consistent and logical reasons that WTO members espouse for their proposals lies a range of very different motivations. Some members are motivated by their frustration with the current system, others are motivated by political pressures, and others by their desire to participate in the system.

Assessing proposals for change

By way of background in my view, the DSU, to a large extent, provides a good framework, and a level playing field, for the resolution of disputes between WTO members. It has faults, as have been demonstrated, but I have never yet come across an international treaty of this nature that has been perfect.

Further, there are a number of elements of the DSU that are vital. Firstly, it is geared towards the resolution of disputes (rather than the prosecution of members). Hence, the system has a compulsory consultation stage during which many disputes have been resolved, or the subject matter narrowed.

Secondly, the WTO membership (rather than panellists or Appellate Body members) drives the dispute settlement system. The Dispute Settlement Body (the DSB, which is the WTO Membership sitting as the DSB) have to adopt the findings of a Panel and Appellate Body for the findings to have legal standing. And in any case, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Of course, it is also important to note in this context the so-called negative consensus rule, which makes the DSU different from the pre-WTO system. Under the negative consensus rule, reports of panels² and the Appellate Body³ are adopted unless there is consensus not to adopt the report.

Finally, the system does not create a body of binding jurisprudence. Each dispute must be considered on its merits. But of course to ensure continuity and stability of the system, panels and Appellate Body members pay close attention to relevant previous decisions.

¹ 1994 Ministerial Decision.

² DSU, Article 16.4.

³ DSU, Article 17.14.

In my view, it is critical that any changes to the DSU do not detract from its main objectives. And that is why, even if Australia or New Zealand were not to anticipate being involved in a dispute – ever – it would still be important to pay attention to proposed changes to the system. It is not in the interests of the membership to effectively weaken the unique features or seek to change the system to a more traditional court-like system, because that may actually undermine the legitimacy on which the DSU and the WTO is reliant.

Thus, when considering any particular proposal for change, there are a number of criteria I consider important, including, and not in a particular order:

- Necessity – is there really a problem to be fixed – in the text;
- Clarity and unintended consequences – whether changes will lead in fact to more confusion;
- Balance or equity – of rights and obligations, between complainants and respondents, and third parties, and between large and small economies;
- Commercial or trade policy considerations – we do not want to forget that at the end of the day the DSU is not about punishing recalcitrants, but about helping to ensure members comply with their rights and obligations;
- Transparency – within and external to the WTO membership and whether increased transparency can be attained without undermining the efficiency of the system, or changing the balance of rights and obligations;
- Predictability;
- Timeliness – whether the changes will contribute to a speedier resolution, or at least not unintentionally lead to longer time frames.

From this list, it is obvious that – at least from my perspective – I have a fairly cautious perspective on proposals for change. Some of the more elaborate proposals, or those that radically seek to alter existing DSU rights and obligations are viewed with considerable caution.

What types of issues are under discussion in the DSU Review?

Members have submitted a broad range of proposals for the DSU Review negotiations, with almost every major aspect of the DSU under scrutiny. Regardless of motivation, all these have to be considered in the negotiations.

For the sake of brevity, during questions or in the margins of the conference I am happy to discuss aspects of the Review that might be of interest to you.

Conclusion: Where is the DSU Review heading?

I do not want to take the risk of predicting exactly what will happen from now on. The DSU Review is clearly different from market access negotiations.

My hope is that a genuine spirit of compromise and a sharing of perspective will continue to build as we reach the conclusion of this round, and in that spirit, the membership can agree on the appropriate consensus package.

The Use of Arbitration for Investment Treaty Disputes

David Williams QC and Elizabeth Gellert*

Introduction

Globalisation is a defining concept of the present age.¹ It has been defined as a dynamic process of worldwide liberalisation and integration of the markets for labour, goods, services, technology and capital. Globalisation has been praised as the herald of a new world order and has also been the subject of mass protests in western capitals on the basis that it involves oppression, exploitation and injustice. Attitudes to globalisation differ sharply in our own country as witness the Select Committee hearings and parliamentary debates on the 2001 Agreement between New Zealand and Singapore on a Closer Economic Partnership (“NZ/S/CEP”). For example, one submitter at those hearings said:²

This Agreement is premised on a simplistic assertion of neoclassical trade theory which claims that global free markets will raise the standard of living and job opportunities in Singapore and New Zealand. The experience of many New Zealand people, communities, and businesses over the past fifteen years put the lie to such claims. This mirrors the experience of millions of others around the world. As a result, the ideology of free trade and investment is under sustained attack. It is a tragedy that this Government has failed to see that the tide has turned and is intent on committing future New Zealand governments to continue down the failed free market path.

Opposing global free trade should not be confused with opposing international trade. Trade is essential, especially for a country with limited resources and productive capacity. However, the objectives of trade and trade policy need to be balanced with a range of other economic, social, cultural and environmental objectives. Likewise, opposing unregulated foreign investment is not to oppose foreign investment per se. This country has a limited domestic capacity to generate the capital investment, research and development and international linkages that are necessary to enhance existing businesses and promote new opportunities in ways that will benefit New Zealand and New Zealanders. However, the current highly liberalised foreign investment regime does not achieve that.

It is not proposed to debate these political, economic, and ideological issues, but simply to explain the way in which arbitration has come to the fore as the primary means of resolving investment treaty disputes.

It has been said that the lifeline of globalisation is foreign direct investment. It usually consists of equity investment by a firm in a foreign country. In order to increase and encourage foreign direct investment more effective protection of foreign investment was required. Arbitration has become one of the key methods of meeting this need. The modern growth of arbitration in the field of foreign investment dates from the 1965 Washington Convention (on the Settlement of Investment Disputes between States and Nationals of other Parties), which established the International Centre for the Settlement of Investment Disputes (“ICSID”). New Zealand is a party to the ICSID Convention.³ An example of an ICSID dispute

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¹ See generally Cremades and Cairns, “The Brave New World of Global Arbitration” (2002) 3 *Journal of World Investment* 173.

² Professor Jane Kelsey, Faculty of Law, University of Auckland, in the preamble to Submission on the Free Trade and Investment Agreement between the Governments of New Zealand and Singapore. Available on-line at <<http://aotearoa.wellington.net.nz/he/jk.rtf>>

³ See Arbitration (International Investment Disputes) Act 1979, discussed in detail in *The Laws of New Zealand Arbitration* part 6, 93 - 106.

involving New Zealand is *Attorney-General v Mobil Oil New Zealand Ltd*, which involved the Motonui synthetic petrol plant in Taranaki.⁴

Initially the ICSID workload was lean, averaging a single case a year in its first 20 years. Since the mid-1980s its workload and importance has expanded with the explosion of international instruments enabling investors to use the ICSID procedures to arbitrate investment disputes against foreign states. This paper will explain how the remarkable change in the ICSID caseload has come about by examining the general nature of investment treaty arbitration. It will discuss some New Zealand investment agreements and relationships, particularly the NZ/S/CEP and describe the dispute resolution provisions of that agreement.⁵

A brief summary of the development of investment treaty arbitration

There is an enormous literature on the topic and what is offered here is the briefest of summaries. The development of treaty-based foreign investment dispute resolution mechanisms arose out of the need to supplement customary international law rules at a time when newly independent states required foreign capital in order to develop their economies. They were often unable to attract foreign investment and wealth creating international transactions in the absence of reliable protections for investors. The first bilateral investment treaty (“BIT”) was signed in 1959. Early BITs involved reciprocal undertakings between states whereby each state guaranteed a minimum standard of treatment to investors of the other state. These treaties did not confer any rights on investors that they could enforce directly against a host state. Instead, disputes had to be resolved between the state parties to the treaties under the established rules of international law which have been helpfully summarised as follows:⁶

For most purposes, individuals and private business organisations have no standing under international law. A complaint that a state has breached its international obligations can be made only by another state. Historically, this was as true in the area of foreign investments as in any other. If a private investor experienced an injury as a result of an action by a state in breach of its international obligations, the investor’s only means of redress was to seek to have its national government take action on its behalf.

Such dispute resolution procedures depended upon states being prepared to sponsor claims and pursue them through time consuming intergovernmental arbitration or other dispute resolution methods. From the 1960s, however, there emerged a trend towards foreign investors having the right to bring actions directly against host states. Initially, host states recognised the legal personality of foreign investors by contract but, as noted above, the most significant development was the 1965 Washington Convention (“the ICSID Convention”). This Convention created ICSID and permitted foreign investors to refer a dispute with a state party directly to ICSID, if consent was obtained in writing. In the *Mobil* case the consent was contained in Article VII of the participation agreement signed when the project was launched. Article 25(1) provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

The significance of the Convention and the subsequent utilisation of its dispute resolution procedure in BITs and multilateral investment treaties (“MITs”) has been helpfully summarised by Professor Sir Elihu

⁴ [1989] 2 NZLR 649, 4 ICSID Reports 117.

⁵ The NZ/Singapore Closer Economic Partnership Act 2000 came into force on 01.01.01, making limited changes to existing legislation in order to align the agreement with domestic law.

⁶ Cremades, “Promoting and Protecting International Investments” [2000] *Int ALR* 53, 56.

Lauterpacht QC in his Foreword to Professor Schreuer's magisterial commentary on the ICSID Convention:⁷

At the time the Convention was concluded, some of its most important features represented significant new developments, though in the light of subsequent advances in international law they now appear almost commonplace. For the first time a system was instituted under which non-State entities – corporations or individuals – could sue States directly, in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the States parties.

The system was at first limited to cases where both the national State of the investor and the State party to the case were parties to the Convention. This meant that if one party to the dispute did not meet this requirement, the matter could not be submitted to ICSID, even if both parties so wished. This problem was solved in 1978 by the creation by the Bank of the "Additional Facility" which permits recourse - albeit imperfect - to the main elements of the ICSID system even if only one party meets the requirement, provided that both have given their consent.

Consent to jurisdiction under the system was originally foreseen as deriving principally from express references to it in the arbitration clauses of investment contracts. However, the sources of consent have been significantly widened by the development of recourse to ICSID on the basis of provisions in inter-State bilateral investment protection and investment guarantee agreements, as well as by multilateral arrangements such as the North American Free Trade Agreement. Professor Brigitte Stern has recently produced a striking analysis of the 29 cases pending at the beginning of 2000; five were founded on an arbitration clause; two on an arbitration agreement; one on a national law; and the remaining 21 on multilateral or bilateral treaties. On the basis of the more detailed analysis of which these figures form a part, Professor Stern has concluded that 'we are walking with giant steps towards a general system of compulsory arbitration against States for all matters relating to international investments, at the initiative of the private actors of international economic relations'.

The sources of consent in BITs or MITs came to be seen as the making of an offer to resolve disputes by ICSID arbitration, which an investor could accept by referring a dispute to the Centre, a system that has been aptly characterised as arbitration without privity.⁸ Blanket consents to arbitration became common in the 1970s and the number of BITs containing such provisions increased dramatically in the 1980s and 1990s. It is estimated that over 2,000 BITs have been formed.⁹ Countries continue to conclude numerous BITs containing the usual investor-to-state dispute settlement provisions. According to the United Nations Conference on Trade and Development, 158 BITs were concluded in 2001 alone (the latest year for which data is available).

MITs, which transcend the reciprocal basis of BITs, constitute a further significant step in the evolution of a global foreign investment dispute resolution system. MITs such as the 1992 North American Free Trade Agreement ("NAFTA") between the USA, Canada and Mexico, and the 1994 Energy Charter Treaty between the European Communities and forty-nine mostly European states, are trade and investment treaties, which involve numerous states and have considerable potential for expansion. Under MITs, an investor based in one state obtains a right of direct action against however many states are parties to the treaty. The future expansion of existing MITs and the creation of new ones will cement in place the new international law norm whereby private investors are recognised as having standing under treaties to bring international arbitral proceedings against states.

⁷ Schreuer, *The ICSID Convention: A Commentary* (2001) foreword at xi-xii.

⁸ Paulsson, "Arbitration Without Privity" (1995) 10 *ICSID Rev – Foreign Investment LJ* 232.

⁹ UNCTAD: Developing Countries Further Liberalize their FDI Regime in 2001
<http://r0unctad.org/en/sibsites/dite/bit_dtt.htm> (at 20 March 2003).

The different types of dispute settlement mechanisms in investment treaties – the ICSID system

Different investment treaties provide different dispute resolution mechanisms. Many investment treaties permit only the private investor to choose a method of dispute resolution provided in the treaty to which he or she will resort. The options offered are often the courts of the host state or international arbitration. Almost invariably the specified dispute resolution method may only be resorted to after a cooling off or conciliation period has elapsed. Should the investor select arbitration, it is also up to the private investor to choose which arbitration mechanism contemplated in the treaty should apply. The arbitral options available are usually the ICSID arbitration system, including the ICSID Additional Facility, utilised where the state party to the investment treaty has not ratified the ICSID Convention, and the UNCITRAL Arbitration Rules. Some treaties also include the ICC arbitration system as one of the possible options, while others provide that both the claimant and respondent may agree on a type of arbitration not expressly contemplated in the treaty itself. The Energy Charter Treaty Article 26 provides the private investor with a very wide choice of arbitral options including arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The relevant provisions are attached as Appendix 1 for illustrative purposes.

NZ/S/CEP between New Zealand and Singapore allows for conciliation or arbitration under the ICSID Convention or any dispute resolution method agreed between the parties. It has a preliminary requirement of amicable negotiations and a six month “cooling off” period.¹⁰ This is discussed in more detail below.

NAFTA permits an aggrieved investor to select arbitration under:¹¹

- (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
- (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.

In pure ICSID arbitration the ICSID Convention creates a supranational system, which excludes appeal, thus foreclosing challenges to awards on traditional New York Convention grounds.¹² The autonomous character of ICSID arbitration is clearly stated in Article 26, which provides that consent of the parties to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedies. By submitting to ICSID arbitration the parties therefore have the assurance that they may take full advantage of procedural rules specifically adapted to their needs and, equally important, that the administration of these rules will be exempt from the scrutiny or control of domestic courts and states that are parties to the Convention. ICSID itself supplies the only remedies available to a losing party, namely as to the interpretation of the meaning or scope of the Award; revision on the grounds of discovery of a previously unknown factor of decisive importance; and annulment of the Award by an ad hoc Review Committee. In short, ICSID itself is expected to supply its own internal quality control systems.

¹⁰ NZ/S/CEP Article 34(1) and (2).

¹¹ Article 1120.

¹² This supranational nature of the ICSID system was discussed in a New Zealand case where a stay of proceedings was granted against the New Zealand government which had commenced proceedings in breach of a contract which provided for reference of investment disputes to ICSID. The Judge noted that ICSID arbitration constituted a self-contained machinery functioning in total independence from domestic legal systems: *Mobil Oil NZ Ltd v Attorney-General* [1989] 2 NZLR 649; 4 ICSID Reports 117.

As noted earlier, ICSID normally has jurisdiction over investment disputes between a state that is a party to the Convention and an investor from another Convention state.¹³ With reference to NAFTA, since Mexico and Canada are not yet parties to the Washington Convention, ICSID must supervise arbitration involving these countries under its Additional Facility regime, designed for cases in which the Convention does not apply and the investor chooses ICSID arbitration instead of arbitration under the UNCITRAL Rules. Under the ICSID Additional Facility regime, the litigants use ICSID rules and supervisory personnel outside the ICSID Convention framework. As with awards made under the UNCITRAL Rules, an award's finality thus depends on the judicial review mechanisms at the place of arbitration, and in some countries awards are subjected to mandatory judicial control.¹⁴ Thus an important feature in NAFTA (and ECT) arbitration is that an investor's choice of arbitral rules can produce a different result as to the scope and standard of review of the arbitral award and the procedure for review. As to NAFTA, this is because Chapter 11 of the NAFTA treaty does not specifically address the question of review or recourse against arbitral awards made pursuant to the treaty.

In summary, if an investment treaty claimant selects ICSID arbitration under the Washington Convention the review process is internalised within ICSID itself and parties may not challenge enforcement of the award in domestic courts by way of appeal or other remedy.¹⁵ This makes it particularly attractive to investors so long as the internal ICSID annulment process does not result in frequent overturning of ICSID awards. However, neither the ICSID Additional Facility Rules nor the UNCITRAL Rules provide a procedure for review or recourse against awards. The matter is left to the courts at the seat of arbitration and the scope and procedure of review will be determined by the applicable international commercial arbitration legislation at the seat of arbitration. This is implicitly confirmed by Article V(1)(e) of the New York Convention, which provides that one of the grounds for refusing recognition or enforcement of an arbitral award is that it has been set aside by a competent authority of the state in which the award was made. It is also confirmed by Article 1136 of the NAFTA, which provides in relevant part:

Article 1136: Finality and Enforcement of an Award

3. A disputing party may not seek enforcement of a final award until:

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

Article 1130 of the NAFTA provides that unless the disputing parties agree otherwise, an arbitral tribunal must hold an arbitration in the territory of a party that is a party to the New York Convention. Currently, this means that the scope of review will be determined by the international commercial arbitration legislation in either Canada, Mexico or the United States, depending upon the seat selected by the arbitral tribunal. Generally speaking the legislation in each of the three jurisdictions incorporates the grounds for refusing recognition and enforcement of awards contained in Article V of the New York Convention, which are replicated in Article 34 of the UNCITRAL Model Law.¹⁶ However, courts in the three

¹³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 4 ILM 532 (1965).

¹⁴ See NAFTA Art 1136, 32 ILM 646.

¹⁵ Article 53. Each Contracting State must recognise an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

¹⁶ Article V of the New York Convention provides:

“Article V

jurisdictions may interpret and apply the grounds differently, and in particular may differ as to what constitutes a sufficient public policy imperative to justify the setting aside of an award or the refusal to grant it recognition and enforcement.

An example of investment treaty arbitration: the *Metalclad* case

Investment treaty arbitration throws up many problems. The *Metalclad*¹⁷ case, the first in which an application was made to a domestic court to set aside an arbitral award rendered under the provisions of the NAFTA, highlights a number of difficult questions which have arisen in investment treaty cases including the confidentiality of the proceedings, whether third parties should be allowed to participate in the proceedings and, if so, to what extent, and the issues involved when a domestic court is called upon to review an investment treaty arbitral award. It also gives a helpful indication of the general nature of a typical investment treaty arbitration.

Metalclad, a United States company, instituted international arbitral proceedings against the United Mexican States in a dispute arising from the construction by *Metalclad* of a landfill and waste treatment facility in a Mexican state. *Metalclad* had purchased a Mexican company called *Coterin* from Mexican nationals and federal authorities in Mexico had assured *Metalclad* that its subsidiary *Coterin* would have no difficulty obtaining the necessary consents to complete and operate the facility. *Metalclad* subsequently concluded an agreement with Mexican federal environmental agencies as to the operation of the facility and proceeded with construction. However, the Mexican company did not have a permit from the local municipality, which obtained an injunction in respect of the agreement with the federal authorities. Subsequent negotiations to obtain a permit from the municipality were unsuccessful. After arbitral proceedings had been issued, the state government declared the area in which the facility had been built to be a permanent ecological reserve, which almost certainly meant that *Metalclad* would never be able to operate the facility for its intended purpose. *Metalclad* elected arbitration under the Additional Facility Rules of ICSID. Pursuant to the NAFTA, the Tribunal, in consultation with the parties, determined that the

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1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

¹⁷ *United Mexican States v Metalclad Corp* [2001] BCSC 664, Tysoe J. See *Mealey's International Arbitration Report* (2001) Volume 16, Issue 1, A-1 for a copy of the final award of the Tribunal. See Pearce and Coe Jr. “Arbitration under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico” *Mealey's International Arbitration Report* (2001) Volume 16, Issue 1, 62 at 69 for a discussion of the Tribunal's treatment of the issue of confidentiality.

place of arbitration would be Vancouver, British Columbia, although the hearings took place in Washington D.C.¹⁸

Following a preliminary procedural meeting of the Tribunal, Metalclad disclosed information that had been discussed in the course of the meeting to certain shareholders and brokers. As a result of this disclosure, Mexico requested that the Tribunal issue an order prohibiting any further disclosure of information regarding the case. Metalclad opposed this request on the grounds that the Additional Facility Rules did not impose a duty of confidentiality, the parties had not expressly agreed for the proceedings to be confidential and Mexico's own conduct was inconsistent with the existence of any such rule.¹⁹ Metalclad claimed that the requirements of NAFTA, specifically Articles 1127 and 1129 and the United States' Freedom of Information Act, ultimately made confidentiality illusory and difficult to enforce. Metalclad also questioned how any duty of confidentiality could be enforced in light of disclosure requirements placed upon Metalclad as a public company by United States securities law.

The Tribunal noted that neither the NAFTA nor the ICSID (Additional Facility) Rules contained any express restriction on the parties to publicly discuss arbitration proceedings. Moreover, that no general principle of law existed to proscribe public discussion of arbitration proceedings and that no duty of confidentiality existed in the UNCITRAL Rules or the draft articles adopted by the International Law Commission. The Tribunal also noted Metalclad's duty of disclosure under United States securities law. The Tribunal noted that the avoidance of publicity is one of the reasons parties choose to submit disputes to arbitration but concluded that, in the absence of an agreement between the parties, neither is forbidden from public statements. The Tribunal to a large extent adopted the views of Metalclad and declined to issue the confidentiality order sought by Mexico. However, in doing so the President of the Tribunal expressed the view that (at para. 13):

Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak of the arbitration... The above having been said it still appears to the arbitral tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relationships between the parties if during the proceedings they were both to limit public discussion to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be bound.

On the matter of confidentiality the NAFTA Rules are also of interest as to the ability of non-parties to make submissions to tribunals appointed under Chapter 11. The Rules themselves provide that in the course of arbitration any state party, Canada, Mexico or the United States, may make submissions to a tribunal on a question of interpretation of the agreement, and need not be a party to the arbitration proceedings in order to do so.²⁰ The issue did not arise squarely in *Metalclad*, but it did in the NAFTA arbitration involving *Methanex Corporation v United States of America*²¹ (the *Methanex* arbitration), where the Tribunal addressed the ability of a number of environmental organizations that were neither parties to the arbitration nor party to the NAFTA Treaty, to make submissions before the Tribunal. These organizations sought permission to make written and oral submissions, view the parties' written pleadings, and attend hearings on the basis that there was no overriding principle of confidentiality in arbitration that should exclude *amici* submissions and that participation of an *amicus* would allay public disquiet due to the closed nature of the proceedings. The Claimant resisted this application and submitted that the hearings ought to be held *in*

¹⁸ ICSID (Additional Facility) Case no. ARB(AF)/97/1. The Tribunal (Professor Sir Elihu Lauterpacht QC CBE, Mr Benjamin R Civiletti, and Mr Jose Luis Siqueiros) rendered an award on 30 August 2000.

¹⁹ Metalclad claimed that Mexican officials had publicly expressed their views in the media on facts and theories in the case in a manner which was inconsistent with the existence of a duty of confidentiality.

²⁰ Article 28.

²¹ *Mealey's International Arbitration Report* (2001) Volume 16, Issue 1, 1/01.

camera pursuant to Article 25(4) of the UNCITRAL Arbitration Rules.²² They also submitted that the application was contrary to the agreement reached by the parties by way of a Consent Order regarding Disclosure and Confidentiality. The Respondent argued that there was nothing in the UNCITRAL Rules that prohibited acceptance of *amicus* submissions, that the UNCITRAL Rules were sufficiently flexible to allow *amicus* submissions and that the Tribunal ought to use its discretion in a manner appropriate to the dispute. However, with respect to the Petitioner's requests to be allowed to attend hearings and receive copies of all documents filed in the arbitration, the Respondent's position was that the Tribunal's jurisdiction was effectively restricted by Article 25(4) of the UNCITRAL Rules and by the terms of the Consent Order.

In deciding the issue, the Tribunal observed that since neither the UNCITRAL Arbitration Rules nor Chapter 11 expressly addressed *amicus* submissions, the issue would have to be resolved by reference to the Tribunal's more general powers. The Tribunal referred to practice in the Iran-US Claims Tribunal, the WTO and the ICJ,²³ and observed that "the receipt of written submissions from a non-party does not necessarily offend the philosophy of international arbitration involving states and non-state parties." The Tribunal referred to the "difficult area" of confidentiality and cited the cases of *Esso* and *Bulbank* but concluded that due to the presence of the Consent Order it did not have to rule upon the law on confidentiality in arbitration in general terms.

The Tribunal held that under Article 15(1) of the UNCITRAL Rules²⁴ it did have the power to accept *amicus* submissions from the Petitioners but refused the Petitioner's requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration. The Tribunal concluded that:²⁵

There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the transnational arbitration between commercial parties... The public interest in this arbitration arises from its subject matter... There is also a broader argument, as suggested by the Respondent and Canada, that the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.

The *Methenex* arbitration involved a \$970 million claim filed by Methenex Corporation against the United States over California's decision to ban MTBE from gasoline. The case raised issues of constitutional importance on the balance between governmental authority to implement environmental regulations, and property rights. The outcome of the case had the potential to affect the willingness of governments in NAFTA states to implement measures to protect the environment and human health. Use of arbitration to settle this claim has been subject to widespread criticism and has been referred to as a form of "secret government."²⁶

To return to *Metalclad*, the Tribunal found that the actions of Mexico and the municipal authority breached Mexico's obligation to afford Metalclad's investment a standard of treatment that was in accordance with international law, including fair and equitable treatment pursuant to Article 1105. This finding was based first upon Mexico's failure to ensure a transparent and predictable framework for Metalclad's business planning and investment. The Tribunal relied upon Article 102(1) of the NAFTA, which lists objectives

²² Article 25(4) states that "Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are to be examined."

²³ Although the Tribunal was guided by the practice of the Iran-US Claims Tribunal and the WTO the Tribunal saw the practice of the ICJ as providing little assistance.

²⁴ Article 15(1) states that "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

²⁵ *Mealey's International Arbitration Report* (2001) Volume 16, Issue 1, D-1.

²⁶ Goldhaber "The Court That Came In From the Cold" (May 201) *The American Lawyer* 105.

and principles of the treaty, including transparency and the substantial increase in investment opportunities. The Tribunal considered that, pursuant to Article 31 of the Vienna Convention on the Law of Treaties and Article 1131 of the NAFTA, which require that treaty provisions be interpreted in the light of the treaty's overall objectives, the principle of transparency was relevant to the interpretation and application of Article 1105.

Second, the Tribunal found that the same actions were tantamount to expropriation as prohibited by Article 1110. In the Tribunal's view the denial of a right to operate the facility after the earlier governmental assurances was a measure tantamount to expropriation of the investment. The Tribunal also stated, although it did not consider this to be necessary for the decision, that the issuance of the ecological decree was also a measure tantamount to expropriation, because it permanently barred operation of the facility. The Tribunal awarded Metalclad damages of nearly US\$17 million.

Mexico applied to the Supreme Court of British Columbia to have the award set aside. There was naturally great interest in how the Court would approach the case, and Canada and the province of Quebec joined as interveners. As to the appropriate standard of review, the Court was required to decide which of two different British Columbia arbitration Acts, the International Commercial Arbitration Act or the domestic Commercial Arbitration Act, applied to a review of a NAFTA award. The choice depended not upon whether the arbitration was international or domestic, but upon whether the arbitration was commercial pursuant to the definitions in section 1(b) of the International Commercial Arbitration Act, which provided in relevant part:

An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:

- (d) an exploitation agreement or concession;
- (p) investing.

The choice was fundamental to Mexico's application because whilst the Commercial Arbitration Act allowed for appeals on a question of law, the International Commercial Arbitration Act did not, and it restricted applications for the review or setting aside of an award to the grounds contained in Article 34 of the UNCITRAL Model Law, which replicate those for refusal of enforcement in Article V of the New York Convention.

Mexico, and the Canadian government as intervener, argued that the dispute between the parties did not have a sufficiently significant commercial nature for the International Commercial Arbitration Act to apply. There was an important distinction between arbitration pursuant to a private agreement between international commercial parties and arbitration pursuant to an international treaty, the existence of the treaty giving the dispute a public law character. Furthermore, the relationship between the parties was a regulatory relationship, not a commercial one. The Court rejected this view, and noted the wide definition of "commercial" in the International Commercial Arbitration Act. This classification was supported by the legislative history of the UNCITRAL Model Law. The Court also held that the regulatory aspect of the dispute was incidental, as Chapter 11 of the NAFTA was intended to deal with the treatment of investors. This brought the dispute within the International Commercial Arbitration Act and accordingly its limited grounds for review applied to the dispute.²⁷ Unable to appeal on a question of law, Mexico relied primarily upon section 34(2)(a)(iv) of the International Commercial Arbitration Act, which permitted the Court to set aside an Award of the Tribunal if the decision was beyond the scope of the submission to arbitration.²⁸

²⁷ Paras 39-49.

²⁸ Section 34(2)(a)(iv) provides:

"An arbitral award may be set aside by the Supreme Court only if

(a) the party making the application furnishes proof that ...

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration ..."

This ground of challenge contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute but which exceeded its powers by dealing with matters that had not been submitted to it. Redfern and Hunter²⁹ suggest that it is becoming increasingly common for this issue to be raised as a first line of defence by losing parties.

The Court emphasised the narrowness of the review permitted by the Act and cited the decision of the British Columbia Court of Appeal in *Quintette Coal Ltd v Nippon Steel Corp* as follows:³⁰

It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes” spoken of by Blackmun J. [in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985)] are as compelling in this jurisdiction as they are in the United States or elsewhere. It is **met** therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia.

It will be recalled that the Tribunal found that Mexico had breached its international law obligations under Article 1105 of the NAFTA by not providing a transparent regulatory environment for investment. Mexico submitted first that the Tribunal’s reliance on the transparency issue for its finding of a breach of Article 1105 was in excess of jurisdiction and went beyond the scope of the submission to arbitration, and secondly that the Tribunal similarly erred in going beyond the transparency provisions contained in the NAFTA and creating new transparency obligations. It argued that the international law standard contained in Article 1105 did not require a transparent regulatory environment. Mexico further asserted that the Tribunal’s finding that measures taken by Mexican authorities were tantamount to expropriation pursuant to Article 1110 of the NAFTA was also unsound because the finding was based in large part on the alleged breach of Article 1105 by failing to provide a transparent business environment.

The Court held that the submission to arbitration was confined to Metalclad’s claim that Mexico had breached Articles 1105 and 1110. In respect of Article 1105, the Court decided that in order to determine whether the Tribunal had made a decision which was outside the scope of the submission to arbitration, it was necessary to determine whether the Tribunal had applied the correct legal standard for determining whether Mexico was under an obligation pursuant to Article 1105, to provide a transparent regulatory environment.

The Court determined that the Tribunal had failed to apply the correct law. The legal standard in Article 1105 was the minimum standard of treatment required by customary international law. His Honour further held that the reference in Article 1105 to “fair and equitable treatment and full protection and security” was not additional to the customary international law standard but was merely an example of it.³¹ The Court observed that the Tribunal gave no evidence for a finding that customary international law required a transparent regulatory system and if the Tribunal’s belief that such a standard could be applied was based upon matters of fairness and equity in the circumstances, the Tribunal’s decision was not merely a misinterpretation of the wording of Article 1105 but a misstatement of the applicable law.³² Tysoe J further observed that Article 102(1) lists transparency as a rule or principle by which the NAFTA objectives are to be carried out. It is not an objective for the purposes of Article 31(1) of the Vienna Convention. The rules and principles are elaborated in specific chapters, and transparency is implemented through Chapter 18, not

The International Commercial Arbitration Act of course provides the same ground for refusal of enforcement of an award. The ground derives from Article V(1)(3) of the 1958 New York Convention.

²⁹ Redfern and Hunter, *Law and Practice of International Arbitration* (3rd ed, 1999) 464.

³⁰ [1991] 1 WWR 219, 229.

³¹ Paras 62-65. The Court held that “including” could not ordinarily be read as “plus”.

³² Para 70.

Chapter 11. The principles in Article 102(1) were not intended to be used in the interpretation of all provisions of the NAFTA. The state parties provided in the NAFTA that investors could bring proceedings only in respect of the undertakings in Chapter 11 and certain undertakings in Chapter 15, and breaches of any other provisions were to be dealt with between the states.³³

The Court went on to hold that the Tribunal's finding that Mexico's conduct prior to the issuance of the ecological decree was tantamount to expropriation, was based in large part on the finding of a breach of Article 1105. However, Metalclad was still entitled to compensation because the Court had no jurisdiction to set aside the Tribunal's finding that the ecological decree was tantamount to expropriation. This finding was not in any way based on a breach of Article 1105 and no other sound basis had been advanced by Mexico for setting aside the Tribunal's conclusion in respect of the ecological decree. The Court said that it was a question of interpretation of Article 1110, and whilst the Tribunal's definition of expropriation was "extremely broad", including incidental interference with the use of property, the Court did not have jurisdiction to set aside the award.³⁴ Accordingly the award of damages remained largely intact, the only change being an adjustment to the interest component as Mexico had breached Chapter 11's protections at a later stage than determined by the Tribunal. Mexico commenced an appeal against this decision in May 2001, but abandoned it in October of that year, perhaps concerned that it would risk losing foreign investment if it refused to honour the Award and settle the dispute.

Some commentators have asserted that *Metalclad* is an example of why it is inappropriate for a national court to enter upon matters of international law when reviewing an international arbitral decision. However, in many respects an analysis of the *Metalclad* decision suggests that there is no reason to be overly concerned. Firstly, the Court rejected the view of the state parties to the NAFTA that awards rendered pursuant to Chapter 11 could be subject to wider review in domestic courts than ordinary international commercial arbitral awards. The Court also dismissed the notion that the treaty gave the dispute a non-commercial public law character, which would justify wider review than is justified in standard international commercial disputes.

Secondly, the Court readily accepted that it did not have jurisdiction to set aside the Tribunal's finding that the ecological decree was tantamount to expropriation. The Court held that it did not have jurisdiction to set aside an interpretation, even if the interpretation was "patently unreasonable".³⁵ The interpretation of Article 1110 was a matter for the expert Tribunal, which the Court did not have jurisdiction to second guess.

Thirdly, the Court avoided the tendency, which some ad hoc annulment committees constituted under the Washington Convention appear to have adopted, of automatically annulling an award if found to contain any errors. Instead, the Court considered the award in its entirety and held that even though Mexico succeeded on the Article 1105 point, the Tribunal's finding on the ecological decree could not be set aside.

Fourthly, the Court, although not deciding the issue, inclined to the view that a patently unreasonable finding disregarding relevant evidence was not a ground for setting aside an award.

Fifthly, the Court took a strict approach to proof of public policy exception when rejecting claims that allegedly improper acts by Metalclad rendered the Award in conflict with the public policy in British Columbia.

Finally, the Court rightly refused to apply the proposition, said to derive from the ICSID ad hoc annulment committee decisions in *Klöckner*, *Amco* and *MINE*, discussed below, that an arbitral award should be set

³³ Article 1116.

³⁴ Para 99.

³⁵ Paras 99-100.

aside if it does not address all arguments made by the parties which would have changed the outcome of the award if the arguments had been accepted.

Overall, there is an argument for concluding that the British Columbian Court, exercising jurisdiction under the grounds contained in the New York Convention and UNCITRAL Model Law, performed rather better than the first ad hoc annulment committees in ICSID international arbitration (see below).

However, in respect of Article 1105 it is debatable whether the Court kept within the bounds of the narrow standard of review which it correctly held applied to the dispute, and whether its interpretation of Article 1105 was correct. It has been suggested that the case really turned on the interpretation of Article 1105, not on the application of the correct law, and so the Court should not have second-guessed the Tribunal's views on Article 1105.³⁶ In *Quintette*, the parties submitted the interpretation of a contractual provision to the Tribunal, and in subsequent proceedings the Court held that it was not permitted to substitute its interpretation of the provision in place of the interpretation of the Tribunal. It has been argued that Article 1105, as an undertaking by the state party, is analogous to a contractual provision and it was therefore for the Tribunal, not the Court, to determine the standard of treatment required by the provision. An eminent three-member international tribunal was asked in *Metalclad* to rule on the extent of the obligations undertaken, and the domestic court should not have asserted jurisdiction to set aside the award.

New Zealand's investment treaties including the 2001 agreement between New Zealand and Singapore on a closer economic partnership ("NZ/S/CEP")

Apart from the NZ/S/CEP, New Zealand has two other investment treaties in force, which may be briefly mentioned before describing the essential features of NZ/S/CEP. The Investment Promotion And Protection Agreement ("IPPA") with Hong Kong has been in place since 1995 and also provides foreign investors with recourse against the host state in the event of an investment dispute under the Agreement. The Hong Kong IPPA provides for the settlement of investment disputes either by a procedure agreed between the parties or alternatively under the UNCITRAL Arbitration Rules.³⁷ A similar IPPA with China has been in force since 1989, which involves more complex investment dispute procedures including the right to initially submit the dispute to a competent court of the host state.³⁸ The China IPPA further provides that in the event of the establishment of an international arbitral tribunal it may determine its own arbitral procedures, with reference both to the procedures agreed in the Agreement and the ICSID Convention.³⁹ Both of these treaties have a minimum term of 15 years, with investment protection to continue for an additional 15 years from the date of termination in the event that the agreement is subsequently cancelled.⁴⁰

In addition, two agreements have been signed by the New Zealand government with Chile and Argentina and are awaiting ratification. They provide investment protection measures for foreign investors of either state party. Furthermore, the government has now entered negotiations with Hong Kong seeking a CEP similar to that enjoyed with Singapore. It is also considering a tripartite "Pacific Three CEP" with Singapore and Chile as parties. These latest agreements aim to build and develop the investor protection mechanisms created in the NZ/S/CEP.

³⁶ See, eg., the criticisms of the decision in Weiler, "Metalclad v Mexico: A Play in Three Parts" in Waelde, ed., *Internet Journal of the Centre for Energy, Petroleum and Mineral Law and Policy*. Available at: www.dundee.ac.uk/cepmlp/journal/html/article9-20.html.

³⁷ Agreement between the Government of New Zealand and the Government of Hong Kong for the Promotion and Protection of Investments (5 August 1995), Article 9.

³⁸ Agreement between the Government of New Zealand and the People's Republic of China on the Promotion and Protection of Investments (25 March 1989), Article 13 (2).

³⁹ Article 13 (6).

⁴⁰ See NZ/China IPPA Article 17(3), NZ/Hong Kong IPPA Article 13(2).

The NZ/S/CEP entered into force on 1 January 2001 after a surprisingly short period of negotiation between the two parties.⁴¹ It intends to encourage free trade commitments and facilitate investment between states in the Asia-Pacific region. The objectives of the treaty include, *inter alia*,⁴²

... that a clearly established and secure framework of rules for trade in goods and services and for investment will provide confidence to ...[allow] businesses to take investment and planning decisions, lead to a more effective use of resources, and increase capacity to contribute to economic development and prosperity through international exchanges and the promotion of closer links with other economies, especially in the APEC region.

Standard of treatment available to investors under NZ/S/CEP

Articles 28, 29, and 30 of the NZ/S/CEP provide non-discrimination standards to be recognised by the host state in relation to foreign investment. The provisions are substantive obligations that the state parties are required to recognise, and in the event that the host state does not do so, may give rise to the right of an investor to seek dispute resolution under Article 34 for a breach of the treaty. The provisions are broadly similar to those in a wide number of BITs.

The non-discriminatory standards are intended to ensure that NZ/S/CEP investors will be entitled to treatment no less favourable in the host state than that enjoyed by nationals and third party foreign investors. However, foreign investors need to be aware that under the NZ/S/CEP there are a number of specified limitations to the standards.⁴³

Article 28 states:

Except as otherwise provided for in this Agreement, each Party shall accord to investors and investments of the other Party, in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer (or other disposition), protection and expropriation (including any compensation) of investments, treatment that is no less favourable than it accords in like situations to investors and investments from any other State or separate customs territory which is not party to this Agreement.

Article 28 establishes most-favoured-nation (“MFN”) status for investors under the NZ/S/CEP. MFN status provides that foreign investors under NZ/S/CEP will be granted the same benefits conferred upon foreign investors from other states and territories, within the host state. In principle, in the event that investors from another state are accorded greater benefits, the MFN clause will ensure those privileges are multi-lateralised to NZ/S/CEP investors.

⁴¹ Cabinet authorised the commencement of negotiations 22 September 1999. See Hoadley, *Negotiating Free Trade. The New Zealand-Singapore CEP Agreement*. New Zealand Institute of International Affairs, Wellington, 2002, 29. The Agreement was signed 14 November 2000. See

www.mft.govt.nz/foreign/regions/sea/cepsingdocs/singcepbooklet.html.

⁴² NZ/S/CEP Preamble.

⁴³ For the details of these provisions refer to Annexes 3.1 and 3.2 of the NZ/S/CEP. New Zealand creates limitations on national treatment standard obligations *inter alia* through requirements for Ministerial approval where investments are made commencing or acquiring a business, or seeking the acquisition or control of at least 25% of company shares for the amount of NZ\$50 million or greater. This enables New Zealand to maintain a degree of control over large-scale investments in New Zealand, although in the event that consent is granted, the provisions of Part 6 apply to an approved investment in the manner stipulated in the NZ/S/CEP. It is clear the government does not retain the right to amend the non-discriminatory standards provided in Articles 28, 29 and 30 when determining whether an investment should be approved.

Article 28 contains a very broad definition of the undertakings that are entitled to the benefits of MFN status. Like the national treatment provision, the article is largely analogous to its NAFTA counterpart, although broadens the undertakings to include “liquidation” and “protection and expropriation (including any compensation).”⁴⁴

A MFN clause raises the issue of whether an investor may claim the benefit of a clause with more favourable provisions arising under a treaty between the host state and a third party. The question was addressed in *Emilio Agustin Maffezini v Kingdom of Spain*⁴⁵. The Tribunal found in respect of a more favourable dispute resolution process that the investor was able to claim breach of a MFN obligation provided in the Argentine-Spain BIT. Thus the investor was able to invoke a more favourable dispute resolution clause in the Chile-Argentine BIT, not requiring an 18 month local remedies period prior to the initiation of international arbitration.

Article 29 states:

Except as otherwise provided for in this Agreement, each Party shall accord to investors and investments of the other Party in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer (or other disposition), protection and expropriation (including any compensation) of investments, treatment that is no less favourable than that it accords in like situations to its own investors and investments.

Article 29 provides that national treatment shall be afforded to investors under the NZ/S/CEP. This grants them equal access to the benefits and opportunities available to the nationals of the host state, where they are in a ‘like’ commercial situation.

The definition of undertakings covered by the article mirrors that in Article 28. The provision is very similar to the national treatment clause in NAFTA⁴⁶, and, as noted with the MFN clause, also includes protection in relation to “liquidation” and “protection and appropriation (including any compensation)”. The NAFTA clause provides equal treatment to investors “in like circumstances” with nationals. As stated previously, NZ/S/CEP applies the standard to foreign investors “in like situations”. These phrases are in all events interchangeable. As a result an examination of claims brought under Article 1102 of the NAFTA will provide general guiding principles in interpreting the extent of protection given to investors under Article 29 of the NZ/S/CEP. The NAFTA decisions examine whether ‘like’ circumstances exist between foreign and local investors, and if so, evaluate the ‘treatment’ alleged by the claimant. WTO dispute resolution panels, and its appellate body, have provided a body of case law examining the concept, upon which the NAFTA tribunals have built.

The *Pope and Talbot*⁴⁷ arbitral decision found that the reference to “investors” in the NAFTA Article did not preclude a single investor from claiming that the obligation to provide national treatment had not been observed. An investor is not required to establish that more favourable treatment had been accorded to more than one domestic investor.⁴⁸ Such rulings are directly applicable to the NZ/S/CEP provision.

The *Pope and Talbot* NAFTA Tribunal examined an export control regime imposed by Canada on softwood lumber in certain provinces. The award distinguished two forms of a breach of the national

⁴⁴ See NAFTA Chapter 11, Article 1103.

⁴⁵ ICSID Case No ARB/97/7 reported at (2001) 16 *Foreign Investment Law Journal/ICSID Review* 212. See also *Anglo-American Oil Company Case* (Jurisdiction) ICJ Reports, 1952, 93, *Ambatielos Case* (merits: obligation to arbitrate) ICJ Reports, 1953.

⁴⁶ NAFTA, Chapter 11, Article 1102(1) and (2).

⁴⁷ *Pope and Talbot v Canada*, Award on Merits of Phase 2 available at <www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp#PandT> at paras 30-104.

⁴⁸ Paras 36-38.

treatment principle. A breach may be the result of a specific government measure (*de jure* discrimination), or alternatively could appear *prima facie* to be a non-discriminatory measure, whilst a difference in treatment between domestic and foreign investors was occurring in fact (*de facto* discrimination). The “first step” in ascertaining ‘like circumstances’ is to determine entities in the same business or economic sector with whom the treatment of the investor can be compared.⁴⁹ In the event of *de facto* discrimination, the tribunal will then determine whether in fact there are differences in treatment between the disparate investors. If this is found to have occurred, the tribunal should consider the surrounding facts to establish whether the investors or investments are ‘in like circumstances’.⁵⁰

The parties in the *Ethyl Case*⁵¹ suggested the relevant approach in determining whether foreign goods have been treated as favourably as domestic goods is one of commercial substitutability. The question is whether products produced by foreign suppliers are substitutes in the marketplace for those produced by the domestic industry. This follows the approach taken by the WTO and GATT on the matter. Thus whether the products are ‘like’ should be considered, and when assessing ‘likeness’ considerations of processes and procedures to make the product and the impact on the environment are irrelevant. However, other cases have considered that environmental impacts may be a justifiable ground for differences in treatment of goods.⁵²

The *Pope and Talbot* Tribunal considered that where ‘like’ circumstances are found, regulatory activities affecting a foreign investor may be legitimate in circumstances where foreign investors are in fact treated differently. A difference in treatment must be examined in light of whether it “bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.”⁵³ If this is found to be the case, the investors or investment are not ‘alike’. This analytical process constitutes a three-part test for national treatment:⁵⁴

- (1) Define the relevant market;
- (2) Determine if there has been “treatment less favourable”;
- (3) Require the NAFTA party to provide proof that its measure was justified on some reasonable policy grounds.

On the facts, the Tribunal held differences in treatment between the claimant and other investors were based on a legitimate non-discriminatory policy objective.

In *S D Myers* another NAFTA Tribunal also held that differential treatment between foreign and national investors could be justified by legitimate public policy measures.⁵⁵ On the facts a breach of Article 1102 was found to have occurred, as measures implemented by Canada were intended “to protect the Canadian PCB disposal industry from US competition” where environmental objectives could have been achieved by other methods.⁵⁶ While protectionist intent was considered important, it was not decisive, and the Tribunal

⁴⁹ Paras 73, 78.

⁵⁰ VanDuzer J A NAFTA Chapter 11 to Date: The Progress of a Work in Progress. Available on-line at <www.carleton.ca/ctpl/ch11papers/vanduzer.htm> p 10.

⁵¹ *Ethyl Corporation v Government of Canada*. Award on Jurisdiction, (June 24, 1998) 38 ILM 708 (1999).

⁵² *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agents*, 5 TCT 8003 (1992), is an example of this. Available on-line at <www.worldtradelaw.net/reports/gattpanels/canadaalcdistributionII.pdf>

⁵³ Para 79.

⁵⁴ Weiler, Todd “Substantive Law Developments in NAFTA Arbitration” *Mealey’s International Arbitration Reports* (December 2001) 16 #12, 69 at 78.

⁵⁵ *S.D. Myers Inc v Canada Partial Award* (November 13, 2000) para 246. Available on-line at <www.dfait-maeci.gc.ca/court_of_appeal/tna-nac/NAFTA-e.asp#SDM>.

⁵⁶ Paras 194-5.

emphasized a practical impact was necessary to breach the standard.⁵⁷ The factors to be considered in assessing whether a breach of the national treatment obligation had occurred were stated as:⁵⁸

- Whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;
- Whether the measure, on its face, appears to favour nationals over non-nationals who are protected by the relevant treaty.

These decisions indicate that the provision of national treatment obligations within BITs and MITs will not undermine the ability of a state to regulate with legitimate public policies in mind. On this basis foreign investors under the NZ/S/CEP must be aware that a differential standard of treatment may not always amount to a breach of the host state treaty obligations. This is an approach that has been met with approval by environmental groups.⁵⁹

Article 30 provides that in the event Articles 28 and 29 provide for differing standards of treatment available to an investor under the NZ/S/CEP, the better treatment shall prevail. This Article is almost identical to the standard of treatment provision in Article 1104 of the NAFTA. However in contrast to NAFTA, no minimum standard of treatment article requiring compliance with international norms is included in the NZ/S/CEP. Article 1105(1) of the NAFTA states:

Minimum Standard of Treatment

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The true construction of the Article has enlivened several NAFTA Tribunal decisions.⁶⁰ However, whether the exclusion of such an article in NZ/S/CEP will detract from an investor's right to a minimum standard of treatment in any event will be a matter for debate.

⁵⁷ Para 254.

⁵⁸ Para 252.

⁵⁹ See, eg, Mann and von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment, *International Institute for Sustainable Development*, Winnipeg (1999) Available on-line at <www.iisd.org/pdf/nafta.pdf>.

⁶⁰ Two issues arise as to the breadth of Article 1105. The first issue is what is included in international law. On the one hand is the argument that it includes only customary international law, whilst on the other is the argument that a broader definition is appropriate, particularly in the light of the definitions of international law contained in the Statute of the International Court of Justice, which many regard as the definitive definition. Article 38 of the Statute provides:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

This means that Article 1105 may extend beyond the customary norms by which states consider themselves and other states to be bound. It may extend to treaty commitments (for example the WTO obligations), international judicial decisions, and the opinions of eminent international law jurists.

Dispute resolution under the NZ/S/CEP

Turning to the essential investment arbitration features of the NZ/S/CEP, they involve recourse to the jurisdiction of ICSID. Article 34 provides:

Investment Disputes

1 Any legal dispute between an investor of one Party and the other Party arising directly out of an investment in the territory of that other Party shall, as far as possible, be settled amicably through negotiations between the investor and that other Party.

2 If the dispute cannot be resolved as provided for in paragraph 1 within 6 months from the date of request for negotiations then, unless the parties to the dispute agree otherwise, it shall, upon the request of either such party, be submitted to conciliation or arbitration by the International Centre for the Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States done at Washington on 18 March, 1965, provided that the other party does not withhold its consent under Article 25 of that Convention.

As noted earlier, there is a mandatory requirement that ‘amicable’ negotiations between parties occur prior to seeking arbitration as a dispute resolution method. The parties to the dispute have the discretion to agree to a dispute resolution method other than that stated in the NZ/S/CEP. There is no express requirement in the Agreement for parties to comply with the local remedies rule and thus litigate the dispute through the domestic Courts of the host state, although the parties may do so if they wish. However, once both parties have given consent to ICSID arbitration, the exclusive jurisdiction of an ICSID Tribunal is assured by Article 26 of the ICSID Convention and municipal courts no longer have jurisdiction over the matter.⁶¹

The concluding proviso of Article 34(2) is problematical. A literal interpretation would mean that notwithstanding the agreement in the first part of the Article, by which an investor may require the state party to submit to ICSID arbitration, the state party could nevertheless not grant the written consent required under Article 25(1) of the ICSID Convention, by virtue of the concluding phrase. Thus the provision would not create jurisdiction in ICSID as it does not grant unilateral consent in anticipation of a dispute.⁶²

However, such a literal interpretation does not appear likely. Article 34(2) may be more properly interpreted to constitute valid unilateral consent by the host state to conciliation or arbitration under the ICSID Convention. The concluding proviso is perhaps best understood as an attempt by the state parties to limit the extent of their subject-matter jurisdiction to classes of disputes as notified pursuant to Article 25(4) of the ICSID Convention, which provides:

Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all such Contracting States. Such notification shall not constitute the consent required by paragraph (1).

The other issue is whether “fair and equitable treatment and full protection and security” form part of the minimum international law standard or are additional to it. There are currently conflicting arbitral decisions rendered under the NAFTA treaty as to which see Weiler, above n 5 at 79-83. The issue was also considered by the reviewing Court in *United Mexican States v Metalclad Corp* [2001] BCSC 664, Tysoe J.

⁶¹ Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment” (1997) 12 *ICSID Review FILJ* 287, 334.

⁶² For a discussion on types of dispute resolution clauses identified by Alan Broches, see Sornarajah M, *The Settlement of Foreign Investment Disputes*, (2000) *Kluwer Law International*, The Hague, 211-12.

Such a notification does not amount to a reservation of the treaty.⁶³ It is merely for information only, designed to avoid misunderstandings, and most importantly does not have any legal consequences.⁶⁴ Thus in ordinary circumstances, express consent to ICSID arbitration or conciliation by the state, such as is provided in a BIT, is not limited by a contrary notification under Article 25(4). In fact, a state may give consent to arbitrate a dispute that comes within a class previously notified as one of those it would not consider submitting to ICSID jurisdiction. This has been seen in a number of BITs containing consent clauses contradicting Article 25(4) notifications.⁶⁵

Neither Singapore nor New Zealand have provided notifications under the ICSID Convention.⁶⁶ Thus, the proviso to Article 34(2) NZ/S/CEP can be seen as an attempt to ensure any future Article 25(4) notification will not be undermined by the express consent to arbitrate provided in the first part of the Article. This endeavours to establish a degree of legal protection for any future notification.

However, it must be doubted whether the NZ/S/CEP clause will in fact give legal effect to any future notification. Once consent has been validly granted under Article 25(1) of the Convention, it cannot be defeated by subsequent notification under Article 25(4). Attempts to achieve this were rejected by ICSID Tribunals in the Jamaican Bauxite cases.⁶⁷ While ambiguous consent clauses may be interpreted in light of existing notifications, with the assumption a state intends to remain within the limits of its notification, this does not appear to extend to notifications provided after the consent has been expressed.⁶⁸

There are other difficulties with Article 34(2). The wording “upon the request of either such party”, implies erroneously that the state party may elect to instigate ICSID proceedings, presupposing the consent of the foreign investor. A BIT cannot provide the consent for both parties to a dispute to accept the Centre’s jurisdiction; it merely provides the offer of the host state to do so. It is necessary for an investor to provide a prior expression of consent before the state may instigate proceedings.⁶⁹ The NZ/S/CEP does not clearly convey this position.

In addition, the proviso to Article 34(2) is expressed in terms of a mutual possibility to withhold consent, which is inaccurate. Only a state party to the ICSID Convention can notify the Centre of classes of disputes it would not consider submitting to the jurisdiction of the Centre; a foreign investor has no such standing.

Therefore, while Article 34(2) may be constituted as providing state consent to submit to the jurisdiction of ICSID, it lacks the same clarity of intent now evident in other modern investment treaties. Such provisions may, for instance, expressly state that they provide the necessary consent for the purposes of Article 25 of the ICSID Convention, and are an “agreement in writing” as required by the New York Convention.⁷⁰ As such, NZ/S/CEP can be contrasted with treaties such as NAFTA, where state parties clearly provide the requisite consent within the terms of the treaty and therefore only the investor need provide the additional written consent in order for the ICSID arbitration to become the operative dispute resolution procedure.

⁶³ Schreuer, *The ICSID Convention: A Commentary* (2001) Cambridge University Press, para 625.

⁶⁴ *ibid* para 622.

⁶⁵ See, eg, *Jamaica-US BIT (1994)*, *Turkey-UK BIT (1991)*, *Papua New Guinea-Australia BIT (1991)*

⁶⁶ See www.worldbank.org/icsid/pubs/icsid-8/icsid-8-d.htm

⁶⁷ *Alcoa Minerals of Jamaica v Jamaica*, *Kaiser Bauxite v Jamaica*, *Reynolds Jamaica Mines Ltd and Reynolds Metals Company v Jamaica*. See Schreuer, 344, note 807.

⁶⁸ This is in the absence of contrary evidence. Schreuer, para 632, 344.

⁶⁹ Schreuer, para 305, 220.

⁷⁰ See, eg, the Canada-Philippines (1996) or Canada-Lebanon (1999) Treaties.

Concluding comments

Over the last 10 years investment treaty arbitration has become the fashionable area of international commercial arbitration. The arrival of the NZ/S/CEP and the possibility of a US free trade agreement mean that investment treaty arbitration may soon become a reality from the standpoint of New Zealand investors and the New Zealand government. It is hoped that this paper will provide a useful introduction to this developing area of the law of international commercial arbitration.

Is the WTO ‘Mucking’ with National Quarantine Standards?

Jacqueline Peel*

Introduction

“Quarantine matters – don’t muck with it!” This is the message currently being promoted by the Australian Quarantine and Inspection Service (AQIS) in a series of television commercials featuring Steve Irwin (a.k.a. the ‘Crocodile Man’).¹ Steve dodges a hungry crocodile but warns viewers that an even greater danger faces Australia if we are not vigilant to prevent the introduction of pests and diseases from overseas. AQIS’s television advertising campaign focuses on the problem of travellers bringing home infected animal and plant products which could lead to the spread of new pests and diseases. But equally a cause for concern is the potential for invasive pests and diseases to be introduced into Australia through imports of foreign commodities, like grains, fruit, meat or fish.

Australia is one of a number of countries which has traditionally relied upon tough quarantine regulations for imported plant and animal products, as the primary defence against serious pests and diseases that are prevalent in other parts of the world. The nation prides itself on the ‘clean and green’ image of its agricultural products and the diversity of its native fauna and flora. However, strict quarantine laws in Australia and other countries are increasingly attracting the scrutiny of the global regulatory body for international trade, the World Trade Organisation (WTO). New WTO rules on trade restrictive ‘sanitary and phytosanitary’ (SPS) measures² have the potential to impact upon domestic quarantine regulatory practices significantly because of their requirement for national authorities to demonstrate a ‘scientific justification’ for import controls implemented for plant/animal health purposes. This creates problems for countries, such as Australia, which take a cautious approach to quarantine issues, and seek to impose SPS measures on foreign commodities in circumstances where scientific information about potential health or environmental threats is uncertain.

This paper examines the impact of WTO SPS rules upon national quarantine standards for imported plant and animal products, highlighting the requirements which national standards must currently meet to be WTO-compliant. It then goes on to explore the scope for national regulatory authorities to take a ‘precautionary approach’ to quarantine regulation. This second part of the paper asks the question whether national quarantine authorities can implement standards restricting imports of foreign commodities in circumstances where scientific information about the threat of pest or disease introduction is incomplete or inadequate.

WTO rules affecting quarantine

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) came into operation on 1 January 1995, together with a range of other international trade agreements concluded during the Uruguay Trade Round. Initially, the new agreement attracted little attention, but this situation changed dramatically following the 1998 decisions of a WTO panel and the Appellate Body in the high-

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1 For details see the AFFA website at <http://www.affa.gov.au/content/output.cfm?ObjectID=034897D6-D1D1-4618-8DD0AFEB72F6C89A>.

2 Agreement on Sanitary and Phytosanitary Measures, Annex 1A, (1994) 33 I.L.M. 28 (SPS Agreement).

profile *Beef Hormones* dispute between the US and the EU.³ Since that time, two other SPS disputes have been decided (including the *Salmon* case involving Australia),⁴ one dispute is currently awaiting determination by a WTO Panel⁵ and several more are in the pipeline.⁶ Indeed, in April 2003, the EC initiated consultations within the WTO seeking a review of Australia's entire quarantine regime for imports under the SPS Agreement.⁷ The rules of the WTO under the SPS Agreement, and their interpretation by WTO dispute settlement bodies, thus may have a significant impact on quarantine standards adopted in Australia and other countries.

Outline of the SPS Agreement

The purpose of the SPS Agreement is to lay down the conditions governing the adoption of sanitary and phytosanitary measures by WTO Members. The SPS Agreement does not deny the right of each WTO Member to take SPS measures necessary for the protection of human, animal and plant life or health, but requires that any such national measures meet the provisions of the Agreement.⁸ The main conditions that WTO Members must observe when establishing and applying SPS measures for quarantine purposes are those requiring measures to be 'based on scientific principles' and preceded by a scientific risk assessment.⁹

To promote the harmonisation of SPS measures, and thus reduce the barriers to trade which they may create, WTO Members are encouraged to 'base' their SPS measures on international standards, where they exist.¹⁰ However, national authorities are not prevented from introducing or maintaining stricter SPS standards 'if there is a scientific justification', or in circumstances where a risk assessment has been undertaken on which the stricter SPS measures are based.¹¹

Risk assessment under the SPS Agreement is largely a scientific process, which must take into account 'available scientific evidence', as well as relevant technical and economic factors.¹² There is limited scope for SPS measures to be implemented in circumstances of scientific uncertainty, although Article 5.7 of the Agreement provides that where 'relevant scientific evidence is insufficient' to allow a full risk assessment, WTO Members may adopt provisional SPS measures 'on the basis of available pertinent information', subject to seeking additional information for a more complete risk assessment within a 'reasonable' period of time.

SPS disputes to date

Disputes between WTO Members over SPS measures for quarantine purposes are dealt with under the dispute settlement procedures of the WTO. So far three disputes have been decided by WTO Panels and the

³ See *EC Measures Concerning Meat and Meat Products (Hormones)*, Reports of the US and Canadian Panels, WT/DS26/R/USA & WT/DS48/R/CAN, 18 August 1997 (Panel Report) and *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R & WT/DS48/AB/R, 16 January 1998 (Appellate Body Report).

⁴ See *Australia – Measures Affecting Importation of Salmon*, Report of the Appellate Body, WT/DS18/AB/R, 20 October 1998 (*Australian Salmon*) and *Japan – Measures Affecting Agricultural Products*, Report of the Appellate Body, WT/DS76/AB/R, 22 February 1999 (*Japanese Varietals*).

⁵ The *Japanese Fire Blight Apples* dispute (DS245, brought by the US). The Panel Report was due at the end of May 2003 but it yet to be released to the public.

⁶ Notably DS291, European Communities: Measures affecting the approval and marketing of biotech products (initiated by United States on 20 May 2003).

⁷ DS287 Australia: Quarantine regime for imports (brought by EC).

⁸ SPS Agreement, Article 2.1.

⁹ Ibid Articles 2.2 and 5.1.

¹⁰ Ibid Article 3.1.

¹¹ Ibid Article 3.3.

¹² Ibid Article 5.1 and 5.2.

Appellate Body: the *Beef Hormones*, *Australian Salmon* and *Japanese Varietals* cases.¹³ The *Beef Hormones* dispute involved a US challenge to EU restrictions on imports of hormone-treated beef, which the EU argued were justified on human health grounds. The *Australian Salmon* dispute concerned a Canadian challenge to Australian quarantine standards for uncooked Pacific salmon that Australian authorities contended were required to prevent the introduction of diseases affecting salmon into Australia. The *Japanese Varietals* dispute arose out of a US challenge to Japanese requirements for quarantine testing of varietals of various agricultural products prior to import. In all three cases, the Appellate Body struck down the SPS measures adopted by the countries concerned, either on the basis of a lack of scientific justification for the measures, or the inadequacy of risk assessments undertaken by national authorities. Currently a WTO Panel is considering another US challenge to Japanese quarantine standards, this time for the protection of apples from the introduction of fire blight disease.¹⁴ A further dispute, between the US and the EU, seems likely to go ahead, challenging the EU's de facto moratorium on the approval of new genetically modified crop strains, which has been in place since mid-1998.¹⁵

The SPS disputes decided to date suggest that the new agreement places significant restrictions on the ability of WTO Members to adopt SPS measures, such as quarantine standards, with potential trade effects. The decisions emphasise the need for measures to be based on a scientific assessment of potential risks, which comprehensively evaluates the *probability*, and not just the mere *possibility*, of adverse effects.¹⁶ In other words, a risk assessment, to be adequate for WTO purposes, must make some assessment of the *likelihood* of potential threats materialising, on the basis of the available scientific evidence. Moreover, this assessment must be based on scientific information which is specific to the threat at issue, rather than relying upon a general category of scientific data concerning similar substances or diseases.¹⁷ The scientific focus of risk assessments under the SPS Agreement does not preclude 'real world' risks (e.g. threats arising from practical difficulties associated with the control, inspection and enforcement of requirements) being taken into account as part of the assessment,¹⁸ but ultimately there must be a rational relationship between any SPS measure and relevant scientific evidence.¹⁹

While provisional SPS measures can be adopted under Article 5.7 where scientific information is insufficient to allow a full risk assessment, WTO Members are under an obligation to seek additional information germane to the conduct of a proper risk assessment and must review any provisional measures within a reasonable period of time.²⁰ Importantly, the Appellate Body has ruled that the 'precautionary principle' does not provide a separate basis for the adoption of SPS measures where the underlying science is uncertain.²¹ In other words, national authorities which do not wish to utilise Article 5.7 provisional measures, cannot rely on 'lack of full scientific uncertainty' and 'threats of serious or irreversible damage' to justify precautionary SPS measures.²² In the *Beef Hormones* dispute, the Appellate Body seemed to suggest that a 'precautionary approach' to risk assessment might be allowed in such circumstances. In particular, a WTO Member might be justified in basing its measures on qualified divergent scientific opinion 'where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety.'²³ However, this would seem to impose a much higher

¹³ See notes 3-5 above. Following the Appellate Body ruling in the *Salmon* case, Australian quarantine authorities produced a new risk assessment and amended quarantine measures for uncooked Pacific salmon. The revised measures were unsuccessfully challenged by Canada before a WTO Recourse Panel: see *Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada*, Report of the Panel, WT/DS18/RW, 18 February 2000.

¹⁴ See note 5 above.

¹⁵ See note 6 above.

¹⁶ *Australian Salmon*, Appellate Body Report, para 123.

¹⁷ *Beef Hormones*, Appellate Body Report, paras 199 and 200.

¹⁸ *Ibid* para 187.

¹⁹ *Japanese Varietals*, Appellate Body report, para 84.

²⁰ *Ibid* paras 92 and 93.

²¹ *Ibid* para 81; see, also, *Beef Hormones*, Appellate Body report, para 124.

²² The most widely accepted version of the 'precautionary principle' is that contained in Principle 15 of the Rio Declaration on Environment and Development, June 1992.

²³ *Beef Hormones*, Appellate Body report, para 194.

standard than the precautionary principle's threshold of 'threats of serious or irreversible damage', and raises questions as to how a 'clear and imminent' threat may be established to the satisfaction of the WTO dispute settlement bodies in circumstances where scientific information is uncertain or incomplete.

Precautionary approach to quarantine

The findings of the WTO dispute settlement bodies in the SPS disputes decided to date make it likely that 'precautionary' quarantine measures adopted by national authorities in circumstances of scientific uncertainty will continue to attract WTO scrutiny and challenge. National quarantine authorities will face the greatest difficulties in justifying strict quarantine standards under the SPS Agreement:

- where relevant scientific information on pests and diseases, their mode of spread or their interactions with local ecosystems is incomplete or non-existent; or
- where authorities seek to base quarantine measures on a minority scientific view suggesting the potential for harm, rather than mainstream scientific opinion.

The SPS Agreement and the decisions in the SPS disputes reflect a faith in the capacity of scientific knowledge to provide an objective standard for distinguishing between appropriate SPS measures and those which are, in reality, disguised trade restrictions. However, such a robust view of scientific knowledge and its reliability as a basis for decision-making on health and environmental threats may often not be justified for two reasons:

1. *Science in the environmental and health fields is often plagued by uncertainty and ignorance.* This may stem from a variety of sources including lack of knowledge about causal relationships or affected ecosystems, inappropriate methodologies, or use of simplifications and assumptions in risk assessments. Where scientific information is potentially affected by uncertainty, its capacity to provide a reliable basis for decision-making may be limited.
2. *What constitutes a threat of harm is not purely a scientific question but involves value judgments on the part of the community concerned.* While science can inform decisions about a country's chosen level of SPS protection, it cannot determine these questions.

In circumstances where scientific uncertainty arises, insistence on a 'scientific justification' for SPS measures, or strong links between such measures and scientific assessments of risk, may prevent national authorities from acting in a precautionary fashion to protect biodiversity and avert the potentially devastating environmental, economic and social consequences of the introduction of invasive pests and diseases.

Quarantine and SPS – where to now?

WTO scrutiny of national quarantine measures under the SPS Agreement is only likely to increase in coming years. The recent EC request for consultations within the WTO in order to review the SPS-compliance of Australia's entire quarantine regime serves to highlight the importance of this issue. Future disputes may help to clarify the scope for a precautionary approach to quarantine matters under the SPS Agreement, but current WTO law suggests that national authorities will face difficulties justifying strict quarantine standards, which are not based on strong scientific evidence of potential harm.

Addressing this issue in the WTO requires a fundamental change to the way in which scientific information is approached by decision-makers within this institution. In particular, two changes are necessary. First, WTO decision-makers must be prepared to acknowledge that scientific information about many SPS threats is incomplete, inadequate or uncertain. In these circumstances, science cannot provide a reliable basis for

decision-making and risk assessments based on 'available scientific evidence' are merely a guide to decision-making, rather than a definitive source of information about potential threats. Second, WTO decision-makers must adopt a broader approach to decision-making on SPS threats, which acknowledges that, in circumstances of scientific uncertainty, decisions about appropriate quarantine standards cannot be based on scientific information alone. Determining the need for quarantine protection in these circumstances involves questions of value as well as science, and will be influenced by judgments about the level of scientific uncertainty, the importance the community places on protecting the environment or health, and 'real world' factors, such as the difficulties of controlling or eliminating pests and diseases once introduced into a country.

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Trans-Tasman Legal Co-ordination: The Next Frontiers

David Goddard*

Introduction

In a paper delivered in Auckland earlier this year, Justice Michael Kirby called for further thought to be given to the future of the trans-Tasman relationship.¹ Justice Kirby encouraged us to be imaginative and constitutionally inventive, and to move beyond the purely economic dimension of the relationship. In this short paper I make a few suggestions in response to that challenge. I fear that by Justice Kirby's standards they will seem unduly timid. But I will do my best.

These suggestions are proffered on the basis of a few core assumptions. First, I assume (as does Justice Kirby) that full political union is unlikely in the foreseeable future. Indeed, the case for political union seems to me ever weaker, given the trend towards smaller states based on social and cultural identity, associated together in a range of bilateral and multilateral arrangements and organisations concerned with economic, trade and security matters. Political union is not a prerequisite for single markets, a single currency, or common arrangements for security and foreign policy. So arguments for any of these forms of integration provide no support for moves towards a "Republic of Australasia".

Second, I assume that integration is not to be pursued for its own sake. There needs to be a clear rationale for any given proposal, and the expected benefits must justify both the direct costs and, more importantly, the indirect costs in terms of any effect on tailoring of laws and institutions to local conditions and preferences, participation values, and direct local accountability.

My work on trans-Tasman legal and regulatory issues does, however, suggest that there are fields where further integration would provide real benefits on both sides of the Tasman. The most obvious front on which to keep working is economic: reducing barriers to trans-Tasman commercial activity should provide further stimulus for growth and economic development in New Zealand and Australia.

But there is also, it seems to me, the potential for real gains on the human and social fronts. Enhanced freedom of movement for workers and their families, and for students, benefits the individuals concerned, and enriches the societies in which they live and work. And although it seems so obvious as to be trivial, it is worth reminding ourselves that on both sides of the Tasman we rely on the law – civil and criminal – to underpin not only economic activity, but also a wide range of (mostly shared) social values and expectations. If – as I believe is the case – those values and expectations are also relevant to many trans-Tasman dealings, but there are significant barriers to the application of our laws in such cases, our economies are thereby damaged, and our values undermined. Enhanced cooperation on such matters would provide benefits going well beyond the purely economic.

Thus the focus of this paper, legal coordination between Australia and New Zealand, has important implications for both economic and social issues.

* QC, New Zealand; Special Counsel – International, Ministry of Economic Development. The views expressed in this paper are the personal views of the author, and do not represent the views of the Ministry of Economic Development or of the New Zealand Government.

¹ Hon Justice Michael Kirby, "Australia & New Zealand – Past, Present & To Come?" speech delivered to Knowledge Wave Conference 2003, Auckland, 19 February 2003.

Trans-Tasman Court proceedings and regulatory enforcement

Civil proceedings – trans-Tasman service and enforcement of judgments

I delivered a paper to the ANZSIL/ASIL joint conference three years ago on the subject of cross-border dispute resolution in civil and commercial cases. In that paper I canvassed the highly unsatisfactory state of the law in relation to trans-Tasman court proceedings. Despite the ever-increasing movement of people and assets between the two countries, and ever-deeper business and trade links, we have made little progress towards closer integration of our civil justice systems. We treat each other in this context in essentially the same way as any other foreign country, and apply the standard rules for asserting jurisdiction over persons abroad, and enforcing civil judgments. Some steps have been taken to recognise the frequency with which disputes in one or other country have a trans-Tasman element. There is a simplified regime for taking evidence for use in civil cases (other than family proceedings)² and there have been some minor procedural tweaks to the law in relation to enforcement of judgments.³ But the basic rules on when civil proceedings can be served in the other country, and when we will enforce a judgment from the other country, have not been addressed.

For example, we do not enforce each other's non-money judgments. We do not grant interim relief in support of proceedings in the other country. We do not enforce judgments given in the other country in proceedings where the defendant was served abroad and did not appear, unless the defendant was resident in that country at the time of service abroad, or had previously agreed to submit to that country's courts, however closely connected with that country the proceedings may be. In these respects our civil justice systems provide for less cooperation than has been achieved in Europe, between legal systems with much more significant differences, under the Brussels Convention (now the Brussels Regulation⁴) and the Lugano Convention. And it seems especially odd that we will enforce non-money arbitral awards made in the other country, but not non-money judgments, even where the parties had expressly agreed that the court in question would hear the dispute.

In my view, it is time for a more fundamental reappraisal of the rules that apply to civil proceedings with a trans-Tasman element. We have very similar court systems. We each have full confidence in the quality of the other's justice system. Most of the safeguards that are applied in relation to proceedings in other more distant and less similar countries simply are not relevant in the trans-Tasman context.

When I spoke three years ago, I outlined the current state of negotiations towards a global convention on jurisdiction and enforcement of judgments in civil and commercial matters, under the auspices of the Hague Conference on Private International Law. It seemed then that such a convention might go some way to addressing the concerns I identified. However I argued that it was possible for Australia and New Zealand to move faster, and to go further, than would be possible in the global context. Developments since 2000 have confirmed the difficulties of achieving widespread multilateral support for a broad convention on jurisdiction and enforcement of judgments. A Diplomatic Conference in mid-2001 exposed deep-seated differences between participants on fundamental questions of scope, as well as on myriad points of detail. The Hague Conference is now considering a proposal to work towards a more focused convention on choice of court clauses, providing for the chosen court to have jurisdiction, and for enforcement of judgment given by the chosen court. This is, I think, a very worthwhile project. But it illustrates starkly how limited, and how slow, progress is likely to be on these issues in any multilateral forum. The case for a special Australasian regime is stronger than ever.

What might that regime look like? Similar issues were addressed as between the Australian states and territories some 20 years ago. The Australian Law Reform Commission prepared a comprehensive

² See the Evidence and Procedure (New Zealand) Act 1994 (Cth) and the Evidence Amendment Act 1994 (NZ).

³ See the Foreign Judgments Act 1991 (Cth), and the 1992 amendments to the Reciprocal Enforcement of Judgments Act 1934 (NZ).

⁴ European Council Regulation (EC) No 44/2001 of 22 December 2000.

report which led to the enactment of the Service and Execution of Process Act 1992 (Cth).⁵ Essentially, this Act provides that proceedings issued in one state can be served in another state in accordance with that Act, and are then treated as if they had been served domestically. The resulting judgments are enforced throughout Australia. It is not open to a defendant to fail to appear, then contest the jurisdiction of the original court. However a defendant who considers that the court in which proceedings have been commenced is not the appropriate forum can apply to that court for a stay of proceedings on the grounds that another state's court provides a more appropriate forum, in all the circumstances.

I see no reason why this regime could not relatively simply be extended to New Zealand. This would achieve a significant reduction in uncertainty and risk associated with dealings between the two countries, and would reduce the waste of costs on unnecessary and inappropriate disputes about where a claim will be decided, and about the enforceability of judgments. The importance of addressing these issues to reduce transaction costs and facilitate trade was recognised early in the life of the European Community: the Brussels Convention, which provides a comprehensive regime governing questions of jurisdiction and enforcement of judgments in civil proceedings, was completed in 1968. We also need to deal with this issue, as one of the building blocks on which trans-Tasman economic integration is founded. And raising our eyes above economic horizons, as Justice Kirby urged, such measures should also enhance access to justice and strengthen the rule of law in Australasia. Where a couple has separated, and one partner has gone to live in Australia, for example, it does no credit to our legal systems that the complexity and cost associated with resolving questions about division of property in the cross-border context may mean that neither partner has effective access to the courts.

Regulatory proceedings

The work I have done on business law coordination over the last few years suggests to me that this model could be taken further still. The consumer protection and business regulatory frameworks in Australia and New Zealand are very similar. It is increasingly common for a firm in one country to deal with firms, and consumers, in the other. And technology makes it ever easier to do this direct, without local intermediaries. However, our regulatory regimes struggle to address this development. For example, suppose a New Zealand firm supplies unsafe goods direct to consumers in Australia, either through traditional mail order channels or (more likely in today's world) as a result of internet sales. It is an offence to supply those items in Australia, but it is not possible for proceedings to be commenced in Australia against a New Zealand firm, and served outside the jurisdiction. Nor is extradition usually an option in such cases: it is only available in respect of natural persons, yet most regulatory offences nowadays are committed by companies. And in very many cases, the sanction for breach of these regulatory regimes is a fine – possibly a substantial fine – but not a period of imprisonment sufficient to found a request for extradition.

It seems to me that we should carefully study whether the solutions that have been adopted within Australia in relation to service and execution of criminal process across state borders could be adapted to the trans-Tasman environment. I have some reservations about the appropriateness and viability of simply extending the internal Australian regime, in this context. But at least we should do the work.

If more ambitious forms of co-operation in criminal proceedings are found to be too problematic, at least in the medium term, it seems to me that there may be lesser forms of cooperation which would be capable of being put in place relatively swiftly. At the least, we should be able to identify a positive list of statutes relating to consumer protection and business regulation, which are of particular importance in the context of trans-Tasman dealings. We could provide that proceedings under these statutes, where the sanction is limited to imposition of a fine, can be served in the other country. The statute could go on to provide that if the defendant elects not to appear (in person, by counsel or – perhaps – by video link, along the lines of the evidence regimes) then the court can proceed in the absence of the defendant. Alternatively, provision could be made to compel the attendance of the defendant at court premises in the defendant's country, with a video link to the relevant court in the other country. Any fine imposed by the court could be enforced in the usual way in the country in

⁵ ALRC Report no 40, Service and Execution of Process, 1987.

which it was imposed. And it could be enforced as if it were a civil money judgment in favour of the government of that country, under the civil enforcement regime based on SEPA.

This proposal raises a few complex issues, and I acknowledge at once that it is quite novel. But it would ensure greater integrity and effectiveness for both countries' consumer protection and regulatory regimes, and its implementation requires only a little imagination and invention.

Mutual recognition

Adopting uniform laws across two jurisdictions, each with their own legislatures, distinct electorates, and differing political imperatives, is never simple. Nor, in most contexts, is it necessary or appropriate to do so.⁶ In most fields of law, the principal objective of legal coordination is to reduce barriers to cross-border commercial activity, and to movement of people and assets. A very simple and effective tool to achieve this goal is mutual recognition. In essence, a mutual recognition regime provides that where a person carries on an activity in country A, in accordance with the law of country A, they can also engage in that activity in country B while complying with the requirements of the law of country A, and without needing to comply with any different or additional requirements that would otherwise apply to that activity under the law of country B.

The Trans-Tasman Mutual Recognition Arrangement came into effect in 1998. The objective of the arrangement is “to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand, and to thereby facilitate trade between the two countries. This is intended to enhance the international competitiveness of Australian and New Zealand enterprises, increase the level of transparency in trading arrangements, encourage innovation and reduce compliance costs for business.”

The Arrangement gives effect to two basic principles relating to goods and occupations respectively:

1. Goods

The basic principle in respect of Goods is that a Good that may legally be sold in the Jurisdiction of any Australian Party may be sold in New Zealand, and a Good that may legally be sold in New Zealand may be sold in the Jurisdiction of any Australian Party.

2. Occupations

The basic principle in respect of Occupations is that a person Registered to practise an Occupation in the Jurisdiction of any Australian Party is entitled to practise an Equivalent occupation in New Zealand, and a person Registered to practise an Occupation in New Zealand is entitled to practise an Equivalent occupation in the jurisdiction of any Australian Party.

The Arrangement provides for a review after five years of operation. At the request of Australasian Heads of Government, the Productivity Commission (an independent body established under Commonwealth legislation, with expertise in microeconomic reform) is currently carrying out research to inform that review, in conjunction with the ten-year review of the Australian Mutual Recognition Agreement. The Productivity Commission recently released a draft research report which suggests that the mutual recognition schemes are effective overall in achieving their objectives, and should continue.⁷ The Productivity Commission has made preliminary findings suggesting some clarifications and minor extensions of the schemes. Submissions on the draft report are due by 8 August 2003, after

⁶ For more detailed discussion of the circumstances in which identical laws are required to achieve coordination objectives, see David Goddard, “Business laws and regulatory institutions: some approaches to CER coordination” in A Grimes, L Wevers & G Sullivan (eds) *States of Mind: Australia and New Zealand 1901 – 2001* (Institute of Policy Studies & Stout Research Centre, 2002).

⁷ Australian Productivity Commission, *Evaluation of the Mutual Recognition Schemes – Draft Research Report*, June 2003.

which the Productivity Commission will prepare a final report to governments. Officials will then conduct the formal review of the arrangement, and report to Heads of Government.

The Productivity Commission has carried out a thorough and careful review of the Mutual Recognition Schemes. The draft research report is a very useful document, which sheds a great deal of light on the current state of play in relation to mutual recognition, and identifies some worthwhile improvements. However, in the spirit of Justice Kirby's speech, I would like to suggest three more ambitious extensions to the mutual recognition regime.

Regulatory requirements affecting movement of goods

There is a strong case for the regime to be extended to apply to regulatory requirements that have the *effect* of preventing or deterring trans-Tasman movement of goods, whether or not those requirements relate directly to the sale of goods. In particular, it seems to me that the regime should apply to regulatory requirements in relation to the manner in which goods can be used. For example, a rule that washing machines that do not meet local standards cannot be connected to the plumbing network does not directly relate to the sale of washing machines, but will prevent or discourage the sale of washing machines made in the other jurisdiction to that jurisdiction's standards.

This proposal is inspired by the European mutual recognition regime for goods, established by Articles 28-30 of the EC Treaty, and caselaw following the well-known *Cassis de Dijon* decision of the European Court of Justice.⁸ Under that regime, a member state's law is overridden by the mutual recognition principle if it discriminates directly against goods from another member state, or if it is "indistinctly applicable" but in practice imposes a greater burden on goods from other member states. However a rule that is generally applicable to all goods, regardless of origin, will be valid if:

- it is directed at a legitimate regulatory objective (eg public health and safety, the environment, consumer protection);
- it is proportional to that objective; and
- it gives effect to that objective in the manner least likely to impede the free movement of goods.

The European regime, while removing some barriers to movement of goods, has given rise to a new set of legal uncertainties and complexities. A key tool in resolving those uncertainties and complexities has been the existence of the ECJ, which can authoritatively determine the application of the mutual recognition principle to particular domestic laws of member states.

In Australasia we could simply leave such a principle to be applied by domestic courts: I would not rule that possibility out completely. But if that is seen as too risky and too ambitious, at least at this stage and in the absence of any authoritative trans-Tasman court to bring consistency to the application of the regime, it seems to me we could devise an alternative institutional structure to give effect to a principle of this kind. For example, we could establish an inter-Governmental Review Committee, made up of senior officials from each of the participating jurisdictions, to which these issues could be referred.⁹ Where a complaint was received that a domestic requirement infringes the extended mutual recognition principle, this Review Committee could consider whether the requirement prevents or impedes trans-Tasman movement of goods. If it did, the Review Committee would then go on to ask whether the requirement was directed at a legitimate regulatory objective (eg. public health and safety, the environment, consumer protection), whether it was proportional to that objective, and whether it gave effect to that objective in the manner least distortionary to trade.

⁸ Case 120/78, [1979] ECR 649.

⁹ This would not need to be a permanent body, and no new bureaucracy would need to be established: I envisage that relevant expertise and support could be obtained as and when required from the Australian Office of Regulation Review and the New Zealand Regulatory Impact Assessment Unit. Advice might also be sought from the Productivity Commission, where the issue before the Committee was a significant one.

I envisage such a body having an advisory role, rather than making binding determinations of legal rights. The Review Committee would make recommendations to the government in question in relation to any changes to the law which it considered were required by reference to the mutual recognition principle. That government would be required to report within six months on its proposals to modify the regulatory regime, and within (say) 12 months on steps taken to do so.

Such a body would have three advantages. First, the questions are essentially policy design issues rather than pure legal issues. A body of this kind, supported by agencies whose core business it is to assess regulatory measures against core principles of effectiveness and efficiency, would be more likely than a court to have the relevant expertise. Second, there may be a number of options for giving effect to the principle, rather than one “right answer”: a general finding of inconsistency coupled with guidance on options for removing that inconsistency may be more appropriate, and leave more scope for legitimate local choices about implementation, than a court-imposed solution. And third, but perhaps most important, non-binding recommendations are more likely to be acceptable to participating jurisdictions: a proposal of this kind has better chances of acceptance.

Regulatory requirements affecting movement of service providers

Similarly, TTMRA could be extended to apply to regulatory requirements which have the effect of creating barriers to the movement of service providers between the two countries. Here also there would be a two-stage inquiry: does the regulatory requirement have the effect of preventing movement of service providers, and if so, is it justified by reference to a legitimate regulatory objective, is it proportional to that objective, and does it give effect to that objective in the manner least harmful to cross-border movement of service providers?

In this context also, it may be more productive to refer the question to a Review Committee with an advisory function, rather than to the courts for a binding determination.

Remote and temporary provision of services

Third, TTMRA could be extended to facilitate remote and temporary provision of services, by establishing a regime for mutual recognition in relation to provision of services by persons who do not have a permanent establishment in the host jurisdiction. TTMRA focuses on movement of service providers. It facilitates registration in another jurisdiction. But registration is still required in each jurisdiction before services are provided in that jurisdiction. The TTRMA model does not work well for two increasingly common situations. First, it does not work well for mobile professionals, such as physiotherapists travelling with a sports team.¹⁰ Second, it is increasingly common for services to be provided at a distance, using various forms of information and communications technology. An architect in New South Wales can readily provide services across the internet to clients in Victoria or Queensland or New Zealand. But it is unlawful, either to provide the services or to call oneself an architect in those other jurisdictions, without becoming registered in each jurisdiction. This creates a significant barrier to occasional sales into a market, and thus to organic growth of Australasian service sector businesses.

In Europe, there are two recognition models that address this issue. In some sectors, in particular financial services, a service provider is entitled to provide services in any member state subject to the regulatory jurisdiction of their home state. Appropriate notice must be given as to the applicable regulatory regime. This approach is underpinned by a high degree of substantive convergence of the regulation of financial service providers. The second, generally applicable, model is established under Articles 49 *et seq* of the EC Treaty. A service provider from one member state has the right to provide services on a temporary basis in another member state. Those services are provided subject to the same regulatory requirements that apply to domestic providers in the host state. However, there are two important qualifications to this requirement. First, the host state cannot require registration as a condition of providing services in that state. Second, the host state cannot uncritically apply all the regulatory requirements that apply to domestic providers. The local rules can be applied only where

¹⁰ See Productivity Commission, at note 7, p 75.

they are justified by reference to a legitimate regulatory objective, are proportional to that objective, and do not impede temporary provision of services across borders more than is necessary to give effect to that objective. Very importantly, the manner in which the local rules are applied to providers of such services must not unnecessarily duplicate or overlap with regulatory requirements to which the service provider is subject in that service provider's home state.¹¹

The Productivity Commission's draft report does not consider the possibility of adopting, in the Australasian context, one or other of these European models. In theory, either could work. The real question is what the benefits and disadvantages of each might be, in our part of the world.

The benefits seem reasonably clear, at least in principle. Regimes of this kind – especially a “home regulation” regime – would reduce barriers to cross-border provision of services, thus enhancing competition, increasing customer choice, and reducing compliance costs for businesses. Organic growth of businesses into service export markets would be facilitated. The real question is how significant these benefits would be: would they be widespread, or would they apply only to a very few firms in a limited number of sectors? This is an issue that the Productivity Commission might usefully consider, in completing its work.

Careful thought would also need to be given to the costs and risks of such a regime. The direct costs of administering such a regime seem unlikely to be significant. More important would be the risk of compromising some of the regulatory objectives of occupational regulation in each jurisdiction. On the one hand, it can be argued that purchasers of services would be willing, if for example they were opening an office in the other jurisdiction, to purchase the services there, under that jurisdiction's regime. So there is already an informal recognition of the adequacy of the other Australasian jurisdictions' regulatory regimes, just as there is with goods.¹² On the other hand, there is a plausible argument that the differences in regulation of service providers are more significant and more complex to evaluate. Purchasers of services make assumptions about the basis on which those services are provided, and the regulatory protections available to them, based on their domestic experience. For some purchasers a simple warning that the services are provided subject to the law of another designated jurisdiction would be insufficient to put them on notice as to the nature and significance of the choice they are making in selecting a service provider from that other jurisdiction, rather than a domestic provider.

There would also be some issues about enforcement against distant service providers, but these could be addressed by the proposals outlined in section 1 of this paper.

One possible middle road might be to create a regime of this kind, but to exclude services provided to consumers, that is, to persons who acquire the services primarily for personal, family or household purposes. Business purchasers of services, who are more sophisticated and better placed to identify and manage risks, could then decide whether they were or were not willing to deal with remote service providers, regulated in another jurisdiction under somewhat different rules.

A general presumption of mutual recognition of commercial regulation?

But this focus on an extension of TTRMA – even significant extension of TTRMA – probably falls short of the challenge to be imaginative and inventive. Stepping back, these proposals form part of a broader tapestry of mutual recognition projects currently underway: cross recognition of securities offerings, recognition of financial reporting, and various other possibilities identified in the field of business regulation. Is there any general principle that underpins these various initiatives?

¹¹ For a helpful review of the EC law, see Catherine Barnard, “Fitting the Remaining Pieces into the Goods and Persons Jigsaw” (2001) 26(1) *EL Rev* 35 - 59.

¹² This argument played a central role in the case for the mutual recognition regime in relation to goods: see Gary Sturges, “Fuzzy Law and Low Maintenance Regulation: The Birth of Mutual Recognition in Australia”, address to Royal Institute of Public Administration Australia (Qld Division), Brisbane, 12 February 1993.

It seems to me that that general principle may be that Australia and New Zealand are increasingly willing to recognise regulation of commercial activities by the other, and refrain from imposing additional local requirements, in the absence of compelling reasons to the contrary. We could take the Memorandum of Understanding on Coordination of Business Law a step further, and make this approach explicit, by introducing a strong presumption of mutual recognition of regulation of business activities with a trans-Tasman element. The MoU could provide a direction to policymakers to consider, when preparing new or revised legislation, the potential for trans-Tasman activity, or for an entity established and regulated in one country to carry on its regulated business in the other. Where that potential is present, the default approach should be to include in the legislation a power to make regulations implementing a recognition regime, in the absence of compelling reasons not to do so.¹³ Regulations introducing mutual recognition on a trans-Tasman basis would normally follow.

The extent of recognition would vary from context to context – in some cases, the home country’s regulatory regime would be sufficient without more, in others aspects of the home country regulatory regime would be retained, and in some cases there would be tailored “top-up” or “translation” requirements that would need to be complied with in order to obtain recognition. The need for such tailoring in many cases, and the need to vary the tailored requirements as and when domestic regulatory regimes change in the other country, is the main reason for implementing such recognition regimes by regulations, rather than directly in primary legislation.

Political economy factors point to pursuit of such regimes on a mutual basis, in most cases, though in principle unilateral recognition often makes good sense.

There is a link between this proposal, and the suggestion of establishing a trans-Tasman Review Committee to consider regulatory impediments to trans-Tasman provision of services and movement of goods. A key technique for reducing such impediments will often be mutual recognition. The ability to introduce and adapt mutual recognition regimes will be an important mechanism for giving effect to recommendations of the Review Committee. And effective mutual recognition regimes will of course reduce the prospect of regulatory regimes coming before the Review Committee, and of adverse findings being made.

Joint institutions

What of joint institutions? Would it not be more imaginative and more inventive to advocate across-the-board merger of our regulatory institutions? Work is well advanced on a joint therapeutic products agency. Why not a single patents office? A single accounting standards setting body? A single competition agency? A single securities regulator?

Some of these possibilities may make sense, and may in time come to pass. But there are significant costs and challenges associated with establishing single institutions that are effectively accountable to two distinct polities. I explored some of these in a paper presented to the recent “States of Mind” conference.¹⁴ The practical experience of developing the ownership, governance and accountability arrangements for the joint therapeutic products agency has confirmed that these are real issues, not merely theoretical ones. The initial and ongoing costs of establishing joint institutions are non-trivial. The work done in developing the joint therapeutics products agency should provide a template that simplifies somewhat the creation of further joint institutions. But I suspect their number will increase fairly slowly over the coming years. Other techniques – mutual recognition, cross appointments of members of the regulatory body (as with the Takeovers Panel), information sharing – will almost certainly be more common.

¹³ See, eg, Part 5 of the Securities Act 1978, inserted by the Securities Amendment Act 2002.

¹⁴ David Goddard, above n 5.

Coordinated policy processes

The proposals set out above move a little way beyond the purely economic. They involve an element of imagination and invention. But I suspect that Justice Kirby might find them a disappointing response to his challenge: I have perhaps lost sight of the wood, through focussing too much on the trees.

So let me conclude with a more broad brush, more ambitious, suggestion. It seems to me that the degree of legal convergence and regulatory co-ordination between Australia and New Zealand has reached the point where we can envisage, and should progressively undertake, coordinated policy development processes. We face many of the same challenges. We are both relatively small OECD countries. We have similar legal and institutional frameworks. There are social and cultural differences between the two countries, but in many contexts they are not especially dramatic or especially relevant. So why should we invent the wheel separately, twice, when one research project would do? And in particular, where we are both implementing international models for a particular legal regime, why do we need to do so separately, with subtle differences that increase costs for those subject to both regimes?

Initially, I suggest two forms of co-ordinated policy process:

- we should experiment with joint projects undertaken by the New Zealand Law Commission and the Australian Law Reform Commission. Where the same law reform issue arises in both countries, and is suitable for referral to a Law Commission, the Australian and New Zealand governments could make parallel references to the two Commissions, and ask them to work together and (if possible) prepare a single report to the two governments. It seems to me this would enrich the law reform process – a broader range of perspectives on any issue is always valuable – and reduce the risk of unnecessary divergence of laws, where there is no substantive difference between the two countries which requires different regulation;
- we should set up some pilot joint officials' processes, with ministers from both sides of the Tasman asking their officials to undertake a policy exercise in tandem, and prepare a single report to the two ministers. This already happens in relation to inherently trans-Tasman issues, such as the direction from ministers earlier this year to explore options for closer coordination of financial reporting bodies. That should be encouraged. But there is no reason why projects such as implementation in each country of cross-border insolvency law should not be undertaken jointly.

The best starting point for joint policy processes may come in the context of multilateral law reform processes. There is already a significant degree of formal and informal cooperation between New Zealand and Australian representatives in many international fora. A more conscious approach to joint participation in certain exercises, to maximise our joint impact, could be followed by joint work on domestic implementation.

Finally, we should not rule out the possibility of joint rule making in some well defined areas. The discussion paper released by the Australian and New Zealand governments in relation to the proposed joint therapeutic products agency contemplates new forms of joint legislative instruments: rules to be made by the Ministerial Council (broadly analogous to regulations) and Orders to be issued by the Agency (similar to Orders issued by the Therapeutic Goods Administration under the existing Australian regime, and to rule-making powers conferred on some agencies in New Zealand). These new forms of legislative instrument would be made under the Treaty governing the joint regime, and would have direct effect in both countries by virtue of domestic implementing legislation.

This approach could – cautiously – be taken further. In some other areas, where there is no material difference in conditions in the two countries, or in relevant preferences, and where some form of detailed delegated rule making or decision making is required, legislation in each country could confer the power to make those detailed rules on a single agency or committee, or could require the rules to be

made with the concurrence of two domestic agencies.¹⁵ The model could also be appropriate where the necessary rules are very technical - “lawyers’ law” – and where there is no good reason for differences between the two countries. The rules made by this body would be subject to parliamentary oversight in both countries. There would need to be appropriate processes to ensure voice for stakeholders in each country, and accountability to those stakeholders.

This suggestion falls short of moving to a single legislature responsible for primary legislation generally, and well short of political union. But it goes far beyond the purely economic. And who knows what it might lead to over time.

¹⁵ Another model is provided by the Food Standards Authority of Australia and New Zealand (FSANZ), which makes food standards, to which each country is then required to give effect by regulations. Again, we have a single set of rules.

Even Closer Economic Relations?

Stephen Bouwhuis and Paul Schofield*

Introduction

This paper takes a big picture approach to the economic relationship between Australia and New Zealand. The paper begins with a brief examination of the current state of the relationship between Australia and New Zealand and an overview of the development of the current framework between the two nations. The paper then highlights some CER building blocks presently under construction and concludes by outlining some possible future developments in economic relations between Australia and New Zealand.

The relationship between Australia and New Zealand

Australia and New Zealand - with their geographic proximity; shared language; similar history, institutions and culture - have a very special relationship. Like any close relationship it requires close care and attention on the part of both parties if it is to continue to grow. Some commentators take the view that the CER process has stagnated and that Australia and New Zealand are starting to drift apart.¹ In light of these concerns, there have been calls for the governments of Australia and New Zealand to use the 20th Anniversary of CER as an opportunity to reinvigorate the relationship.

It is important to view CER as a dynamic process, requiring both parties to continue their search for ways to improve the relationship. It would be a mistake for us to get too 'comfortable and relaxed' and to neglect each other. The 20th Anniversary of CER seems like an opportune time for us to stop, reflect and refocus our efforts.

In political science reform, efforts are typically classified on a scale ranging between radical and incremental. Radical reform involves a substantial shift in the way that things are ordered. An example of such reform would be the closure of the Uruguay trade round, resulting in the creation of the World Trade Organisation. Incremental reform, in contrast, is slow change at a gradual pace. In our view the evolution of relations between Australia and New Zealand provides an example of such incremental reform.

One of the criticisms of CER in recent years has actually been its incrementalism. Some have suggested that the CER process is moving more slowly than economic integration elsewhere, for example in the European Union. The comparison is stark given the similarities between Australia and New Zealand, contrasted with the diversity of the nations now part of the European Union. As the world moves rapidly towards more closely meshed economies, as exemplified by agreements such as the North American Free Trade Agreement and the creation of the European Union, there is a concern that Australia and New Zealand are increasingly being left behind.

The development of the current CER framework

The *Australia New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA) is actually the fourth major trade agreement between Australia and New Zealand. ANZCERTA was preceded by

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¹ Most notably the Hon Max Bradford MP, Opposition Spokesperson on Foreign Affairs and Defence and former Minister of Defence (New Zealand); and the Hon Justice Michael Kirby AC CMG, Justice of the High Court of Australia.

trade agreements in 1922 and 1933 as well as by the New Zealand Australia Free Trade Agreement of 1965. Each agreement builds upon the other, a demonstration of an incremental approach.

ANZCERTA entered into force on 1 January 1983. At the time it was regarded as one of the most comprehensive bilateral free trade agreements in the world. It was a significant improvement on the New Zealand Australia Free Trade Agreement of 1965, in that it adopted a negative list approach rather than a positive list approach.² In a negative list, one only lists the sectors to be excluded from the disciplines of the agreement, rather than only those sectors to be included in the agreement. The difference seems subtle, in reality the former tends to be much more comprehensive than the latter.

After ANZCERTA came into force there were three scheduled formal reviews of the operation of the agreement in 1988, 1992 and 1995. Since 1995 these periodic reviews have been replaced with a more informal assessment as part of the annual Trade Ministers meeting. In the course of these reviews the scope of ANZCERTA has been extended through a series of protocols, understandings, agreements and arrangements. There is now a substantial body of agreements and arrangements (about 50 in total), which are collectively referred to as 'CER' or 'Closer Economic Relations'.³ ANZCERTA is the head agreement from which the other agreements or arrangements flow. The overall effect of the CER framework has been to create a comprehensive free trade area between Australia and New Zealand that is WTO consistent.

Key instruments in the CER framework

In July 1990, ANZCERTA, in conjunction with the Protocol on the Acceleration of Free Trade in Goods 1988, eliminated all remaining tariffs and quantitative restrictions on goods between Australia and New Zealand. In addition to the removal of tariff and quantitative restrictions, CER also aims to harmonise non-tariff barriers, such as customs procedures and technical standards, thereby limiting their potential to be employed as trade protection measures. The Memorandum of Understanding on Technical Barriers to Trade 1988, the Agreement on Standards, Accreditation and Quality 1990 and the Customs Cooperation Arrangement 1996 have all been important steps in this regard.

The Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement 1988⁴ provides for free trans-Tasman trade in all services, again using a negative listing approach.⁵ The Services Protocol is complemented by the Trans-Tasman Mutual Recognition Arrangement 1998. This Arrangement aims to remove regulatory barriers to the movement of goods and service providers between Australia and New Zealand. The two basic principles are that:

- a good that may be sold legally in one country may be sold in the other; and
- a person registered to practice an occupation in one country is entitled to practice an equivalent occupation in the other.

² The primary objectives of ANZCERTA are (a) to strengthen the broader relationship; (b) to develop closer economic relations through a mutually beneficial expansion of free trade; (c) to eliminate barriers to trade in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and (d) to develop trade under conditions of fair competition.

³ According to the CER webpage maintained by the Australian Department of Foreign Affairs and Trade, there are 33 documents within the CER framework dealing with the core issues of trade in goods, trade in services, the regulatory environment for business and government assistance and purchasing. Another 19 documents are listed on the selected documents page of New Zealand.

⁴ Australia and New Zealand have a long history of allowing citizens to move between the two nations with a minimum of hindrance dating back to the 1920s, so the negotiations did not have to overcome the difficulties faced by their North American and European Counterparts in this aspect of services liberalisation.

⁵ Services excluded by Australia include aspects of telecommunications, air services, coastal shipping, broadcasting and television, third party insurance and postal services. Services excluded by New Zealand are aviation and coastal shipping.

The Arrangement is a good example of one of the strengths of CER - practical and simple solutions to complex problems.

The Memorandum of Understanding on Harmonisation of Business Law⁶ was another significant step requiring Australia and New Zealand to jointly 'examine the scope for harmonisation of business laws and regulatory practices'. The process of harmonisation under the Memorandum was not intended to require the passage of identical laws in each nation, but rather to facilitate the identification of differences that increase the transaction and compliance costs faced by companies and to reduce those costs, where possible, through harmonisation.

Another important CER instrument is the Protocol and Agreed Minutes on the Harmonisation of Quarantine Administrative Procedures 1988, which reaffirms the principle that quarantine restrictions should not be used as trade barriers without sufficient scientific justification.

In 1995 the Agreement between the government of Australia and the government of New Zealand Establishing a System for the Development of Joint Food Standards created a single regulatory agency (FSANZ) to develop joint food standards for the two nations.

Apart from these key documents in the CER framework, there are numerous other documents dealing with other important aspects of the relationship between Australia and New Zealand, such as trans-Tasman travel, reciprocal health care, social security, double taxation, and aviation.

In addition to all this documentation it is worth noting that government Ministers and officials from New Zealand participate in a range of Australian Commonwealth –State Ministerial Councils covering almost every portfolio, including primary industries, environmental protection, food regulation, and industry and technology. The Prime Ministers of Australia and New Zealand meet annually, as do other Ministers such as the Trade Ministers, the Foreign Ministers, and the Treasurers.

By any account CER has been a huge economic success. Trans-Tasman trade has increased 500 percent since the commencement of CER in 1983 and total two-way investment now amounts to some \$33.8billion.⁷

CER building blocks presently under construction

The new additions to the CER framework presently under construction include:

Triangular taxation

In February this year the Australian Treasurer, Peter Costello, and the New Zealand Finance Minister, Michael Cullen, announced reforms to resolve the long running problem of 'triangular taxation'. Essentially, this problem arises where a New Zealand resident individual shareholder in an Australian company which earns New Zealand sourced income does not receive an imputation credit for the tax paid in New Zealand on that New Zealand sourced income. The same problem arises for a resident Australian individual who owns shares in a New Zealand company that derives Australian sourced income. The New Zealand company cannot pass on to Australian shareholders a franking credit that reflects the tax paid in Australia. In both cases the income is taxed twice. Ameliorating this situation will create greater incentives to invest across the Tasman.

⁶ This was replaced by the *Memorandum of Understanding on Business Law Coordination 2000*.

⁷ A Celebration of Trans-Tasman Relations: 20 Years of Closer Economic Relations between Australia and New Zealand 1983-2003, DFAT, March 2003

Therapeutic goods

The governments of Australia and New Zealand have agreed to examine proposals for a single Australia New Zealand therapeutic goods⁸ agency, which would be a bi-national regulatory agency. This project is expected to be finalised by mid-2005.

Review of TTMRA

The Australian Productivity Commission is currently reviewing the Trans-Tasman Mutual Recognition Agreement 1998, and a final report is anticipated in October 2003.

It is clear that these proposed additions to CER framework reflect the incremental approach that has characterised the development of CER to date.

Possible future developments

Further 'difficult issues' must be bridged to establish even closer economic relations between Australia and New Zealand. Key in this regard, as in any public policy process, will be the need to maintain public support for such reforms. It remains important to reassure the doubters, and in this regard reformers can in part point to the success of CER to date. That said, we tend to agree with the sentiment of one commentator who stated that: 'Australia and New Zealand need to find a new paradigm to get the relationship on a new footing, which will allow us to face the challenges and opportunities of globalisation together much better than we can do separately.'⁹

Finding a new paradigm is something that others have already tried to do. A good example is the Report of the Foreign Affairs, Defence and Trade Committee Inquiry into New Zealand's economic and trade relationship with Australia ('the Committee Report').¹⁰ The Report supports 'deepening the relationship at all levels' and notes that 'this may eventually need to lead to new political arrangements'. The report goes on to suggest a 'process of economic integration leading to the creation of an "Australasian" Economic Community'. The objective would be the creation of an economic union consisting of a single market.

With this in mind as a potential long-term goal, we suggest the following possible future developments for even closer economic relations between Australia and New Zealand:

Improved links and understanding

As noted above, there are a number of existing formal mechanisms for consultation between Australia and New Zealand. There is, however, room for taking this approach much further. The Committee Report makes a number of innovative suggestions in this regard. One such suggestion is for hosting an annual multi-sectoral forum between our nations - including leaders from the business, government, cultural, academic, and non-government sectors. Another suggestion is for each nation to fund a university chair in the other nation dedicated to trans-Tasman studies.

Upgrading the CER framework

The Committee Report recommends negotiating an expanded treaty between Australia and New Zealand encompassing and building on all the current elements of CER. This new consolidated agreement would replace the web of agreements and arrangements which make up the current CER framework. It would be more transparent and accessible. It would also provide an opportunity to improve CER through a more focussed review of the areas where barriers to trade can be further reduced. This could include: removing inscriptions from CER; harmonising external trade policy;

⁸ Includes medicines and medical devices.

⁹ The Hon Max Bedford MP.

¹⁰ New Zealand House of Representatives, *Inquiry into New Zealand's economic and trade relationship with Australia*, Report of the Foreign Affairs, Defence and trade Committee, Forty-Sixth Parliament, (Graham Kelly, Chairperson) 2002.

greater tax harmonisation; a single corporations law spanning across both jurisdictions; and liberalising direct investment across the Tasman.

Merged stock exchange

In 2001 the proposal for a merger between the Australian and New Zealand stock exchange failed. This is regrettable, as a merged stock exchange would be more likely to tap into world capital markets. It is also likely to make it easier for Australians to invest in New Zealand companies and vice versa.

Currency union

Following the birth of the Euro there was a lot of discussion about the possibility of some sort of currency union between Australia and New Zealand. The debate over currency union has proved to be rather controversial because of its symbolism, in many ways money being seen as akin to a national flag, and this attachment has stymied any political ambition in this regard.

The main argument in favour of currency union is that it would reduce transaction costs for trans-Tasman business,¹¹ thereby reducing another non-tariff barrier to trade. There is also economic evidence which suggests that nations which have a common currency have a higher degree of trade between themselves than can be explained by other factors such as colonial ties or geographic proximity.¹² There is a further argument that the cost of borrowing is higher in small nations with an independent currency because international lenders apply a risk premium on debt denominated in a small potentially volatile currency. A larger currency is less likely to be vulnerable to external shocks, leading to reduced costs for borrowing (i.e. interest rates).

Arguments against currency union are that the maintenance of an independent currency provides a buffer against economic shocks and allows for an independent monetary policy. A particular concern from the New Zealand point of view may be a fear that New Zealand concerns in this regard will not be appropriately taken into account by their trans-Tasman counterparts.

A more radical currency union option would be to establish a three way currency union with Singapore. In addition to CER, both Australia and New Zealand have recently concluded free trade agreements with Singapore, and there seems scope for greater tri-national arrangements. Although at the first glance the option may seem ambitious, it represents less of a step than has already been achieved in the European context, where a single currency now spans a variety of languages and cultures.

Conclusion

Hopefully from this very cursory examination of the CER it is clear that the Australian and New Zealand economies are continuing to grow incrementally closer together. There is, however, still much room for future development. Pursuing these developments is important if CER is to keep pace with its European and American counterparts.

¹¹ Kiyotaki, Nobuhiro and Randall Wright, 'A Search-Theoretic Approach to Monetary Economics' (March) 83(1) *American Economic Review* 63-77.

¹² Rose, Andrew, 'One Money, One Market: Estimating the Effect of Common Currencies on Trade' (1999) *Economic Policy* 2000.

The CER: Its Relationship with Australian Law and Legal Integration Across the Tasman

Daniel Lovric¹

Introduction

The CER is Australia's most radical free trade regime.² It is a regime of deep integration. Not surprisingly, the CER has had a significant impact on Australian law. The CER has also been shaped *by* Australian law. This paper is about the relationship between CER rules and Australian law.

This paper is in two parts. Firstly, I will look at the general structure of interaction between the CER and Australian law. Secondly, I will discuss some CER schemes that raise general issues about the integration of judicial, legislative and executive functions across the Tasman.

This paper focuses on *legal* issues. Of course, the CER is about much more than law. The CER is based on broader *economic* and *cultural* relationships, and cannot be understood merely in legal terms. So this paper has a relatively narrow goal – to identify legal issues that will affect wider discussion about future trans-Tasman integration.

Structure of interaction between CER rules and Australian law

The first part of this paper is about the way CER rules and domestic rules interact. This interaction is very *tight*, which is not surprising for a regime of deep integration.

A lot of this has to do with the detailed nature of CER rules. I say *rules* here rather than *laws*, because some CER instruments do not create binding obligations. CER instruments are often very *detailed*, particularly in the way they require domestic implementation. CER provisions often spell out what implementing legislation is required, and when it should be passed.³

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² For general introductions to the CER, see *Background Guide to the Australia New Zealand Economic Relationship*, Commonwealth Department of Foreign Affairs and Trade, 1997, http://www.dfat.gov.au/geo/new_zealand/anz_cer/cer.pdf; *Australia - Country Paper*, New Zealand Ministry of Foreign Affairs and Trade, 2003, <http://www.mft.govt.nz/foreign/regions/australia/country/australiapaper.html>; *20th Anniversary Of The Closer Economic Relations Agreement Between Australia & New Zealand*, Address By The Hon Peter Costello, Treasurer Of Australia to the Auckland Chamber Of Commerce, 20 February 2003, <http://www.treasurer.gov.au/tsr/content/speeches/2003/001.asp>; I Barker & B Beaumont, "Trans-Tasman Legal Relations - Some Recent and Future Developments" (1991) 65 *ALJ* 566; P Lloyd, *CER Lessons*, paper presented at conference "Australia-US Free Trade Agreement: Foreign Policy Challenges and Economic Opportunities", 2002, <http://www.apec.org.au/docs/Lloydfta.PDF>; K Vautier, J Farmer and R Baxt (eds) *CER and Business Competition - Australia and New Zealand in a Global Economy* (CCH, New Zealand, 1983). See, also, A Castles, "Long Shadows Affecting Future Planning for Closer Legal Relationships Between Australia and New Zealand" (1990) 64 *ALJ* 721.

³ For example, the *Agreement between the Government of Australia and the Government of New Zealand establishing a System for the Development of Joint Food Standards* (1996) provides:

- (1) Subject to Annexes C and D of this Agreement, each Member State shall take such legislative or other steps as are necessary to adopt or incorporate, by reference and without amendments, as food standards in force under the law of that Member State, the food standards that are from time to time:

One can view the detailed nature of CER rules in a broader international law context. For example, one can draw an analogy with the international law of state responsibility, in its distinction between *obligations of conduct* and *obligations of result*.⁴ CER rules are often drafted as obligations of conduct, requiring a specific course of legislative action. Contrast this with the looser wording of WTO rules, which are mostly obligations of result, only requiring a general *consistency* with implementing legislation.⁵ CER rules, particularly more *recent* CER rules, require not just consistency, but also *how* to achieve consistency.

One might wonder if the specificity of CER rules could affect the dualist relationship between domestic and international laws. Traditionally, Australia and New Zealand maintain the dualist perspective of a strict separation between international laws and domestic laws.⁶ One can certainly view CER regimes from the dualist perspective. For example, if CER-implementing legislation was clearly inconsistent with its related treaty, both Australian and New Zealand courts would probably apply the legislation in a CER-inconsistent way – and leave it to the legislature and executive to clear up the resulting problems. But I would suggest that the possibility of such clear inconsistencies is low, because of the close political relationship across the Tasman. After all, why would the governments of Australia and New Zealand agree to such highly specific international rules if they were not serious in their desire to implement them?

The dualist position is undoubtedly the law as it stands. But if you will permit me to speculate for a moment, we could instead look at many CER regimes as a combination of international and domestic rules in one dynamic system, that is, as a *transnational* structure.⁷

For example, the transnational perspective is a very useful way to view the *Trans-Tasman Mutual Recognition* system (which provides mutual recognition in relation to most goods and occupational standards). This system comprises a complex network of interlocking rules. It is based on a non-binding intergovernmental agreement between the Commonwealth, New Zealand and the Australian States.⁸ The intergovernmental agreement has international and domestic aspects. Internationally, the agreement can be seen as a soft law pact between Australia and New Zealand. Domestically, it can be seen as an understanding between the Commonwealth and the States. The intergovernmental agreement is implemented by Commonwealth and New Zealand statutes,⁹ and there are also other statutes under which Australian States have referred powers to the Commonwealth or adopted the Commonwealth

- (a) prepared and recommended by the Authority to the Council; and
- (b) adopted with or without amendment by the Council; and
- (c) published in the Commonwealth of Australia Gazette and the New Zealand Gazette; such food standards to take effect on the same date in both Member States as specified in the Commonwealth of Australia Gazette and the New Zealand Gazette.

⁴ Up until 1999 the International Law Commission's *Draft Articles on State Responsibility* provided for definitions of breach of an international obligation according to whether the obligation was one of conduct or result (in 1996 the Commission provisionally adopted draft articles 19 and 20 to that effect). The distinction has been summarised as follows: "An obligation of conduct is an obligation to engage in more or less determinate conduct. An obligation of result is one that gives the State a choice of means" (Crawford, *Second Report on State Responsibility*, A/CN.4/498, 1998, para 58). This definition of the distinction is rather different from the obligation/conduct distinction recognised by civil lawyers, in particular, lawyers in France (P Dupuy "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility" (1999) 10 *EJIL* 371, 375). The distinction was not retained in the completed Draft Articles (reasons for not retaining the distinction are summarised in Crawford, *ibid* para 88-92).

⁵ *Agreement Establishing the WTO*, Article XVI:4 provides as follows: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Nevertheless, this Article only provides general context for particular WTO rules, which may be more specific on implementation requirements.

⁶ See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, Chief Justice Mason and Justice Deane at para 25.

⁷ On the debates over whether international trade law should be seen as a combined transnational system, see S Voitovich, *International Economic Organizations in the International Legal Process* (Martinus Nijhoff, London, 1995) 6-7.

⁸ *Arrangement Relating to trans-Tasman Mutual Recognition* (1996).

⁹ *Trans-Tasman Mutual Recognition Act 1997* (Commonwealth), *Trans-Tasman Mutual Recognition Act 1997* (New Zealand).

legislation.¹⁰ No part of the system can really be understood without reference to the other parts. The system has a complex transnational structure.

Less dramatic examples of transnational structure occur wherever there is an ambiguity in domestic legislation. Here, the established rule of statutory interpretation is to prefer the statutory meaning that is consistent with the related international rule.¹¹ A notable example is the *Blue Sky* case.¹² Here, the High Court of Australia had to interpret section 160 of the Broadcasting Services Act 1992:

The ABA [Australian Broadcasting Authority] is to perform its functions in a manner consistent with:

- (a) the objects of this Act and the regulatory policy described in section 4; and
- (b) any general policies of the Government notified by the Minister under section 161; and
- (c) any directions given by the Minister in accordance with this Act; and
- (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

With particular reference to paragraph (d), the Court held that the ABA had to perform its functions consistently with the CER *Trade in Services Protocol*.¹³ The applicable law was found in a combination of CER treaty rules, Commonwealth statutory rules, and general Australian administrative law. Thus, the ABA was obliged (in a functional rather than a strictly legal sense) to follow rules of behaviour that arose out of the combination of CER rules and domestic legislation.

Similar combinations could arise under many other Commonwealth statutes, in various ways. Some Commonwealth statutes incorporate CER rules expressly (as in the current version of the Broadcasting Services Act 1992).¹⁴ Some others incorporate Australia's treaty obligations generally (for example, in the Australian Postal Corporation Act 1989).¹⁵ Other Commonwealth statutes might pick up CER rules via the *Teoh* principle,¹⁶ although a recent High Court decision has cast some doubt on *Teoh*.¹⁷

Sometimes CER regimes exist through combinations of Australian and New Zealand domestic legislation, without the involvement of international rules. Indeed, a recent memorandum of understanding between Commonwealth and New Zealand ministers looks towards harmonisation of legislation in a variety of commercial areas.¹⁸ In some cases, the regime exists through legislation running on parallel tracks. An example is the competition regime, which I will describe later. In other cases, Commonwealth statutes just *incorporate* New Zealand law. Two examples of this can be seen in recent Commonwealth legislation. The first example is a recent addition to Commonwealth income tax law.¹⁹ The new provisions recognise New Zealand imputation credits for the purposes of calculating Australian income tax. The second example is a Bill currently before the Commonwealth Parliament,

¹⁰ Trans-Tasman Mutual Recognition (New South Wales) Act 1996, Trans-Tasman Mutual Recognition (Victoria) Act 1998, Trans-Tasman Mutual Recognition (Queensland) Act 2003, Trans-Tasman Mutual Recognition (South Australia) Act 1999, Trans-Tasman Mutual Recognition (Tasmania) Act 1998, Trans-Tasman Mutual Recognition Act 1998 (Northern Territory), Trans-Tasman Mutual Recognition Act 1997 (ACT). Western Australia is yet to pass similar legislation; the Trans-Tasman Mutual Recognition (Western Australia) Bill 2002 is still before the West Australian Parliament.

¹¹ See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, Chief Justice Mason and Justice Deane at para 26.

¹² *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹³ *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations - Trade Agreement* (1988).

¹⁴ Following the *Blue Sky* case, the Broadcasting Services Act 1992 was amended to alter paragraph 160(d) to read "Australia's obligations under the CER Trade in Services Protocol". See Senate Environment, Communications, Information Technology and the Arts Legislation Committee report, *Australian Content Standard for Television & Paragraph 160(d) of the Broadcasting Services Act 1992*, 1999, http://www.aph.gov.au/Senate/committee/ecita_ctte/broad99/report/report_rtf.zip. Para 28(c).

¹⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

¹⁶ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6.

¹⁷ *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2000).

¹⁸ Division 220 of the Income Tax Assessment Act 1997.

which would recognise New Zealand aviation safety approvals for the purposes of Commonwealth aviation legislation.²⁰ In these examples, aspects of the New Zealand legal regime are incorporated into the Commonwealth statute book. An Australian judge wanting to interpret such statutes would presumably need to gain an understanding of the relevant New Zealand law.

These transnational legal structures can best be seen in the light of a few examples. In the remainder of this paper, I will describe a number of regimes under the CER framework. These regimes raise issues about legal integration under the CER, in terms of judicial, legislative and executive functions.

Integration of judicial, legislative and executive functions

The first regime covers trans-Tasman competition law. Since 1990, Australia and New Zealand have had parallel competition regimes, each covering the entire trans-Tasman market. The competition scheme runs along parallel tracks of Australian and New Zealand competition legislation.²¹ This parallel track structure could create some legal problems. The substantive law is not exactly the same in both jurisdictions; it has been only partially harmonised. There is therefore some scope for forum shopping. In practice, however, I suspect that these problems are overcome by cooperation between competition authorities, and by degree of mutual respect between courts. The implementing legislation encourages this cooperation, by including rules allowing registration of judgments, and by empowering courts to take evidence and sit in the counterpart jurisdiction.

I think that the general issue raised here is the integration of *judicial* functions. Some commentators have suggested doing away with parallel tracks, and instead creating a trans-Tasman court.²² These suggestions have a venerable heritage, stretching back to the nineteenth century. In fact, the first debates about a High Court for Australia envisaged it being an *Australasian* court.²³ At one stage, it might have been possible to give the UK Privy Council a limited role in deciding trans-Tasman disputes; now, however, Australia has abolished appeals to the Privy Council and New Zealand appears to be on course to abolish such appeals as well.²⁴

Suggestions for a trans-Tasman court have been unsuccessful so far because of political and legal difficulties. Here I will concentrate on the legal difficulties, particularly those arising from the Commonwealth Constitution.²⁵ The judicial power of the Commonwealth can only be exercised by a court mentioned in Chapter III of the Commonwealth Constitution – therefore, a trans-Tasman court might have to be an Australian creation. Of course, New Zealanders may find this objectionable.

But there are solutions to this problem. One option is to provide dual commissions for judges in Australia and New Zealand.²⁶ This has already been done in non-judicial review bodies, such as

²⁰ Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand and Other Matters) Bill 2003.

²¹ See Trade Practices Act 1974 (Commonwealth), section 46A, and Commerce Act 1986 (New Zealand), section 36A. See, also, K Vautier, “Trans-Tasman Trade and Competition Law”, in K Vautier, J Farmer and R Baxt (eds) *CER and Business Competition - Australia and New Zealand in a Global Economy* (CCH, New Zealand, 1983) 73.

²² M Kirby, “Integration of Judicial Systems” in K Vautier, J Farmer and R Baxt (eds) *CER and Business Competition - Australia and New Zealand in a Global Economy* (CCH, New Zealand, 1983).

²³ Ibid 16-19.

²⁴ *Reshaping New Zealand's Appeal Structure*, Discussion Paper, Attorney-General of New Zealand, 2000, <http://www.executive.govt.nz/minister/wilson/privy-council/pc-discussion.pdf>; *Supreme Court Bill*, Report of New Zealand Justice and Electoral Committee, 2003, <http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/16bar2.pdf>.

²⁵ M Kirby “CER Trans-Tasman Courts and Australasia” (1983) *NZLJ* 304, M Kirby “Integration of Judicial Systems” in K Vautier, J Farmer and R Baxt (eds) *CER and Business Competition - Australia and New Zealand in a Global Economy* (CCH, New Zealand, 1983).

²⁶ M Kirby, *ibid* 31.

takeover panels,²⁷ and under the trans-Tasman mutual recognition scheme.²⁸ Another solution is to create a court with international legal personality. Such a court could resolve trans-Tasman disputes on the plane of *international* law. Such courts would probably exercise *international* legal power, not the judicial power of the Commonwealth – this seems to be the position in relation to Australia’s participation in the International Criminal Court, ITLOS and other international courts.²⁹ Of course, this option would mean moving the bulk of CER rules out of legislation, and into treaties. This option is clearly radical, and is unlikely to become practicable in the short to medium term.

The second CER scheme of interest relates to food standards. Here, there is a treaty³⁰ linked with an intergovernmental agreement³¹ and with complementary Commonwealth and New Zealand legislation.³² The scheme has created a Joint Food Standards Code for both countries. The Code can be varied by an Australian statutory authority. But variations need the consent of a trans-Tasman ministerial council and must be consistent with principles set out in the treaty.³³ New Zealand also has wide powers to opt out of such variations.³⁴

The issue here is the integration of *legislative* functions. The food standards scheme is arguably the first example of truly trans-Tasman legislation. There are relatively few constitutional problems here, because the High Court of Australia has been fairly relaxed about delegations of legislative power.³⁵ But trans-Tasman legislation raises other issues. How can parliaments scrutinise such legislation? Who will write it? And how will we manage differences in legislative process across the Tasman?

The question of who will write trans-Tasman legislation is trickier than might appear at first glance. According to tradition, international rules (such as treaties) are written by international lawyers (most often working in foreign ministries) or by subject specialists in relevant ministries. Domestic rules are written by legislative drafters; in Australia and New Zealand these are the parliamentary counsel. But this traditional split between international and domestic rule-drafting could be counterproductive in the case of trans-Tasman legislation. Here, the closely-woven *transnational* schemes require close cooperation, or even integration, of domestic and international rule-drafting. One pragmatic solution is to create ad hoc teams, combining the skills of international lawyers with those of parliamentary counsel. This solution appears to have been applied in recent CER regime-drafting. In the long term, this solution might take on an institutional character.

A more obvious issue in drafting trans-Tasman legislation is the *nationality* of the drafters. Should trans-Tasman legislation be drafted by teams including both Australians and New Zealanders? In the case of treaties, or other rules on the international plane, the answer is obviously yes. But in the case of domestic legislation, the answer is more subtle. There are clear efficiencies in having one set of domestic rules, or at least mirror provisions, on both sides of the Tasman. It is possible to draft such provisions through close cooperation between Australian and New Zealand parliamentary counsel. However, legislative rules are often better crafted by a single drafter, particularly where those rules are detailed and technical in nature. Luckily, the shared legal heritage, and similarity in legal systems,

²⁷ *20th Anniversary Of The Closer Economic Relations Agreement Between Australia & New Zealand*, Address By The Hon Peter Costello, Treasurer Of Australia To The Auckland Chamber Of Commerce, 20 February 2003, <http://www.australia.org.nz>.

²⁸ For the purposes of certain kinds of review under the Trans-Tasman Mutual Recognition Act 1997 (Commonwealth), see section 35(3).

²⁹ See summary of the advice of the Office of General Counsel, AGS, reproduced in Joint Standing Committee on Treaties, *The Statute of the International Criminal Court*, Report 45, May 2002, para 2.50.

³⁰ *Agreement between the Government of Australia and the Government of New Zealand establishing a System for the Development of Joint Food Standards* (1996).

³¹ *Food Regulation Agreement* (2002).

³² Food Standards Australia New Zealand Act 1991 (Commonwealth), Food Act 1981 (New Zealand), Part 2A.

³³ Annex A to the *Agreement between the Government of Australia and the Government of New Zealand establishing a System for the Development of Joint Food Standards* (1996).

³⁴ *Ibid* Annex C.

³⁵ L Zines, *The High Court and the Constitution* (4th Ed, Butterworths, Sydney, 1997) 154-158; G Moens & J Trone, *Constitutional of the Commonwealth of Australia Annotated* (6th Ed, Butterworths, Sydney, 2001) 38; D Pearce and S Argument, *Delegated Legislation in Australia* (2nd Ed, Butterworths, Sydney, 1999) 257-259.

between the two countries could allow a New Zealander or an Australian to draft legislation designed to apply in both countries.

Managing differences in legislative process across the Tasman is a more difficult problem. There are a number of significant differences in legislative process between Australia and New Zealand. Australia is a federation with numerous legislatures, New Zealand has a single parliament. The Australian Commonwealth parliament is bicameral, New Zealand's is unicameral. New Zealand has a formal Bill of Rights against which draft legislation is compared, while Australia has a looser system based on pre-introduction scrutiny within the bureaucracy and post-introduction scrutiny by parliamentary committee.

Ideally, trans-Tasman legislation should comply with the processes of both countries, but this raises some difficult issues. Should trans-Tasman legislation be judged against the standards of the New Zealand Bill of Rights? How should the New Zealand Parliament react to comments made by an Australian parliamentary committee? How should trans-Tasman legislation be judged in the light of the Treaty of Waitangi? Should the parliaments of all the Australian States and Territories have a role in drafting trans-Tasman legislation where it impacts on their areas of responsibility?

The worst case scenario is a “race to the bottom” in standards of legislative process. In this scenario, Trans-Tasman legislation might be subjected to no quality standards at all, or only to such standards as are common to Australia and New Zealand. At the other extreme, there is the “race to the top” scenario. Here, trans-Tasman legislation would have to comply with all processes of both jurisdictions, thereby ratcheting up legislative quality standards (although probably slowing down the process considerably). In this scenario, a process of one country would be, in effect, *exported* to the other country. I suggest that the “race to the top” is the more likely outcome, although minor aspects of the legislative process may be pushed to the background in the case of trans-Tasman legislation.

Finally, I would like to mention the proposed trans-Tasman therapeutic goods regime. I have had no personal involvement in developing the proposal, so my comments are based on publicly available material.³⁶ The proposal is to set up a joint therapeutic goods authority, with the power to approve or reject the use of therapeutic goods in both Australia and New Zealand. A recent public statement by the team developing the regime provides as follows:³⁷

A treaty will establish the two-member Ministerial Council (comprising the Australian and New Zealand Ministers of Health) and the Board of the agency.

The agency will derive its legal personality from an Australian Act. This Act will provide that the members of the Board are constituted as a body corporate – the Joint Agency. The Agency will be recognised in a New Zealand Act.

There will be a common set of Rules, which will be made by the Ministerial Council. The framework for the regulatory scheme administered by the Agency will be set up under the Treaty and implemented through the Acts, the Rules and, in the case of technical matters, in Orders made by the Managing Director.

The Managing Director, who is a member of the Board, will be the statutory decision-maker.

Clearly, the joint therapeutic goods regime will create another example of integration of legislative functions. The common therapeutic goods Rules seem to be an example of true trans-Tasman legislation, made by a transnational Ministerial Council. By contrast, the Acts constituting the Joint Agency do not appear to be truly transnational, as the constituting Act will be *Australian*, with New Zealand only recognising the Agency's existence. However, it appears that the Agency will have to obey principles set out in the treaty, and presumably the Board of the Agency will be accountable to the transnational Ministerial Council.

³⁶ *A Proposal for a Trans-Tasman Agency to Regulate Therapeutic Products*, Discussion Paper, June 2002, <http://www.jtaproject.com/Downloads/Key%20Documents/june02.pdf>.

³⁷ *Joint Therapeutic Products Agency Project: Questions and Answers*, June 2003, <http://www.jtaproject.com/Downloads/Key%20Documents/Q&A.pdf>.

The regime thus raises the issue of integration of *executive* functions. Constitutionally, such integration is not too problematic for Australia, although there may be some technical issues concerning funding. The real issue is one of accountability. Rather than the traditional notion of ministerial responsibility, the actions of trans-Tasman administrators would be subject to a new type of accountability, that is, to *joint* Ministerial Councils. Further issues of accountability arise if future trans-Tasman regulators are given *international* legal personality. In that case, it is not clear how *domestic* rules of administrative review could constrain such a regulator if it failed to obey guidelines set out by a joint Ministerial Council.

Linked to this is the problem of subjecting a trans-Tasman regulator to *judicial review*. One proposal is that proceedings could be started in courts of either country, the intention being that one court would give a final decision. This brings us back to the vexed issues of entrenched High Court jurisdiction, which I discussed earlier. A decision by a New Zealand court regarding the actions of a trans-Tasman regulator might not be enough effectively to oust the jurisdiction of the High Court of Australia on the matter. This leaves the (theoretical) possibility of conflict between New Zealand and Australian courts. Again, the solution here is probably non-legal, lying in the growing trust and cooperation between courts on both sides of the Tasman.

Conclusion

Legal issues will influence the shape of the debate over the CER. The *location* of trans-Tasman rules, either on the international or domestic planes, in primary documents or in secondary rules, will colour the way in which substantive issues are resolved. There will be an increasing need to draft international rules and domestic rules simultaneously, given the way that the two types of rules will interlock with each other. Also, the trans-Tasman legislative scrutiny process will leave its mark on legislative outcomes. The Australian Commonwealth Constitution will, in some cases, limit the range of solutions available to the architects of future trans-Tasman regimes. Legal considerations will infiltrate the political and economic processes of trans-Tasman integration.

But to conclude this paper, I would like to come back to what I think is the real key here – the strength of economic and cultural ties between Australia and New Zealand. If personal and business ties are strong enough, I think that legal problems will be overcome. This seems most likely to happen, given the warmth of the trans-Tasman relationship.

Crafting Security Council Mandates

Roland Rich*

“By entrusting a collective institution with safeguarding peace among nations, the States Members of the United Nations have indeed taken a decisive step towards the establishment of a true constitution of the international community. Chapter VII of the Charter is the key element of that constitution.”¹

Article 39 of the Charter of the United Nations, the first Article in Chapter VII, states that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security.” In discharging this responsibility, the Security Council has vast powers.² Its ability to employ those powers turns on the political will of the international community as represented by the membership of the Council. In half a century of practice the Council has been through periods when it was unable to form the necessary will to take action and other periods when the options open to the Council appeared limitless.³ In the Cold War years, the common denominator for action was a very narrow field hardly extending beyond the fight against apartheid. In the immediate post-Cold War years the Council took it upon itself to tackle problems as varied as humanitarian disasters in the horn of Africa, state-sponsored attacks on civil aviation, the establishment of international criminal courts, imposing peace conditions, organising national elections, reinstating elected national leaders and undertaking humanitarian interventions.⁴

In adopting resolutions mandating action, the Security Council is acting at times as both an executive and a legislature.⁵ It is a decision-making body deciding on enforcement actions, peacekeeping missions, the imposition of sanctions or steps towards state-building. The decisions are couched in terminology that has a critical bearing on the particular action. The terminology to devise limits on actions, assign roles to various international actors, and furnish the UN secretariat with its mandate is contained in the resolutions adopted by the Council and their accompanying documents. Just as the Council combines both executive and legislative decision-making elements, so does the terminology in its resolutions flow from both political and quasi-legal considerations.

The purpose of this paper is to examine the way Security Council resolutions are crafted, in particular in relation to the democratisation mandates laid down by the Council. This will require an examination of the body of work accomplished by the Council in this field as well as an examination of the development of the terminology employed and the process of arriving at that terminology.

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¹ Christian Tomuschat, ‘International Law as the Constitution of Mankind’ in the International Law Commission’s *International Law on the Eve of the Twenty-first Century* (United Nations, New York, 1997) 46.

² Caron comments on the irony of dealing with a suddenly effective Security Council and the legitimacy of that power in David D. Caron, ‘the Legitimacy of the Collective Authority of the Security Council’ (1993) 87:4 *The American Journal of International Law*.

³ Jarat Chopra, ‘United Nations Peace-Maintenance’ in Martin Ira Glasser, *The United Nations at Work* (Praeger, Westport, 1998) 320-21.

⁴ See Tetsuo Sato, ‘The Legitimacy of Security Council Activities under Chapter VII of the UN Charter after the end of the Cold War’ in Jean-Marc Coicaud and Veijo Heiskanen (eds) *The Legitimacy of International Organisations* (UNU Press, Tokyo, 2001) 323.

⁵ Though Schachter notes that the UN was never conceived as a legislative body, the mandate terminology tends to have a legislative effect. Oscar Schachter, ‘United Nations Law’ (1994) 88:1 *The American Journal of International Law* 1.

The breadth of action

The volume of work of the Council in recent years suggests that the key developments in this regard have taken place since the end of the Cold War. In the 43 years between 1946 and 1989, 646 resolutions were passed by the Council, at the rate of about 15 a year. In the following 13 years to 2002, the Council passed a further 808 resolutions at the rate of about 62 a year, or four times the annual volume of work.

In the past decade the complexity of the Council's work has also increased. Sanctions regimes have become more sophisticated, at times targeting non-state actors and occasionally dealing with individuals' criminal responsibility. The interdiction regimes have also become 'smarter', often focusing on arms embargoes but also incorporating difficult features such as the oil-for-food rules in the Iraqi sanctions regime⁶ or freezing of government funds in the Libya sanctions regime.⁷ The most difficult and ambitious development in the Council's work has been its attempts at state-building. Since the first attempt outside the Trusteeship system at taking responsibility for a territory and its people in the case of Namibia in the late 70s, which itself only entered the implementation stage at the end of the Cold War, the Council has spent the last decade grappling with a score of situations on four continents while attempting to build or rebuild states traumatized by war, genocide or foreign occupation.

While each of the situations is clearly *sui generis* flowing from their unique combinations of history and geography, the common aspect of the UN's work in these situations is the multiplicity of objectives to be achieved. Whereas the few arms embargoes of the Cold War years basically required member states of the UN to undertake not to trade arms with the country or entity the subject of the embargo, the recent interventions require the UN itself to take the front line role. That role may incorporate an interdiction regime but is likely to include many other aspects. There is often a requirement for monitoring the implementation of a peace agreement including separation of forces agreements, cantonment and storage of weapons. There may also be a complicated logistical process of food delivery in a humanitarian emergency. The security situation may not be fully resolved at the time of the UN intervention, thus requiring a strong military component. To add to these complicated logistical exercises one must also often add a difficult sociological exercise of capacity building for institutions to take over key governance activities. And one of the most common and visible of these governance activities is the holding of elections, at times in the form of an act of self-determination and at times as a means of determining the political choice to govern the country as a critical initial step in the state-building process. The multiple objectives are expressed in a mandate and the mandate is part of, or authorised by, the key Security Council resolution triggering an intervention.

The table below lists the 'state-building' situations the Council has faced. The single resolution listed for each situation is perhaps open to misinterpretation. The Council often returned repeatedly to the various situations to consider developments and debate options. The resolutions listed are the first or key mandates for state-building in each case. Where two resolutions are listed, the Council significantly altered or extended the mandate. The Secretary-General's reports listed in the table are the documents before the Council when considering the intervention. This chapter will draw mainly on these examples to examine the democratisation element in those mandates.

Mandates containing democratisation or state-building aspects

⁶ UNSCR 706 (1991).

⁷ UNSCR 883 (1993).

SITUATION	MANDATE	YEAR	S-G's REPORT
Namibia	SCRs 431& 435	1978	S/12636
Namibia -implementation	SCR632	1989	S/20412
Western Sahara	SCR690	1991	S/22464
El Salvador	SCRs 693& 832	1991/93	S/22494
Croatia	SCR743	1992	S/23592
Cambodia	SCR745	1992	S/23613
Angola	SCR747	1992	S/23671
Mozambique	SCR797	1992	S/24982
Somalia	SCR814	1993	S/25354
Liberia	SCR 866	1993	S/26422
	SCR1020	1995	S/1995/881
Haiti	SCR867	1993	S/26480, S/26352
Rwanda	SCR997	1995	S/1995/457
Bosnia-Herzegovina	SCR1035	1995	S/1995/1031
Croatia-Eastern Slavonia	SCR1037	1996	S/1995/1028
Angola - consolidation	SCR1118	1997	S/1997/438
Central African Republic	SCR1159	1998	S/1998/148
	SCR1230	1999	S/1999/98
Sierra Leone	SCR1181	1998	S/1998/486
Kosovo	SCR1244	1999	
East Timor	SCR1272	1999	S/1999/1024
	SCR1410	2002	S/2002/432
Congo (DRC)	SCR1291	2000	S/2000/30
Afghanistan	SCR1378	2001	

Law or politics?

Straddling the executive and legislative divide, the resolutions of the Security Council tend to be the product of both law and politics. The Council is the ultimate political organ of the UN. Its very composition and voting method are designed to reflect a certain world order and to accommodate a certain global balance of power.⁸ One of the great challenges facing the Council is that the changing nature of the world order in the post-Cold War era is raising fundamental political questions about the composition and voting methods of the Council. It comes as little surprise that the Council would employ political solutions in its decision-making.⁹

At the same time, the Council is aware that there is a need for a certain level of consistency in its work. While not bound by any concept of legal precedent, the Council's will nevertheless needs to be conveyed by recourse to terminology that should have clear meaning to both the parties involved in the situation and the implementers of the decision. This calls for great care in the terminology employed and for use of processes analogous to those used by law-making bodies.

The result is a hybrid system of law and politics. At times the identical formulation is used to convey the identical decision, but at other times fine distinctions are employed in terminology either to distinguish the

⁸ As Paul Reuter noted, "extremely subtle voting rules are not the best way of achieving a delicate equilibrium." Paul Reuter, *International Institutions* (Allen and Unwin, London, 1958) 250.

⁹ A useful discussion on perceptions of fairness in the Council's work can be found in Thomas M. Franck *Fairness in International Law and Institutions* (Oxford University Press, 1995) in particular ch 7 'The *Bona Fides* of Power: Security Council and Threats to the Peace' 218-244.

resulting decision from previous ones or simply to hint at a certain result where the necessary political will may not be present.

Some formulations are necessary to trigger certain effects. The Council will invariably utilise the term “acting under Chapter VII of the Charter” or refer to certain Articles of Chapter VII where it wishes its decision to have mandatory effect.¹⁰ Because the Charter arms the Council with this power only in certain circumstances, the resolution has a recitation of one of the three broad triggering circumstances: a threat to the peace, a breach of the peace, and an act of aggression.¹¹ The formulation most commonly used is a determination that certain developments constitute “a threat to international peace and security.” This formulation covers the broadest fact situations and requires less by way of supporting argumentation than does a determination that there has been a breach of the peace. However, where the breach of the peace is glaring, as in Iraq’s invasion of Kuwait, the Council did employ the language of “breach of the peace.”¹² The Council has never determined in its resolutions that there has been an “act of aggression.” This is probably because the concept of “breach of the peace” is sufficiently broad to cover an “act of aggression” and also because the exact definition of an act of aggression is not fully clear, even though a 1974 General Assembly resolution attempted to settle a definition of aggression.¹³

The legal power of a phrase in a Council resolution and the politics behind that phrase was never better demonstrated than in the crafting of Resolution 678 of 29 November 1990, which authorised the use of force against Iraq. Yet the Resolution did not actually use the term ‘use of force’, instead it employed the phrase ‘all means necessary’. Noted journalist Bob Woodward has described the process of arriving at this phrase in detail.¹⁴ The terminology of the draft resolution was the subject of over 200 meetings held by Secretary of State James Baker with foreign ministers and heads of state but the key phrase was finally agreed upon in a meeting with Soviet Foreign Minister Eduard Shevardnadze who initially rejected recourse to the term ‘use of force.’ While the Soviet leadership accepted the concept of using force to evict Saddam Hussein from Kuwait, they preferred to employ a euphemism to authorise it. Five different formulations were tried before the ‘all necessary means’ language was finalised. To cement the meaning of the phrase, it was agreed that Baker, in his coincidental role as rotating Chair of the Council in November 1990, would describe the intent of the phrase to include the use of force. If there were no disagreement, this would make the meaning of the phrase open to no other interpretation. Once the meaning of the phrase was accepted by the Council to authorise the use of force, it was used again on several subsequent occasions where this meaning was required.

The use of this language brings into stark relief the more equivocal language used in Resolution 1441 of 2003 where the threat against Iraq is contained in the phrase ‘it will face serious consequences.’ Whereas some leaders have argued that this is equivalent to an authorisation of use of force,¹⁵ it is noteworthy that the same process of examining the accompanying statements made by the United States representative does not necessarily lead to this conclusion. In the United States statement after the vote on UNSCR 1441, Ambassador Negroponte specifically accepted that the Resolution contained “no ‘hidden triggers’ and no ‘automaticity’ with the use of force.”¹⁶

¹⁰ Simon Chesterman *Just War or Just Peace* (Oxford University Press, 2001) ch 4 and appendices.

¹¹ Security Council action is not contingent upon which of the three heads of power is invoked. Myers McDougal and Florentino Feliciano *The International Law of War: Transnational Coercion and World Public Order* (New Haen Press, New Haven, 1994) 162.

¹² UNSCR 660 (1990).

¹³ UNGA Res 3314 (XXIX).

¹⁴ Bob Woodward *The Commanders* (Pocket Star Books, NY, 1991) 320-321.

¹⁵ Australian Prime Minister John Howard argued that it “self-evidently meant the use of military force” ABC Radio 25 February 2003.

¹⁶ UN Press Release SC/7564 of 8 November 2002.

This raises the question of the consistence of usage of language by the Council and what can be drawn from that usage. The evolution of language authorising action is shown in the following table,¹⁷ which tends to reinforce the consistency of employment of the ‘all necessary means’ language when the Council is authorising use of force as compared to the situations when it is employing the ‘serious consequences’ language. A possible distinction could be made whereby the ‘serious consequences’ language is seen as threatening the use of force as opposed to authorising it.

Situation	Resolution	Year	Authorising Terminology
Korea	83	1950	“assistance as may be necessary to repel the armed attack”
Rhodesia (sanctions)	221	1966	“the use of force if necessary”
Iraq	678	1990	“all necessary means”
Somalia	794	1992	“all necessary means”
Bosnia Herzegovina	781 - no fly zone 836 - safe zones 1031 - peace agr.	1992 1993 1995	“all measures necessary” “necessary measures, including use of force” “all necessary means”
Haiti	940	1994	“all necessary means”
Albania	1101	1997	“ensure the security and freedom of movement of the personnel of the force”
Central African Republic	1125 1136	1997 1997	“ensure the security and freedom of movement of their personnel”
Iraq	1154	1998	“any violation would have severest consequences”
East Timor	1272	1999	“all necessary measures to fulfil its mandate”
Iraq	1441	2003	“Iraq will face serious consequences”

The political nature of the Council’s decisions is quite clear. The use of accompanying statements to elaborate on the meaning of the resolution resembles the method of treaty interpretation whereby if the meaning of certain words cannot be understood through their ordinary and natural meaning, the records of the negotiating conference may be referred to as a guide to the meaning of the words under review.

Another example of the hybrid political and legal effect of Council resolutions can be found in the use of legal sounding terms that have weighty political impact. Resolution 731 (1992) took measures to bring to justice the terrorists who destroyed a civilian aircraft over Lockerbie. The Resolution directed its actions against Libya. A Libyan agent has subsequently been convicted for his involvement in the attack on the aircraft.¹⁸ But the original Resolution linked the action to Libya by noting that investigations “implicate officials of the Libyan Government”. The Resolution used this quasi-legal term to put political pressure on Libya to accept the eventual court proceedings that proved guilt beyond reasonable doubt.

Who holds the pen?

Mandates are normally written into Security Council resolutions. Upon adoption by the Council, the mandate provides the direction, guidelines and limits of the mission the UN is undertaking. If adopted under Chapter VII of the Charter, as are most mandates having democratisation as one of the key

¹⁷ Based on Alex Conte, "Bush v Iraq: A Critical Analysis of the Iraqi Conflict", paper presented at the 11th Annual Conference of the Australian and New Zealand Society of International Law, 4 - 6 July 2003, Wellington, New Zealand.

¹⁸ A three-judge panel found Abdel Basett Ali Al-Megrahi, a former Libyan intelligence officer, guilty of murder and sentenced him to life in prison. CNN.com 1 February 2001.

objectives,¹⁹ the terms of the mandate become the critical words establishing the legality of the UN's subsequent actions. The question of who drafts the resolutions thus becomes an important element in determining objectives and intentions.

As with so many issues concerning the Security Council, it is necessary to draw a line between the Cold War and the post-Cold War work of the Council. It is only in the latter period that the Council could be said in any sense to be acting in a collegial fashion and thus using methodology appropriate to that method. Remnants of the Cold War methodology may remain, insofar as China is concerned, because while insisting on being consulted closely, China does not engage as actively in the drafting process as the other permanent members.²⁰ Leaving aside therefore the dominant fissure of the Cold War era, the drafting process can be viewed in terms of a number of tensions within the Council's work methods.²¹

National or collective responsibility for drafting resolutions?

While the Council ultimately takes collective responsibility for its resolutions, the almost invariable practice is that responsibility for the first draft of that resolution falls to one country. This is for reasons both of politics and practicalities. Clearly drafting in committee is not an efficient method of work unless that committee has a coherent first draft before it. Politically, it is usually a delegation closely involved in the issues before the Council that will undertake the drafting process.

Political proximity to an issue might emerge through one or more of several factors. Proximity and membership of the same geographic group as the subject country or countries may often be the determining factor. Past or present alliance or other close relationship may be another factor determining which delegation will take responsibility for producing the first draft.

Given the continuing nature of many of the troubled situations before the Council, there has been an increasing tendency informally to designate a particular group of countries to oversee certain situations. These 'contact groups' or 'core groups' or simply 'friends' maintain a close watch on the situation and when drafting work is required, designate one of their number to undertake it. The following comments draw on Teixeira, who lists seventeen such contact groups currently operating in the Security Council.²² Where the matter is of the highest political importance, such as was the case with Iraq before the 2003 war, the five permanent members consult among themselves. In certain regional situations the core group is constituted by a small group of most interested countries, whether or not they happen to be currently members of the Security Council. Accordingly, the East Timor 'core group' comprises the United States, the United Kingdom, Portugal, Japan, Australia and New Zealand, and the responsibility for preparing the first draft of Council resolutions and decisions falls on one or other of the two permanent members. Where one of the permanent members has a particular interest in a situation, such as Russia's interest in Abkhazia (Georgia), it plays the main role, but four other countries, the United States, France, the United Kingdom and Germany have constituted themselves as 'friends of the Secretary-General' and attempt to have a moderating influence on Moscow and Tbilisi.

¹⁹ But note the difficult impact of having the UNTAC operation under Chapter VI whereby all parties including the Khmer Rouge knew that force could only be used in self-defence, in Frederick Brown 'Cambodia's Rocky Venture in Democracy' in Krishna Kumar (ed) *Post-conflict Elections, Democratization and International Assistance* (Lynne Rienner Publishers, Boulder, 1998) 105-106.

²⁰ From the veto of Bangladeshi membership of the UN in 1972 to the veto in 1999 of the continuation of UNPREDEP in Macedonia, China has allowed narrow bilateral issues to influence its voting pattern, though both actions were subsequently allowed to proceed.

²¹ The following comments are based on interviews with officials dealing with Security Council matters from Foreign Ministries of some permanent members in March and April 2003 as well as discussions with officers of the UN Secretariat in September 2002.

²² Pascal Teixeira, *Le Conseil de sécurité à l'aube du XXIème siècle*, UNIDIR/2002/7, Geneva 2002.

The pragmatic nature of these arrangements can be seen in the fact that in relation to the long standing issue of Western Sahara, although there is a 'group of friends' comprising the United States, France, the United Kingdom and Russia, the main influence, including over the drafting process, is exercised by the Secretary-General's Special Representative, Mr James Baker, former United States Secretary of State.

The result of these arrangements is to combine the necessity for collective engagement and responsibility with the efficiency of individual drafting of the base document.

P5 dominance or E10 influence?

An examination of the contact group process quickly demonstrates the dominant role of the permanent members (P5). One of the permanent members tends to take the lead role in virtually all the groups. The United States, for example, participates in 14 of the 17 groups. The dominance of the P5 is largely a function of the veto power they wield. Having a far more valuable vote than the elected members (E10) of the Council translates into far broader influence over decision-making.

But there are reasons beyond the veto. Security Council processes and politics are not easy to master. The issues are such that they involve not only diplomats but also ministers and heads of government or state. The E10 are placed in the role of enthusiastic amateurs when compared with the P5 hard-bitten professionals. The P5 have seen the elected members come and go and there is a natural tendency to concert more closely with fellow permanent members. The P5 therefore have the advantage of continuity, mastery over process, broad diplomatic networks on which to draw and the capacity to exert political, economic and military influence.

There is often resentment among the E10 with what certain members may see as the high-handedness of the P5.²³ The criticism is usually a variation on the problem of lack of consultation with the E10. The tendency to seek consensus decision within the Council tends to put a premium on the P5 reaching agreement first, with the E10 then falling into line. This tends to establish as the key decision-making issue whether any of the P5 is prepared to veto a resolution. Rarely is decision-making on resolutions dependent on the availability of the 9 votes in favour required under Article 27 of the Charter. Yet the bitter debates concerning a second resolution on Iraq in 2003 turned at times on whether the United States and the United Kingdom could attract the nine votes necessary to necessitate a veto from one or more of the other P5. In this tricky situation the E10 were far less comfortable, with Chile pleading to the P5 in effect to return to their normal hegemony over Security Council affairs.²⁴

This episode demonstrates the essentiality of P5 involvement and concertation in the Security Council's affairs for the Security Council to be effective under current conditions. P5 dominance is a reflection of global politics, though it may not be a perfect reflection. It therefore stands to reason that the P5 will have the most decisive influence on the shape and text of the Council's resolutions and decisions, including their state-building and democratisation mandates.

Is the UN Secretary-General an equal actor in the process?

Any discussion with senior figures in the UN secretariat will elicit self-deprecating comments that the Secretary-General and his staff are the mere servants of the organisation and that on matters of peace and security the secretariat simply follows the instructions of the Security Council. This deference is politically understandable but does not reflect accurately on the relationship between the secretariat and the Council.

²³ Kishore Mahbubani, 'The Permanent and Elected Members of the Council: A Complex Relationship', in David M. Malone (ed.) *The United Nations Security Council* (Lynne Rienner Publishers, Boulder, 2004).

²⁴ Simon Chesterman and David Malone, 'The Security Council feels the heat', *International Herald Tribune*, 26 February 2003. Chilean intervention in the Security Council debate of 7 March 2003 in *Security Council Press Release SC/7682*.

It goes without saying that the Council and in particular its permanent members wield a level of political and military might which the Secretary-General and his handful of staff cannot in any way match. After all, while the General Assembly formally appoints the Secretary-General, it is the Council that nominates and has the decisive say in the appointment.²⁵ This is true of the original appointment and perhaps the permanent members have an even greater weight in the reappointment of the Secretary-General for a possible second and final term after which they lose their influence through that power of reappointment. It is also true that the Secretary-General has no vote or veto in the Council and has no option but to accept the mandates handed down by the Council. The Charter nevertheless envisages that the Secretary-General is more than a mere servant of the members because he has been given the power independently to draw matters to the Security Council's attention.²⁶ Yet even in this case, the Charter suggests that the formal role is more that of a messenger than that of an actor in the political process.

But on this issue, reality belies formality.²⁷ The table above of the twenty key democratisation mandates contains a column on the relationship of the resolution to a report by the Secretary-General. In these 20 situations, 18 refer to such a report or reports. The reports do not normally flow from the Secretary-General's personal initiative. The Security Council usually requests them, but the baton is then clearly passed to the secretariat to fashion recommendations to resolve the situation under review. The secretariat's involvement may not always be as the principal external mediating force. But the presence of the Secretary-General or his representative, either as principal mediator or as providing legitimacy to a regional or other mediating process, is nevertheless critical to the eventual shape of the international response to the situation. The reports tend therefore to be a key means of shaping the Council's decision-making. In recent years the reports have become more detailed and constructive to the point that in several resolutions the Security Council has considered it sufficient to approve the report and adopt its recommendations as the mandate for the intervention.²⁸

The table also notes two situations in which the mandate setting resolution does not refer to a report by the Secretary-General – Resolutions 1244 and 1378 on Kosovo and Afghanistan respectively. In both cases the mandate is drawn from annexes to the resolutions that are not UN reports. In the Kosovo case, the intervention was by NATO with the UN scrambling to keep up. The intervention was authorised by the Security Council retrospectively and the mandate flowed from previous political negotiations, in particular the Rambouillet Agreement. The UN played a legitimising role rather than a leadership role and the involvement of the Secretary-General in shaping events was less pronounced than in other cases under study. The Afghanistan case, however, while flowing from the UN authorised use of force under the inherent right of self-defence in Article 51 of the Charter, also appears at first blush to be a case of minimal secretariat involvement. The Resolution, however, adopts a subtle means of allowing the situation in Afghanistan to progress through a transitional administration to a democratic form of governance. While this situation does not have a mandate-shaping report, it has a most influential special representative of the Secretary-General in the form of Lakhdar Brahimi playing a key role.

The Secretary-General is clearly a highly influential figure in the setting of mandates. He, his staff and his special representatives can often play a critical role in conceptualising the shape of the UN intervention, articulating it in reports and quietly negotiating it through the Security Council. It would, however, be wrong to think of this process as separate from the deliberations of the Council. The Secretary-General does not work in a vacuum. Delegations keep in close touch with progress and offer their assessments and concerns as the process develops. While the Secretary-General's reports are his own, for which he must take responsibility, their substantive provisions have often already obtained the tacit approval of the key members of the Council.

²⁵ Article 97 UN Charter.

²⁶ Article 99 UN Charter.

²⁷ Abdelaziz Ben Dhia 'Le Rôle du Secrétaire Général des Nations Unies en Matière de Maintien de la Paix et de la Sécurité Internationales' in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber* (Emile Brulant, Brussels 1998).

²⁸ A good example is the establishment of MONUA under Resolution 1118, where the operative article simply adopts chapter VII of the Secretary-General's report.

Does the action take place in New York or in capitals?

It follows that much of the negotiation and drafting of mandates takes place in New York. This allows for a certain body of expertise to develop that can build on common experience. New York most often is the negotiating place for resolutions. At times, delegates in New York will have considerable latitude and discretion in this process. This is often a function of the size of the country and the time zone it is in. Many small countries serving a rare term as elected members of the Council have little option but to arm their representatives with considerable discretion to participate in the negotiating process within the scope of broad guidelines set by capitals. They often do not have the expertise, the experience or sufficiently timely advice of the issues to do otherwise.

Foreign Ministries of course wish to involve themselves as closely as possible in the issues and the Foreign Ministries of the permanent members tend to be best placed to do so. While most countries adopt the practice of having the drafting of resolutions done by their delegations in New York, it can certainly be the case that, where the resolution is being initiated by a certain country, the first draft will originate at headquarters rather than at the New York mission.

The time zone also comes into play. Washington and New York being in the same time zone allows far greater scope for involvement by the State Department, the National Security Council or even the White House than for example by the Chinese Foreign Ministry, which is 12 hours ahead of New York.

Another key element is how politically sensitive the issue under consideration may be. As noted above, Secretary of State Baker negotiated the key terms of Resolution 678 in face-to-face talks with his Soviet counterpart. In the 2003 battle of wills as to whether there should be a new resolution enabling the use of force against Iraq, the key figures were heads of state and government with diplomats in New York playing out parts in a play whose script had been written on the basis of phone calls and press releases at the highest levels of government.

Is there a mandate jurisprudence?

In many ways this is the critical question. Is there a coherent and iterative process that builds on the style and terminology of the previous resolutions to establish an understandable pattern? Is that pattern understandable to the implementers of the mandate? Is there a broad concept of precedence in mandate language? The answer to these questions would seem to be substantially in the positive.

One readily identifiable development is the growing complexity and detail of the mandates. The mandate given to the UN in Resolution 632 in 1989 was to “ensure conditions in Namibia which will allow the Namibian people to participate freely and without intimidation in the electoral process under the supervision and control of the United Nations leading to early independence of the Territory.” The relative simplicity of the decolonisation situation in Namibia lent itself to a relatively simple and understandable mandate with a definite objective of independence. Yet the rather vague injunction to the mandate implementers to “ensure conditions” that will allow the objective to be fulfilled, would be progressively refined in future mandate-setting resolutions.

By 1997, dealing with neighbouring Angola with all its complications of internal rivalries and decades of foreign interference, the complexity of the mandate had increased remarkably. The Security Council adopted Resolution 1118 establishing the United Nations Observer Mission in Angola and incorporating the mandate recommended by the Secretary-General. The mandate has 25 separate elements divided into five major areas. An indication of the complexity of the operation can be gleaned by noting the many different operative verbs shaping the mandate, including: monitor, verify, promote, carry out, provide good offices, inspect, supervise, help develop, investigate and serve as focal point. This is a quantum leap from the vague “ensure conditions will allow.”

Another example of the increasing detail and complexity of the mandates can be found in the broadly analogous situation of the proposed self-determination referenda in Western Sahara and East Timor. Neither represented a traditional decolonisation situation, both involved occupation by a neighbouring country rather than by a distant colonial overlord, and both situations were presented before the Security Council after considerable negotiations among the parties principal involving the Secretary-General. Yet in Resolution 690 in 1991, the Council referred to the apparent political agreement and the Secretary-General's report and then decided, "to establish a United Nations Mission for the referendum in Western Sahara", elegant in its simplicity but avoiding many of the tough issues that have since dogged the process. Eight years later the Council was far more prescriptive. Resolution 1246 decided "to establish the United Nations Mission in East Timor to organise and conduct a popular consultation, scheduled for 8 August 1999, on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy within a unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia..."

A possible exception to the increasing complexity of mandates is the process being adopted in Afghanistan. The mandate is based on the assumption that the international community's role in the state-building process must be subservient to local efforts given the weak state/strong society dichotomy. The tactic is therefore to adopt the 'small footprint' idea by setting out the broad goals but leaving considerable discretion as to means in the hands of the Special Representative.

The shape of the mandate has also developed in the post-Cold War Security Council's work. From the single sentence mandates in the Namibia and Western Sahara situations there appears to be an evolution in mandate drafting. Resolutions in the early to mid-1990s tended to spell out in greater detail the elements of the mandate. The security aspects were invariably spelled out first, followed by the technical assistance and humanitarian aspects of the mandate. A good example is Resolution 797 of 1992 establishing the United Nations Operation in Mozambique (ONUMOZ) and approving the mandate terms recommended by the Secretary-General, which comprised six elements: four significant security-related tasks followed by the task to "provide technical assistance and monitor the entire electoral process" and completed by the task to coordinate humanitarian assistance.

A similar pattern can be seen in 1993 with the revised mandate of the United Nations Mission in Haiti (UNMIH), where Resolution 867 sets out the security elements of the mandate first. But an important development was the specific separation of the military and civilian tasks of the mandate. The security assistance was to be provided by UNMIH while the civilian assistance was to be the responsibility of the International Civilian Mission in Haiti (MICIVIH). This pattern of separating the different aspects of the mandate into its component parts was a practical innovation that assisted the implementers to discharge their specific responsibilities.

By the time the Security Council was authorising large interventions, such as those in Bosnia-Herzegovina in 1995 and in Eastern Slavonia in Croatia in 1996, it had become normal practice to separate the military and civilian tasks of mandates. The practice was also followed in Resolution 1181 establishing UNOMSIL in Sierra Leone where the military and civilian components of the mandate were clearly distinguished.

The pattern of compartmentalising mandates was greatly refined in Resolution 1118 of 1997 which incorporated the Secretary-General's recommended mandate comprising five elements: political aspects, police matters, human rights issues, military aspects and humanitarian aspects. A further refinement can be seen in Resolution 1291 of 2000, extending the mandate of the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC), which specifically lists, in operative paragraph 4, the seven elements of the civilian mission as: human rights, humanitarian affairs, public information, child protection, political affairs, medical support and administrative support.

The process of refinement with each mandate, building on the experience and learning of the previous mandates, amounts to a body of jurisprudence for both mandate drafters and implementers. That process does not equate to a formula that must be slavishly adhered to. Every situation will invariably present particular problems and issues that will require specific mandate language and formulations. The MONUC mandate provides a good example of a task calibrated to a particular situation. It does not fall back on the common injunction to hold free and fair elections but instead focuses on the preliminary task of state-building by requiring close cooperation with the Facilitator of National Dialogue foreshadowed by the 1999 Lusaka Ceasefire Agreement. The human rights objective is also carefully worded to give priority focus to vulnerable groups such as women, children and demobilised child soldiers.

As with any political process, faults can be found. The mandates can at times be seen as exercises in political expediency rather than the implementation of universal principles. A dominant underlying theme in the mandates, expressed openly in the early mandates and more subtly in later mandates, is a concern to keep down costs. The impact can be seen both in the size of the intervention and its duration. There is accordingly a growing sophistication in the drafting of democratisation and nation-building mandates by the Security Council, reflecting the body of practice that has been developed and incorporating the lessons learned from previous interventions.

Mandate terminology

In examining the terminology used in mandates one is also struck by a consistency of language. As noted above, there is a necessary repetition in the verbs used to describe the action. Many mandates require monitoring and verification. Many require support for local capacity building. Others require the implementers to advise, support or assist local processes in various fields. The repeated use of the verbs facilitates better understanding of the scope of the particular mandate.

Yet the crafting of mandate language is certainly a far more involved process than one of cut and paste from previous resolutions. The art is to find a mandate that fits and that is achievable. In searching for the right terminology, the first instinct, particularly of the international lawyers involved in the drafting process both in New York and in capitals, is to find a formulation that has meaning based on a certain use in the past. For generalists or geographic experts involved it is also often a question of settling upon a term that has worked in the past, that has been used by the other members of the Council in previous resolutions and that has been previously approved by political leaders.

An examination of the core group of mandates demonstrates that below the general similarities there are significant variations. Resolution 1244 on Kosovo simply requires that one of the responsibilities of the international civilian presence shall be “protecting and promoting human rights.” Resolution 1181 on Sierra Leone required the civilian element to “report violations of international humanitarian law and human rights.” Resolution 866 of 1993 on Liberia requires a “report on any major violations of international humanitarian law.” Resolution 1118 on Angola contains three human rights objectives: contributing to the promotion of human rights, help develop capacity and “investigate adequately allegations of abuses and initiate appropriate action.” The use of the term “adequately” is a reflection of the difficulty of taking action on the ground and a concession of the limits of the UN’s reach. An example of the specificity of the mandate provisions on human rights can be found in Resolution 1020, which required UNOMIL in Liberia “to assist local human rights groups in raising voluntary contributions for training and logistic support.”

Similarly fine-tuned formulations may be found in the mandates dealing with electoral matters. The mandates in the early 1990s were relatively simple, requiring the UN, as did Resolution 797 of 1992 concerning Mozambique, “to provide technical assistance and monitor the entire electoral process.” In Liberia, Resolution 1020 shared the task of observing and verifying the election results with the then Organisation for African Unity and the Economic Community of West African States. But in relation to

the Central African Republic, Resolution 1230 of 1999 described MINURCA's mandate in the electoral field as restricted to playing "a supportive role." In Eastern Slavonia, on the other hand, the UN was required to organise the elections and certify the results. While in East Timor, conscious of the various devices employed by Indonesia over the years, Resolution 1246 spelled out in clear detail that "a direct, secret and universal ballot" was required for the act of self-determination.

Perhaps the most difficult aspect of crafting Security Council resolutions is the articulation of the political result being sought. When that result is clear, as in the Namibian decolonisation situation or the East Timor case after its clear decision in the act of self-determination, the Council can confidently work towards independence and democratic governance. In Haiti it was assistance to the legitimate constitutional authority and the Security Council expressly stated in Resolution 940 (1994) "that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President." In relation to Sierra Leone the major demand made by the Security Council in Resolution 1132 (1997) was "that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order." But in other cases where the people are still engaged in a form of state-building, the terms require more careful elaboration. In relation to the Democratic Republic of Congo, the objective is national dialogue. In Somalia it was to rehabilitate national institutions and promote national reconciliation. At times the best that can be achieved at a particular moment is to establish a process towards a final goal of democratic governance. In Afghanistan that process is based on the establishment of an interim authority that has guidelines on how it is to operate. But when the objective is unclear or unknown, as in the case of Kosovo, the terminology cannot hide the confusion and the goal of "substantial autonomy" becomes more of a hindrance than a help to the implementers of the mandate.²⁹

Problems with mandates

The foregoing account of the way democratisation and state-building mandates are drafted looks at only one aspect of a far larger issue. The crafting of the mandate is an important part of the process but it is not in itself decisive to the success of an intervention. The importance of the mandate is, nevertheless, beyond question.

Then Secretary-General Boutros Boutros-Ghali, in his *Agenda for Peace*³⁰ and its companion agendas for development and democracy, offered "a comprehensive vision through which global problems might be more effectively met by global solutions."³¹ In relation to the large UN interventions, he notes that "the basic conditions for success remain unchanged: a clear and practicable mandate; the cooperation of the parties in implementing that mandate; the continuing support of the Security Council; the readiness of Member States to contribute the military, police and civilian personnel, including specialists, required; effective United Nations command at Headquarters and in the field; and adequate financial and logistic support." Thus a clear and practical mandate was seen as one of six basic requirements for success. The other five requirements are very weighty. They encompass large issues of politics and implementation. Yet the political and implementation issues have both direct and indirect impacts on the crafting of mandate language.

²⁹ The Secretary-General's first Special Representative to Kosovo, Bernard Kouchner is quoted as saying he read Resolution 1244 twice every morning and still had no idea what 'substantial autonomy' meant, in Simon Chesterman *Kosovo in Limbo: State-Building and "Substantial Autonomy"* (International Peace Academy, August 2001) 4.

³⁰ A/47/277 - S/24111 17 June 1992 An Agenda for Peace, preventive diplomacy, peacemaking and peace-keeping Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992.

³¹ David Hamburg and Karen Ballentine, 'Boutros-Ghali's Agenda for Peace: the Foundation for a Renewed United Nations,' in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber* (Emile Brulant, Brussels, 1998) 496.

One of the political problems concerns the actions of other parties. Mandates are constructed based on certain premises. One of those premises is the coherence of the political agreement negotiated by the disputing parties. If the agreements are negotiated in bad faith, or are beyond the ability of the signatories to implement, or are overtaken by subsequent events, the mandate that flows from them may be inappropriate. Many of the major UN interventions are built on the foundations of a peace agreement:

MINURSO	Western Sahara	UN Settlement Proposals 1988
UNTAC	Cambodia	Paris Agreement 1991
ONUSAL	El Salvador	Mexico Agreements 1991
ONUMOZ	Mozambique	Rome Agreement 1992
UNOMIL	Liberia	Further to Cotonou Ag 1993
MONUA	Angola	Lusaka Protocol 1994
MINURCA	Central African Republic	Further to Bangui Ag 1997
UNAMET	East Timor	New York Agreement 1999
UNAMSIL	Sierra Leone	Lome Peace Agreement 1999
MONUC	Democratic Rep. Congo	Lusaka Ceasefire Agreement 1999

One can point to examples of problems with mandates caused by problematic underlying agreements. The timetables and tasks assigned to MINURSO turned out to be unachievable because of continuing disagreement between the parties. UNTAC performed its mandated tasks but the refusal of Hun Sen to accept defeat in the elections and the formation of an unworkable coalition government would leave basic political problems unresolved. UNAMET successfully conducted the self-determination ballot but its limited mandate did not foresee or prepare for the subsequent violence intended to vitiate the result of the vote.

In *Agenda for Peace*, Boutros-Ghali points specifically to problems with mandates that could in themselves trigger the lapse of the agreement of the feuding parties.³²

There are three aspects of recent mandates that, in particular, have led peace-keeping operations to forfeit the consent of the parties, to behave in a way that was perceived to be partial and/or to use force other than in self-defence. These have been the tasks of protecting humanitarian operations during continuing warfare, protecting civilian populations in designated safe areas and pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept. The cases of Somalia and Bosnia and Herzegovina are instructive in this respect.

Another situation where the UN's mandate may be hostage to the politics of outside forces is where the principal outside political force is not the UN itself but another country or regional group. The best example of this is the Kosovo operation. The UN was constantly playing catch-up, first in the process leading to the Rambouillet Accords and then after the humanitarian intervention by NATO forces. It is a telling fact that the documents establishing the political context on which the mandate of UNMIK is based in Resolution 1244 are annexes to the resolution drawn from negotiations conducted outside the UN. In such circumstances the UN had no choice but to accept an unusual mandate requiring uncertain provisional steps "pending a political solution."

Other problems with mandates have been highlighted by the Brahimi Report.³³ A basic premise of the report is "the pivotal importance of clear, credible and adequately resourced Security Council mandates" and it notes that "most (UN failures) occurred because the Security Council and the Member States crafted and supported ambiguous, inconsistent and under-funded mandates." The Brahimi Report refers to some of

³² Above n 30.

³³ *Report of the Panel on United Nations Peace Operations – A far-reaching report by an independent panel A/55/305 - S/2000/809*, http://www.un.org/peace/reports/peace_operations/.

the political problems noted above, including the problem of implementing mandates developed elsewhere, but it also highlights other serious problems.

One such problem is the Secretariat recommending mandates it thinks the Security Council wishes to implement rather than mandates it thinks it is in a position to fulfil. This can occur because of the apparent urgency to reach a compromise formulation, making it expedient to paper over the anticipated problems. These compromises can often lead to vague and ambiguous formulations that are difficult to implement and may thus compromise the integrity of the operation. Formulations such as an instruction “to promote a climate of confidence”³⁴ or “establishing an environment conducive to the organization of free and fair elections”³⁵ are too vague to be of much service to the implementers on the ground.

Mandates need to be clear and practical but the political process of their drafting may lead to inconsistent obligations. The UNMIK operation in Kosovo provides an example. Resolution 1244 contains a mandate requiring a raft of differing and slightly contradictory functions: the provision of transitional administration by UNMIK; the establishment of provisional self-governing democratic institutions for autonomous self-government; a general injunction to work towards substantial autonomy and meaningful self-administration; as well as facilitating a political process designed to determine Kosovo’s political status as long as it is in line with the Rambouillet Accords. No wonder the Head of Mission confessed to being confused.³⁶

Ambiguity and inconsistency can be, and often are, cured by sensitive management of the situation by those on the ground but under-resourced operations are far more difficult to cure. The problem of funding shortfalls is largely based on a decade-long dispute between the United States and the United Nations over the American contribution to the peacekeeping budget.³⁷ In view of the UN’s activism in the 1990s, the peacekeeping budget blew out to be two or three times the size of the regular budget. UN members have argued that the cost of the privileged situation of the permanent members is that they must pay a larger percentage share of the peacekeeping budget. The US share was 31% for the peacekeeping budget as compared to 25% for the regular budget. As part of the US pressure to renegotiate these percentages,³⁸ large parts of the assessed contributions were withheld leading to a US debt to the UN that at one point almost led to the possibility of a loss of the US vote in the General Assembly under Article 19 of the Charter. The dispute has been largely resolved with the UN decision to lower the US assessed share to 27% of the peacekeeping budget and 22% of the regular budget. But in the period of the UN’s state-building activism the lack of funds largely due to US withholdings had a deleterious effect on peacekeeping operations. The lack of funds also had an impact on mandates, with drafters having to limit the scope of UN responsibilities to meet the available funds. The most notorious example was the inability of the inadequate peacekeeping force in Bosnia-Herzegovina to protect ‘safe areas’. The mandate only asked the peacekeepers to assess threat levels because the Security Council was not prepared to accept the cost of the 30,000-strong force requested by the Secretary-General, which would have allowed for a broader mandate to protect civilian populations.³⁹

Inaction or half-hearted actions flowing from concerns about the cost of implementing mandates undermine the legitimacy of the UN interventions and thus have a corrosive impact on their effectiveness. Clearly,

³⁴ UNSCR 1118 (1997) drawing on the Secretary-General’s Report S/1997/438.

³⁵ UNSCR 867 (1993) drawing on the Secretary-General’s Reports S/26480 and S/26352.

³⁶ Above n 29.

³⁷ See Better World Campaign Factsheets, http://www.betterworldfund.org/factsheets/o_21559.shtml.

³⁸ Reducing peacekeeping costs became a formal policy through Presidential Decision Directive 25 signed by President Clinton on 5 May 1994 and released to the public in unclassified form on 22 February 1996 by the White House, <http://www.fas.org/irp/offdocs/pdd25.htm>.

³⁹ See Jean-Marc Coicaud ‘The legitimacy of Security Council activities under Chapter VII of the UN Charter after the end of the Cold War’ in Jean-Marc Coicaud and Veijo Heiskanen (eds) *The Legitimacy of International Organisations* (UNU Press, Tokyo, 2001) 272.

funding is not unlimited for such interventions but at the very least the UN efforts should not be undercut by nations wishing to prove a political point through the withholding of their assessed contributions.

Appraising mandates

Having described the alchemy through which mandates are forged and having analysed problematic aspects of mandates, how can one conclude the study and appraise the process? One obvious difficulty is that of selectivity. By focusing on the interventions shaped by mandates, those situations that fall outside the realm of the possible in international politics also fall outside the appraisal process. So appraising mandates tells us nothing about the fate of Chechnya or self-determination for Kurdish people or the future of Tibet.

Focusing on the interventions themselves poses further problems of appraisal. Is an intervention successful because fighting stopped or ceasefires were maintained? This is often the media interpretation of events and thus a key component in shaping public perceptions. But the fundamental question of the health of the polity, that is the subject of the intervention, remains unanswered if we look simply at the cessation of hostilities. Measuring state-building is a difficult medium to long-term venture. Perhaps the best political measurement is the satisfaction with the UN intervention by the parties principal, including not only the leaders and factions within the polity but also the key actors in the international community such as the permanent members, the troop and civilian staff contributors and the neighbouring countries. It is perhaps on this basis that the 1995 *Agenda for Peace* claimed that in most cases the interventions have been “conspicuously successful” with Namibia, Angola, El Salvador, Cambodia and Mozambique drawing particular praise. Many commentators would agree with this general comment.⁴⁰

The success of an intervention tells us that the clear and practical mandate was well suited to the result being sought. But the success of the intervention is also due to the five other factors said to be critical: the cooperation of the parties in implementing that mandate; the continuing support of the Security Council; the readiness of member states to contribute the military, police and civilian personnel, including specialists, required; effective United Nations command at Headquarters and in the field; and adequate financial and logistic support. So the mandate is only one part of the formula.

Within the process of judging the intervention as a whole, mandates need to be appraised on their clarity and practicality. A workable mandate will comprise mainly of action tasks that are simply described for the benefit of both the implementers and the subjects. Many of these tasks will be measurable in terms of performance, cost and timeliness. A workable mandate will avoid vague compromise words that paper over essential differences and thus leave the dilemma unresolved and in the hands of the implementers. A workable mandate will have direction and closure. The end point may not always be predictable but the direction should be clear and a point should be ascertainable where the emergency intervention ends and the regular processes of development assistance take over. A workable mandate will have a defined division of labour. This may be based on subject matter, on geographical area or on organisational competence. One of the avoidable problems referred to in *Agenda for Peace* concern difficulties with coordination arising from the various specific mandates decreed for the agencies by discrete intergovernmental bodies. The UN has the responsibility to coordinate its various inputs into a coherent effort.

⁴⁰ Considerable support can be found in the analysis of the UN supervised elections in El Salvador and Mozambique in Enrique Baloyra ‘El Salvador: From Reactionary Despotism to Partidocrata,’ and in J Michael Turner, Sue Nelson, and Kimberly Mahling-Clerk ‘Mozambique’s Vote for Democratic Governance’ in Krishna Kumar (ed) *Post-conflict Elections, Democratization and International Assistance* (Lynne Rienner Publishers, Boulder, 1998). More nuanced assessments are made in relation to Cambodia and Angola in Frederick Brown, above n 19, and Marina Ottway ‘Angola’s Failed Elections’ in the same volume.

It is open from the foregoing analysis to conclude that the UN process of developing mandates for democratisation and state-building purposes have improved with practice. Mistakes have clearly been made but they have contributed to the learning and drafting process. It would be unrealistic to demand that the vagaries of international politics be somehow eliminated from the process of decision-making and formulation of mandates. The power of the permanent members can be seen as a way of channelling *realpolitik* into the decision-making process. For that reason alone, it would be futile to demand consistency. Interventions that have a direct impact on one of the permanent members will not be treated in the same way as the more remote situations.

To what extent should democratisation be a priority in the mandate? The problem with asking this question is that democratisation competes with the reestablishment of security and the provision of humanitarian aid, as the three major thrusts of mandates. There can hardly be a process of democratisation without a generally secure environment, and humanitarian aid in an emergency situation is clearly a priority for the subject peoples. The better way of posing the question is to ask whether sufficient priority is being given to the democratisation process. That is a valid question because without a democratisation process it is unlikely that the polity can ultimately achieve a form of governance that will encourage reconciliation and favour long-term recovery, socially and economically.

The reply, inevitably, is yes and no. Yes, democratisation has found a place in the UN's rhetoric and in its mandates. As one practitioner noted ruefully, even delegates from non-democratic countries happily accept the inclusion in mandates of provisions for free and fair elections and support for civil society. Mandates have become more sophisticated and the UN's response is improving with experience. There have been significant achievements in half a dozen difficult situations and a willingness to build on these processes in the future.

But there is also a negative response. The problem is one of maintaining focus. Democratisation is not achieved by putting out fires, nor is it established by a single transition election; it is a long-term process requiring the patience to endure setbacks and to accept the slow pace of reform. Each new crisis faced by the UN naturally detracts attention from the smoky ruins of the last fire.⁴¹ The funds required for the long haul are often inadequate and the benefits gained initially are put at risk.

A mandate can therefore only begin a process of democratisation. It can put some of the basic foundations in place and set a certain direction. Thereafter the process of democratic transition and consolidation is in the hands of many actors and political forces. No more should be asked of the UN interventions in the field.

⁴¹ Susan D. Moeller *Compassion Fatigue – How the Media Sell Disease, Famine, War and Death* (Routledge, New York, 1999).

Bush and Ors v Iraq: A Critical Analysis of the Iraqi Conflict

Alex Conte*

Introduction

The war in Iraq has been the subject of debate for many months, and will likely be considered for many years to come. Many issues arise out of the war, including the basis upon which states may use force against one another; the effectiveness of the various international instruments governing the non-proliferation and disarmament of weapons of mass destruction; the conduct of military operations in the field; the role of the United Nations and others in post-war reconstruction; the accuracy or otherwise of military intelligence used by leaders to justify action against Iraq; and the role and relevance of international law in modern politics. All are important. All have an impact on the maintenance of international peace and security.

Of those various key issues, the basis upon which states may use force against one another has attracted significant attention. Various justifications might be used to validate the action against Iraq.¹ But there is only one argument that was used by all members of the coalition forces against Iraq: that there existed an implied authority from United Nations Security Council Resolutions to use force against Iraq. This will form the basis of analysis within this article. *Did* the United Nations Security Council authorise the use of force against Iraq, impliedly or otherwise?

Respective positions on the authority to act against Iraq

As indicated, the common justification for intervention in Iraq employed by coalition forces has been the existence of an implied authority through Security Council Resolutions. In his address to Parliament on 18 March 2003, the day before the start of *Operation Enduring Freedom*, United Kingdom Prime Minister Tony Blair referred to the following advice given to him from Attorney-General Lord Goldsmith:²

Authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security.

Similarly, and on the same day, Australian Prime Minister John Howard said this at a news conference:³

The action that might be taken as a result of this decision [to commit Australian troops] has a sound legal basis in the resolutions of the Security Council that have already been passed. If you

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¹ For example: (1) that intervention was permissible as an act of anticipatory self-defence, in the face of intelligence suggesting that Iraq was in a position to launch weapons of mass destruction at 45 minutes notice (to be tempered against the subsequent finding by the United Kingdom Parliamentary Foreign Affairs Committee on 7 July 2003 that a dossier on Iraq's weapons, relied upon by Prime Minister Blair in his address to Parliament on 18 March 2003, was incorrect and against the legal arguments that neither the United Nations Charter, nor customary international law, permit anticipatory self-defence: see n 19 below); and (2) that action was permissible by way of humanitarian intervention (see n 19 below).

² News Release 16 March 2003, "Legal basis for use of force against Iraq", British High Commission in Canada News, URL <<http://www.britainincanada.org/News/Release/2003/mar03/nr1617.htm>>.

³ Transcript available from ABC News Online, "Howard confirms Australian military commitment to Iraq war", URL <<http://www.abc.net.au/public/s809462.htm>>.

go back to Resolution 678, 687 and 1441, you find ample legal authority. That [advice] ... is almost identically the published view of the Attorney-General of the United Kingdom Government.

In a press release from the United States Department of State, Secretary of State Colin Powell took a much more robust approach. He too made reference to the existence of an implied authority to act, but went further to say:⁴

If the UN does not act, then it would be necessary for the United States to act with a willing coalition.

Before moving to examine the implied authority argument, it is useful to consider the New Zealand position on intervention in Iraq. In early March 2003, New Zealand's Minister of Foreign Affairs and Trade Phil Goff stated that:⁵

...the New Zealand position remains as it was stated on 19 February. We do not support military action against Iraq without a mandate from the Security Council...

Likewise, and again on the day prior to *Operation Enduring Freedom*, New Zealand Prime Minister Helen Clark said:⁶

They [referring to the UK, US and Australia] stretch back through a string of UN resolutions to construct a legal edifice for what is happening. I think they will fail to convince most international lawyers.

The use of force at international law

In examining the question at hand, it is important to place the issue in its proper context. It is the first-stated principle of the United Nations to maintain peace and security, suppress acts of aggression and achieve the peaceful settlement of disputes.⁷ Article 2(1) of the United Nations Charter expresses the foundation of the United Nations as being based upon the principle of the sovereign equality of all members. Member states are directed to settle disputes by peaceful means in such a manner that international peace and security is not endangered.⁸ The United Nations itself is prohibited from intervening in the domestic affairs of any member without their consent and unless otherwise permitted under the Charter.⁹ Most significantly, under Article 2(4), members of the United Nations are directed that they must refrain from the use, or threat of use, of force in international relations. The latter provision is regarded to be a norm of *jus cogens*, a peremptory norm of customary international law from which no derogation is permitted.¹⁰ Article 51 of the Charter retains the inherent right of a state to act in defence of itself, and extends the principle to one of "collective self-defence", whereby members

⁴ US Department of State web site, "Powell: Issue is Iraqi Compliance, Not More Inspectors", 9 February 2003, URL <<http://usinfo.state.gov/regional/nea/iraq/text2003/0209pwl.htm>>.

⁵ Address to the Diplomatic Club in Wellington on 13 March 2003: Scoop web site news, "Phil Goff Speech: Iraq crisis: NZ's position", URL <<http://www.scoop.co.nz/mason/stories/PA0303/S00213.htm>>.

⁶ Sydney Morning Herald Online, "Australia commits troops to war", URL <<http://www.smh.com.au/articles/2003/03/18/1047749732511.html>>.

⁷ See Article 1(1) of the Charter of the United Nations. In this regard, the United Nations, and the Security Council in particular, has been criticised in its failure to prevent the intervention in Iraq, given this primary purpose.

⁸ Article 2(3) of the Charter of the United Nations.

⁹ Article 2(7) of the Charter.

¹⁰ See, eg, the judgment of Sir Ivor Jennings in *Nicaragua v United States* [1986] ICJ Reports 4, 518-524; Henkin, Pugh, Schachter and Smit, *International Law Cases and Materials* (1980) 910.

of the United Nations are also permitted to use force in the defence of a state with whom the state is intimately connected and/or where another member seeks the assistance of others to defend itself.¹¹

The Security Council, composed of five permanent members¹² and ten non-permanent members,¹³ is charged under Article 24 of the Charter with the role of maintaining international peace and security. All United Nations members are bound to accept and carry out the decisions of the Security Council.¹⁴ The Council has two primary means of achieving that objective under the Charter: the provisions within Chapter VI, pertaining to the pacific settlement of disputes; and the well-known Chapter VII enforcement action provisions. For the purpose of this article, it is useful to give a brief account of the nature and operation of Chapter VII. Decisions of the Council are made by the affirmative vote of at least nine members, with the proviso that the permanent members may, without needing to justify their position, exercise a veto under Article 27(3).¹⁵ In exercising enforcement action under Chapter VII, the Security Council is required to first determine whether there is a threat to or breach of peace entitling it to take such measures.¹⁶ If so determined, the Council then has the provisions of Articles 40 to 42 at its disposal: it may impose non-military (normally trade) sanctions;¹⁷ provisional measures aimed at preventing an escalation of any threat to or breach of peace; or it may authorise the use of military force under Article 42.¹⁸

In crude terms then, the international law on the use of force can be summarised as follows. The use of force between states, or the threat of such, is prohibited by the United Nations Charter and by way of a peremptory norm of customary international law. It is permitted in only two situations. First, where a state is acting by way of “collective self-defence”, within the narrow terms of Article 51. Second, where authorised by a decision of the Security Council, acting under Chapter VII of the Charter, in response to a threat to or breach of peace.¹⁹

Setting the scene: Iraq, Kuwait and weapons of mass destruction

As set out at the outset of this article, the advice of the Attorney-General to the United Kingdom on the ability to use force against Iraq was based upon the existence of an authority through the combined effect of Security Council Resolutions 678, 687 and 1441. It is important, then, to place those Resolutions in perspective and examine their provisions and effect. The Resolutions cut across three

¹¹ *Nicaragua v United States*, [1986] ICJ Reports 4, 534-536.

¹² China, France, Russia, the United Kingdom and the United States.

¹³ Elected to sit on the Council for two years.

¹⁴ Article 25.

¹⁵ Quaere: should there be a power of veto in the hands of the permanent members? It can be argued that the power of veto is a safety feature aimed at preventing irrational decisions, albeit by a majority of at least nine out of 15 members. It was a criticism of the United States in the present crisis that the veto acted as an encumbrance upon the ability of the Security Council to make decisions, although the subsequent lack of evidence of weapons of mass destruction might in fact support the “safety” aspect of the power of veto.

¹⁶ Article 39.

¹⁷ As it has done in various situations, including South Africa and Iraq.

¹⁸ Note Article 43 of the Charter, which is also, at least technically, a provision affecting the Security Council’s ability to discharge its role. Article 43 makes provision for the establishment of a standing army of the United Nations, by special agreement with member states for the provision by members to the United Nations of personnel and equipment. The reality is that no such agreement has ever been established, resulting in the Security Council needing to delegate the authority to use force not to its own standing army, but to multinational forces established by its members.

¹⁹ It must be acknowledged that there are arguments in favour, and against, further grounds upon which a state may use force against another. Two such (controversial) positions may be taken with respect to “humanitarian intervention” (the idea that states may intervene by use of force against another state where the latter state is committing human rights violations and based upon the notion that the principles of the United Nations Charter include the maintenance and promotion of human rights) and “anticipatory self-defence” (permitting an act in the defence of the state where an armed attack against the state is reasonably anticipated, rather than waiting for such an attack to occur before being able to respond – as is effectively the case under Article 51 of the Charter). These two grounds involve considerable views for and against and, also bearing in mind that they were not expressly employed by the coalition forces as justifying the use of force against Iraq, are beyond the scope of discussion within this paper.

major conflicts involving the use of force against Iraq: *Operation Desert Storm* in January 1991; *Operation Desert Fox* in December 1998; and the recent *Operation Enduring Freedom* that commenced in March 2003.

Operation Desert Storm

Iraq and neighbouring Kuwait to the south have a history of conflict stretching back many years. In 1963 they entered into a treaty of friendly relations,²⁰ under which they agreed upon a boundary between the two states. On 2 August 1990, Iraq invaded Kuwait, resulting in the immediate issuing of Resolution 660, under which the Security Council demanded the immediate and unconditional withdrawal of Iraq from Kuwaiti territory.²¹ The failure by Iraq to do so resulted in the Security Council issuing a further Resolution, 678, of 29 November 1990. This Resolution expressed the following position of the Security Council:

Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;

Authorises Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

Iraq's failure to withdraw from Kuwait by 15 January 1991 resulted in the commencement of *Operation Desert Storm* the following day.

Turning to Lord Goldsmith's position, what can be taken from Resolution 678? His advice to Prime Minister Blair was that this was a Resolution adopted under Chapter VII of the UN Charter, which allows the use of force for the express purpose of restoring international peace and security. To that extent, he is correct. The preamble to Resolution 678 expressed itself as an action under Chapter VII of the United Nations Charter and reaffirmed the Council's earlier determination under Resolution 660 that the invasion of Kuwait constituted a breach of peace; and Chapter VII does indeed permit the Security Council to authorise the use of force for the purpose of restoring peace and security. As seen from the second of the paragraphs quoted above, the Resolution specifically authorises member states to use "all necessary means" to uphold and implement Resolution 660.

What of Lord Goldsmith's view that Resolution 678 provided authority to use force against Iraq in 2003? With all due respect, it is the conclusion of the author that it does not. Resolution 678 bears no relevance at all to the modern Iraqi crisis. It was adopted by the Security Council to authorise the use of force against Iraq for the purpose of enforcing Resolution 660, which had demanded the immediate and unconditional withdrawal of Iraq from Kuwait. The current crisis did not have anything to do with an Iraqi presence in Kuwait and cannot therefore rely upon Resolutions 660 and 678 to justify the use of force.

The only potential argument in favour of an implied authority to use force under Resolution 678 would rely on the final ten words of the Security Council authorisation. Namely, that it authorised members to use all necessary means to enforce Resolution 660 "and to restore international peace and security in the area" [emphasis added]. Might this be an additional authorisation to use force above and beyond the enforcement of Resolution 660? The writer posits that it cannot, for two reasons. First, it is clear that this was not the intention of the Security Council when adopting Resolution 678. Examining the document in its context, it gave an authority to use force *if* Iraq failed to withdraw from Kuwait by 15

²⁰ Iraq and Kuwait signed at Baghdad on 4 October 1963 a document entitled "Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the restoration of friendly relations, recognition and related matters".

²¹ United Nations Security Council Resolution 660 (2 August 1990), para 2.

January 1991 and for the purpose of restoring the democratic republic of Kuwait. It is an untenable stretch of the imagination to say that it was also intended to provide an infinite, or at least long-lasting, authority to use force against Iraq to maintain peace and security in the region. Furthermore, the specific wording of the authorising paragraph supports this first basis of analysis. The defining portion of the paragraph, by which the use of force is authorised, states “*Authorises* Member States co-operating with the Government of Kuwait...”. The authority thereby expressly limits itself to the situation of conflict that was then presented.

Operation Desert Fox

Despite the repulsion of Iraqi forces from Kuwait under *Operation Desert Storm*, Iraq remained belligerent. It threatened to use chemical and biological weapons against Kuwait. It did in fact fire ballistic missiles in unprovoked attacks against Kuwait, and US and UK intelligence sources reported that Iraq was attempting to acquire materials for a nuclear weapons programme.

United Nations Security Council Resolution 687

The result was that, less than three months after the commencement of *Desert Storm*, the Security Council issued a further Resolution against Iraq. Resolution 687 was adopted, again under Chapter VII, on 3 April 1991 with two distinct objectives.

Establishment of a demilitarised zone

The first was to establish a cease-fire between Iraq and Kuwait, which is addressed within Part A of the Resolution, through paragraphs 2 to 4 inclusive. Part A demanded that Iraq respect the inviolability of the international boundary with Kuwait, as had been set out in the 1963 treaty of friendship between the two states. It called upon the establishment of a demilitarised zone²² and authorised the use of force to enforce the cease-fire. Paragraph 4, by which the latter authority was issued, was specific in its authority being limited to the enforcement of the cease-fire and for no other reason:

Decides to guarantee the inviolability of the abovementioned international boundary and to take, as appropriate, all necessary measures to that end in accordance with the Charter of the United Nations;

It should be noted at this stage that Resolution 687 contains no other provision authorising the use of force.

Weapons of mass destruction

The balance of the Resolution does, however, address the issue of weapons of mass destruction by various means. Iraq was required to destroy, remove, or render harmless all chemical and biological weapons and related systems and development facilities and all ballistic missiles with a range greater than 150 km.²³ It was also required to unconditionally undertake not to use, develop, construct or acquire nuclear weapons and related systems, components and development facilities.²⁴ Iraq was obliged to submit a formal adoption of Resolution 687, and invited to unconditionally reaffirm its commitment to the Treaty on the Non-Proliferation of Nuclear Weapons.²⁵

Implications of Resolution 687

Again returning to Lord Goldsmith’s advice, it is clear that, while Resolution 687 is established under Chapter VII and authorises the use of force against Iraq, the latter authorisation is limited in its terms to

²² The demilitarised zone was specified in a letter dated 28 March 1991 from the Permanent Representative of the United Kingdom to the United Nations Secretary-General to be 10 km into Iraqi territory and 5 km into Kuwaiti territory from the international boundary under the 1963 agreement.

²³ At para 8.

²⁴ At para 12.

²⁵ See paras 9 and 11.

the enforcement of the cease-fire agreement between Iraq and Kuwait. Once more, that has no bearing on the 2002/2003 Iraqi crisis. The relevance of the provisions of Resolution 687 is limited to the fact that is placed upon Iraq certain obligations pertaining to disarmament and non-proliferation of weapons of mass destruction.

United Nations Security Council Resolution 1154

In the context of *Desert Fox* and *Enduring Freedom*, it is also of note that Resolution 687 led to the establishment of an Iraq Action Team of the International Atomic Energy Agency (IAEA), tasked with monitoring and reporting on Iraq's compliance with the latter aspects of the Resolution. The Iraq Action Team, comprised of various United Nations appointed weapons inspectors, undertook meetings with the Iraqi regime for the implementation of a comprehensive monitoring and verification programme, but met resistance when faced with the actual inspection process. Difficulties escalated in 1996, ultimately resulting in the withdrawal of the Action Team in 1998.

By Resolution 1154 of 2 March the same year, the Security Council stressed upon Iraq that the provision of immediate and unrestricted access to the IAEA weapons inspectors was necessary for the implementation of Resolution 687.²⁶ Resolution 1154 stated, in that context, that "any violation would have severest consequences for Iraq".²⁷ The failure by Iraq to permit the return of inspectors on those terms led to the UK/US-led coalition action under *Operation Desert Fox*. *Desert Fox* comprised a series of air strikes for four days and nights from 16 December 1998, with its expressed aims being the degrading of Iraq's capability to build and use weapons of mass destruction and diminishing the military threat posed by Iraq to its neighbours.²⁸

In line with today's position of Lord Goldsmith, the United Kingdom and United States argued, in the debates of the Security Council on 16 December 1998, that this conduct was impliedly authorised through the combined effect of Resolutions 687 and 1154. The majority of the Council disagreed with that view, a matter for later discussion within this article.²⁹

Operation Enduring Freedom

At the instigation of the Bush Administration, the United Nations Security Council adopted Resolution 1441 on 8 November 2002, following the continued refusal by Iraq to comply with its obligations to provide UN weapons inspectors with unrestricted access to its facilities, and in view of growing concern that Iraq had re-established a weapons of mass destruction programme. The Resolution begins by reiterating that Iraq remained in breach of Resolution 687.³⁰ It does not state which part of Resolution 687 it refers to, but it can only refer to those parts of the Resolution pertaining to weapons of mass destruction. Part A of Resolution 687, in which the sole authority to use force is contained, relates to the cease-fire with Kuwait. As discussed, this portion of the 1991 Resolution does not hold any relevance to the concerns of the Bush and Blair Administrations. Furthermore, paragraph 1 of Resolution 1441 makes reference to Iraq's breaches relating to its failure to cooperate with United Nations inspectors and to complete the actions under paragraphs 8 to 13 of Resolution 687.

²⁶ At para 3.

²⁷ Ibid.

²⁸ See the United States Department of Defense web site *DefenceLINK*, at URL <http://www.defenselink.mil/specials/desert_fox>.

²⁹ See Part V "All Necessary Means to Maintain Peace and Security", A *The Fall-Out from Operation Desert Fox*.

³⁰ At para 1.

Under paragraph 3, Iraq was required, as a first step towards compliance with its disarmament obligations, to submit a declaration concerning all aspects of its programmes to develop chemical, biological and nuclear weapons, ballistic missiles and other delivery systems. The Resolution expressly provides Iraq with “a final opportunity to comply with its disarmament obligations”³¹ and provides in the penultimate paragraph as follows:³²

Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;

Subsequent to the adoption of Resolution 1441, Iraq lodged with the United Nations Secretary-General the declaration required of it under paragraph 3.³³ The United Nations Monitoring, Verification and Inspection Commission (UNMOVIC),³⁴ under the leadership of Dr Hans Blix, carried out inspections of various facilities in Iraq, albeit that this was preceded by various stall tactics and initial difficulties in the conduct of inspections. The United States and United Kingdom complained that Iraq was in violation of Resolution 1441 through an alleged failure by Iraq to provide a full and accurate declaration as required under paragraph 3.³⁵ Interestingly, however, members of the Security Council were not united on the question of whether the allegations made against Iraq constituted a material breach of Resolution 1441.

On 6 March 2003, UNMOVIC lodged a report with the Security Council,³⁶ presented with an accompanying oral report from Dr Blix.³⁷ Throughout the history of UNMOVIC, this was the first of twelve quarterly reports in which the IAEA was able to say that it had conducted actual inspections of Iraqi facilities, rather than just preparations towards inspections. Dr Blix acknowledged some initial difficulties, but described that UNMOVIC had overall faced relatively few difficulties. He did not suggest that the inspection process had been smooth sailing, but he did acknowledge that UNMOVIC was able at that time to conduct professional no-notice inspections all over Iraq. In the final paragraph of his oral report, he said:

How much time would it take to resolve the key remaining disarmament tasks? While cooperation can and is to be immediate, disarmament and at any rate the verification of it cannot be instant. Even with a proactive Iraqi attitude, induced by continued outside pressure, it would still take some time to verify sites and items, analyse documents, interview relevant persons, and draw conclusions. It would not take years, nor weeks, but months. Neither governments nor inspectors would want disarmament inspection to go on forever. However, it must be remembered that in accordance with the governing resolutions, a sustained inspection and monitoring system is to remain in place after verified disarmament to give confidence and to strike an alarm, if signs were seen of the revival of any proscribed weapons programmes.

Notwithstanding the calls for further inspectors and time for inspections, the US/UK-led coalition commenced military action against Iraq on 19 March 2003.

“All necessary means to maintain peace and security”

³¹ At para 2.

³² At para 13.

³³ Lodged on 7 December 2002.

³⁴ UNMOVIC was established under United Nations Security Council Resolution 1284 (17 December 1999) to undertake the responsibilities of the former United Nations Special Commission (UNSCOM), which was charged with monitoring the elimination of weapons of mass destruction in Iraq.

³⁵ The address of US Secretary of State Colin Powell to the United Nations General Assembly on 5 February 2003 referred, for example, to: intercepted conversations within Iraqi military suggesting that evidence of weapons programmes was being destroyed; the finding by United Nations weapons inspectors of missile warheads capable of delivering chemical weapons; suspicion of mobile biological agent development facilities; and the existence of aluminium tubes capable of use for uranium enrichment.

³⁶ UNMOVIC Report, *Unresolved Disarmament Issues. Iraq’s Proscribed Weapons Programmes*, 6 March 2003 (173 pages in length).

³⁷ The oral report was presented on 7 March 2003, a transcript of which is available online at URL <<http://www.caabu.org/press/documents/blix-report-7march.html>>.

Having disposed of some of the issues in Lord Goldsmith's advice to Prime Minister Blair, as to the relevance of United Nations Security Council Resolutions 678 and 687, one further, vital, question remains. Did Security Council Resolutions 1154 and 1441 impliedly authorise the use of force against Iraq? Were the phrases "severest consequences for Iraq" and "it [Iraq] will face serious consequences" sufficient to trigger an authority for coalition forces to intervene in Iraq? It is the proposition of the author that they were not.

The fall-out from Operation Desert Fox

The starting point in this analysis is to have regard to the Security Council debates of 16 December 1998, the day *Operation Desert Fox* was commenced.³⁸ Within those debates, Russia articulated that the Resolutions existing at that time, 660, 678, 687 and 1154, (1) did not authorise members of the United Nations to act independently on behalf of the United Nations; and (2) did not, by themselves, authorise the use of force against Iraq but in fact required the adoption by the Security Council of a further more specific Resolution. The first of these positions finds clear support within the jurisprudence of the International Court. The Court has held that the United Nations is an institution possessing international personality, a feature of which involves a distinction, in terms of legal powers and purposes, between the organisation and its members.³⁹ It has further decided that this distinction is one whereby individual members of such an institution cannot assert a separate self-contained right over and above the organisation's collective institutional activity.⁴⁰

The second of the arguments posited by Russia and others requires further attention, in the absence of any judicial guidance in the matter. It goes to the heart of the issue in this paper. Did the wording of Resolution 1441, and its similar predecessor 1154, trigger an implied authority to act, notwithstanding the general principle that a member of the United Nations cannot act independently of it?⁴¹ In what way has the Security Council authorised the use of force by its members in the past? Are there particular words required? What follows is an examination of various conflicts in which the Security Council, under Chapter VII of the Charter, has authorised the use of force.

Express Security Council authorisations to use force

There have been various instances where the Council has provided its members with an express authority to use of force against states. It is useful to briefly consider a number of these instances in their context. What will be seen is an emergence of a clear pattern, whereby the relevant Resolutions express an ability to use all necessary means or measures to enforce the Resolution, combined with a delegation of that authority to United Nations members.

North Korea, 1950

Following a report of the United Nations Commission on Korea,⁴² the Security Council expressed grave concern about the armed attack on the Republic of Korea by forces from North Korea and determined that this action constituted a breach of the peace within the terms of Chapter VII of the United Nations Charter.⁴³ Under Resolution 82 it called upon the immediate cessation of hostilities and withdrawal of North Korean forces. The failure by North Korea to do so resulted in the adoption of Resolution 83 on

³⁸ The transcript of these debates are available online at URL <<http://www.un.org/News/Press/docs/1998/19981216.sc6611.html>>.

³⁹ *Reparations Case* [1949] ICJ Rep 174.

⁴⁰ *South West Africa Cases, 2nd Phase* [1966] ICJ Rep 6.

⁴¹ This was the issue dominating the meeting of the Security Council in adopting Resolution 1154. The view of the United States and United Kingdom was that the Resolution provided "automaticity": an automatic right by United Nations members to use force in the case of a violation of the requirements of the Resolution: see Blokker N, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'" (2000) 11:3 *European Journal of International Law* 541. No agreement on that point was reached prior to the adoption of the Resolution, but the US and UK did not receive support for their view.

⁴² Document S/1469.

⁴³ United Nations Security Council Resolution 82 (25 June 1950).

27 June 1950, in which the Security Council noted that urgent military measures were required to restore international peace and security and recommended:⁴⁴

...that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.

Rhodesia, 1966

Towards the end of 1965, the Security Council imposed trade sanctions against Southern Rhodesia, calling on all United Nations members to do their utmost to break off economic relations with the country, including an embargo on oil and petroleum products.⁴⁵ The United Nations received reports that substantial supplies of oil were to reach Southern Rhodesia as a result of an oil tanker having arrived at Beira and the approach of a further tanker. This, coupled with concern that Southern Rhodesia would be capable of resuming oil pumping through the Companhia do Pipepipeline with the acquiescence of the Portuguese authorities, led to Resolution 221. The Security Council considered that oil supplies would afford great assistance and encouragement to the illegal regime in Southern Rhodesia and called upon the Portuguese government not to permit oil to be pumped through the pipeline from Beira to Southern Rhodesia. The Resolution also called on the United Kingdom to prevent the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia “by the use of force if necessary”.⁴⁶

Iraq, 1990-1991

Following the invasion of Kuwait by Iraq in 1990, a series of preliminary Resolutions were issued by the United Nations Security Council, demanding the withdrawal of Iraqi forces and imposing oil trade sanctions upon Iraq.⁴⁷ In breach of the economic sanctions under Resolution 661, Iraq continued to export oil using Iraqi flag vessels. In order to ensure Iraqi compliance with the economic sanctions, the Security Council authorised the use of “such measures commensurate to the specific circumstances as may be necessary ... to halt all inward and outward maritime shipping” under Resolution 665 (1990).

By the end of November 1990, Iraq had still refused to comply with the Security Council’s demands for it to withdraw from Kuwait. The Security Council had made the demand for Iraq to withdraw on 2 August 1990, the day of the Iraqi invasion of Kuwait.⁴⁸ Acting under Chapter VII of the United Nations Charter, the Security Council set out the following demands and authorisations under Resolution 678:⁴⁹

Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;

Authorises Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

As already indicated, Iraq failed to comply with this “one final” opportunity set out within Resolution 678, which thereby authorised the use of all necessary means by United Nations members to ensure the withdrawal of Iraqi forces from Kuwait. The result was *Operation Desert Storm*, which commenced

⁴⁴ United Nations Security Council Resolution 83 (27 June 1950), final paragraph in an un-numbered series of paragraphs.

⁴⁵ United Nations Security Council Resolutions 216 (12 November 1965) and 217 (20 November 1965).

⁴⁶ United Nations Security Council Resolution 221 (9 April 1966), final paragraph in an un-numbered series of paragraphs.

⁴⁷ United Nations Security Council Resolutions 660 (2 August 1990), 661 (6 August 1990), 662 (9 August 1990) and 664 (18 August 1990).

⁴⁸ United Nations Security Council Resolution 660 (2 August 1990).

⁴⁹ United Nations Security Council Resolution 678 (29 November 1990), paragraphs 1 and 2.

with a series of air strikes on 16 January 1991 and ultimately led to Iraq formally accepting cease-fire terms between it and Kuwait on 3 March 1991.⁵⁰

Somalia, 1992

Although initially very slow to act in response to the internal conflict within Somalia, the Security Council ultimately decided to authorise the use of force through Resolution 794 of 3 December 1992. Mass genocide was occurring within Somalia, exacerbated by obstacles in the distribution of humanitarian aid, and recognised as constituting a threat to international peace and security.⁵¹ Following an offer by the United States to establish and lead an operation for the creation of a secure environment in Somalia,⁵² the Security Council authorised the Secretary-General and UN members to implement that offer and, in doing so, authorised those states “to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia”.⁵³

Republic of Bosnia and Herzegovina, 1993-1995

In response to the internal conflict within the former Yugoslavia, which had commenced in 1991, various measures were implemented by the United Nations, including the establishment of the United Nations Protection Force (UNPROFOR) and the imposition of no-fly zones.⁵⁴ Despite the establishment of these no-fly zones, the ban on military flights in the airspace of Bosnia and Herzegovina was repeatedly violated. Against that background, the Security Council allowed a further seven-day period for compliance, following which member states were authorised to use “all necessary measures”, proportionate to the specific circumstances, to ensure compliance with the ban.⁵⁵

The continued fighting within the former Yugoslavia and attacks on ethnic groups prompted the Security Council to establish safe areas within the Republic.⁵⁶ Notwithstanding this, the Council was later faced with military attacks on these safe areas and therefore decided to extend the mandate of UNPROFOR to enable it to deter attacks against the safe areas.⁵⁷ It authorised UNPROFOR:⁵⁸

...acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them...

At the end of 1995, the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia signed a peace agreement.⁵⁹ To ensure the proper implementation of that agreement, the Security Council authorised the establishment of a multinational implementation force (IFOR).⁶⁰ IFOR was authorised to use “all necessary measures” to ensure implementation of the peace agreement.⁶¹

⁵⁰ Such acceptance being in response to United Nations Security Council Resolution 686 (2 March 1991), paragraphs 3 and 7.

⁵¹ United Nations Security Council Resolution 794 (3 December 1992), perambulatory paragraphs.

⁵² As recognised in the report of the United Nations Secretary-General in his report to the United Nations Security Council of 29 November 1992 (S/24868) and within Resolution 794 (paragraph 8).

⁵³ United Nations Security Council Resolution 794, paragraph 10.

⁵⁴ United Nations Security Council Resolutions 781 (9 October 1992) and 786 (10 November 1992).

⁵⁵ United Nations Security Council Resolution 816 (31 March 1993), paragraph 4.

⁵⁶ United Nations Security Council Resolutions 819 (16 April 1993) and 824 (6 May 1993).

⁵⁷ United Nations Security Council Resolution 836 (4 June 1993), paragraph 5.

⁵⁸ Resolution 836, paragraph 9.

⁵⁹ The General Framework Agreement for Peace in Bosnia and Herzegovina, signed at the Paris Peace Conference on 14 December 1995 (S/1995/999).

⁶⁰ United Nations Security Council Resolution 1031 (15 December 1995), paragraph 14.

⁶¹ Ibid, paras 15 to 17.

Rwanda, 1994

Following a failed attempt by the United Nations Assistance Mission in Rwanda (UNAMIR) to establish a meaningful cease-fire agreement in Kigali and outlying areas of Rwanda,⁶² the Security Council authorised the establishment of a multinational force in Rwanda to maintain a presence there until an expanded UNAMIR was deployed.⁶³ Under Resolution 929 of 22 June 1994, the United Nations Security Council authorised the multinational force to contribute to the security and protection of persons at risk in Rwanda, using “all necessary means”.⁶⁴

Haiti, 1994

In July 1993, the Governors Island Agreement was signed between the President of the Republic of Haiti and the Commander-in-Chief of the Armed Forces of Haiti, under which the United Nations was requested to provide assistance for modernising the armed forces of Haiti and establishing a new police force.⁶⁵ As a result, the United Nations dispatched the UN Mission in Haiti (UNMIH).⁶⁶ The Mission, however, encountered obstruction from the Haitian military and were not even able to land on the island. The Security Council in due course determined that the regime in Haiti was an illegal de facto regime and that it had failed to comply with the Governors Island Agreement and was in breach of its obligations under the relevant United Nations Security Council Resolutions.⁶⁷ In July 1994 it authorised the establishment of a multinational force:⁶⁸

...to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and establish and maintain a secure environment...

East Timor, 1999

In the wake of pro-Indonesian riots following the East Timorese vote in favour of independence, and the widespread massacres of East Timorese people, the United Nations established the United Nations Transitional Authority in East Timor (UNTAET) and authorised UNTAET to take all necessary measures to fulfil its mandate.⁶⁹

Summary

By way of summary, the Security Council has made the following express delegations of authority since 1950:

1. *North Korea, 1950*, in response to a breach of the peace by North Korea’s military invasion of the Republic of Korea, an authorisation was made to furnish “such assistance ... as may be necessary”.
2. *Rhodesia, 1966*, in the implementation of trade sanctions, the United Kingdom was called upon to act “by the use of force if necessary”.
3. *Iraq, 1990-1991*, to implement trade sanctions and in response to the invasion of Kuwait, members were authorised to use “such measures ... as may be necessary” (Resolution 665) and “all necessary means” (Resolution 678).
4. *Somalia, 1992*, “all necessary means” were authorised to assist the delivery of humanitarian aid.

⁶² As recommended by the United Nations Secretary-General in his report to the Security Council of 20 April 1994 (S/1994/470) and authorised under United Nations Security Council Resolution 912 (21 April 1994), paragraph 8(c).

⁶³ As recommended by the Permanent Representative of France to the United Nations, Mr Jean-Bernard Merinee (S/1994/734), and accepted by the Security Council in its Resolution 929 (22 June 1994), paragraph 2.

⁶⁴ United Nations Security Council Resolution 929 (22 June 1994), paragraph 3.

⁶⁵ Governors Island Agreement, 3 July 1993, S/26063, paragraph 5.

⁶⁶ United Nations Security Council Resolution 867 (23 September 1993).

⁶⁷ United Nations Security Council Resolution 940 (31 July 1994), paragraph 3.

⁶⁸ Resolution 940, paragraph 4.

⁶⁹ United Nations Security Council Resolution 1272 (25 October 1999), paragraph 4.

5. *Republic of Bosnia and Herzegovina, 1993-1995*, “all necessary measures” were authorised to enforce a no-fly zone; “necessary measures, including the use of force” were permitted in response to the bombing of safe havens; and “all necessary measures” to enforce the 1995 peace agreement.
6. *Rwanda, 1994*, “all necessary means” were authorised to assist humanitarian relief.
7. *Haiti, 1994*, in the restoration of the democratic government, the multinational force was authorised to use “all necessary means”.
8. *East Timor, 1999*, UNTAET was authorised to use “all necessary measures” to implement its peacekeeping mandate.

A clear pattern can be seen through the Resolutions providing United Nations members with the authority to use force. The early Resolutions, pertaining to North Korea and Southern Rhodesia, authorised assistance or the use of force if “necessary”. In 1990 and 1991 in Iraq, the word “necessary” was repeated and the language “measures” (665) and “means” (678) introduced. From that point on, all Resolutions in which United Nations members have been expressly authorised to use force have sanctioned “all necessary...” “...means” or “...measures”. Having regard to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, this fact is significant:

SECTION 3: INTERPRETATION OF TREATIES

Article 31 General Rules of Interpretation

3. There shall be taken into account, together with the context:

b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

The issue that arises is whether the practice of the United Nations Security Council, in using the term “all necessary means/measures” in authorising the use of force under Chapter VII of the United Nations Charter, is a practice in the application of the Charter that establishes the agreement of the parties regarding the interpretation of Resolutions made under Chapter VII. Given the consistency in the manner by which the Security Council has expressed authorisations to use force, there is a strong argument in favour of such a view. There is one further matter to consider, however, concerning instances where the Council has clearly adopted provisions within its Resolutions with an implicit authority to use force.

Implied authority to use force

Two such instances illustrate this point.

Albania, 1997

In early 1997, the United Nations authorised the establishment of a multinational peacekeeping force in Albania and:⁷⁰

... further authorizes these Member States to ensure the security and freedom of movement of the personnel of the said multinational protection force;

In order to facilitate the delivery of humanitarian aid, the Security Council later gave an identical authority under Resolution 1114.⁷¹

⁷⁰ United Nations Security Council Resolution 1101 (28 March 1997), paragraph 4.

⁷¹ United Nations Security Council Resolution 1114 (19 June 1997), paragraph 4.

Central African Republic, 1997

In response to militia action in the Central African Republic, the Inter-African Mission to Monitor the Implementation of the Bangui Agreements (MISAB) was created. Under Resolutions 1125 and 1136, the Security Council authorised participating states to ensure the security and freedom of movement of their personnel”.⁷²

Nowhere in these Resolutions is there any expression permitting the use of force or the use of necessary or reasonable means or measures to achieve certain ends. However, the common feature of the Resolutions is that there is a clear authority to member states to ensure the security and freedom of movement of their personnel, in the execution of a mandate provided to them by the Security Council. The Resolutions authorise members to do something within the territory of another state, from which it can be implied that force may be necessary to protect their own nationals in the execution of that task. The authority to use force in these contexts is ancillary to the United Nations sanctioned mandates.

Summary and analysis

It is proposed, against the background of past Security Council authorisations and Article 31(3)(b) of the Vienna Convention, that a member of the United Nations may be authorised under Chapter VII of the Charter to use force within another state in two situations only. The first is where authorised through the expression “all necessary means/measures”. The second is where a member is provided with a mandate to conduct operations within another state, and it is implicit from the terms of the mandate that the member is able to use force for the protection of its personnel.

Neither of those situations apply to Resolution 1441. The Resolution does not provide any member of the United Nations, or any coalition of members, with a mandate to conduct operations within Iraq from which it might be implied that the use of force was necessary. Nor does the wording of paragraph 13 permit the use of “all necessary means/measures”. Rather it states that the United Nations Security Council:

Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations; [emphasis added]

Of significant relevance to this is the fact that the first draft of Resolution 1441, prepared by the Bush Administration in consultation with the United Kingdom, contained an authority to use “all necessary measures” in the absence of compliance. It was as a result of discussions within the Security Council concerning the draft Resolution that the expression was removed and replaced with a warning of “serious consequences”

One final potential argument should be addressed: that an authority to use force arose not just from the expression “serious consequences”, but from the combined effect of that expression with the provision in paragraph 2 of Resolution 1441 (that Iraq was being provided with “one final opportunity” to comply with its disarmament obligations under Resolution 687). Why else would the Security Council express that Iraq had one final opportunity to comply, if it did not envisage the use of force would follow within the “serious consequences” referred to?

At first blush, that position might hold some appeal. Again, however, it can be dispelled by looking at the prior practice of the Security Council. In Resolution 678, to which Lord Goldsmith referred, Iraq was also given “one final opportunity” to comply with demands of the Security Council. That expression was immediately followed, however, by a time limitation for the exercise of that opportunity and with the express provision that a failure to exercise that opportunity within the time stated would result in the use of all necessary means:

⁷² United Nations Security Council Resolution 1125 (6 August 1997), paragraph 3, and Resolution 1136 (6 November 1997), paragraph 4.

Authorises Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

The time limitation and authorisation to use all necessary means distinguish Resolution 678 from 1441. Finally, regard should be had to the original versus final forms of Resolution 1441. The draft presented by the Bush and Blair administrations contained the magic phrase “all necessary measures”, then replaced by the final wording in paragraph 13. When John Negroponte, US Ambassador to the United Nations, cast the United States’ vote in favour of the Resolution on 8 November 2002, he therefore stated.⁷³

As we have said on numerous occasions to Council members, this Resolution contains no “hidden triggers” and no “automaticity” with respect to the use of force. If there is a further Iraqi breach, reported to the Council by UNMOVIC, the IAEA, or a member state, the matter will return to the Council for discussions as required in paragraph 12.

Conclusion

The principal basis upon which intervention in Iraq has been based is an authority arising out of the combined effect of Resolutions 678, 687 and 1441. Such a position, however, is fundamentally flawed. It has been shown, upon closer analysis, that Resolution 678 had no bearing on the conflict at hand since it related exclusively to the military intervention by Iraq against Kuwait. Similarly, while Resolution 687 is relevant to the extent that it imposed various obligations upon Iraq regarding weapons of mass destruction, it does not contain any authorisation to use force in enforcement of those obligations. The sole authority to use force within that Resolution related to the cease-fire agreement between Iraq and Kuwait, following Iraq’s repulsion from Kuwait in 1991. Resolution 1441 required Iraq to implement its obligations under Resolution 687 regarding weapons of mass destructions. It did not, however, authorise the use of all necessary means or measures to enforce its provisions, nor did it issue a mandate to United Nations members from which such authority might be implied.

Regardless of one’s views on the merits or otherwise of the removal of the Hussein Regime in Iraq, the use of force against Iraq was unjustifiable at international law. The United Nations Security Council did not authorise intervention and, as such, the unilateral use of force by the United States and others constituted an illegal act of aggression. Whereas coalition forces have purported to act in the interest of maintaining international peace and security, it is they that have breached the peace.

⁷³ John D. Negroponte, US Ambassador to the UN, as quoted in the LATimes.com at URL <<http://www.latimes.com/news/nationworld/nation/la-fg-uniraq8nov08.story>>. The Ambassador continued: “The Resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And one way or another, Mr. President, Iraq will be disarmed. If the Security Council fails to act decisively in the event of a further Iraqi violation, this Resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN Resolutions and protect world peace and security.” Paragraph 12 of Resolution 1441 provides: “12. *Decides* to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council Resolutions in order to secure international peace and security.”

Security Council Resolution 1325 (2000): Changing the Gender Narratives of War or Acquiescing to them?

Dianne Otto *

On International Women's Day in 2000, Ambassador Chowdury of Bangladesh, then President of the Security Council, issued a Presidential Statement saying that "[t]he Security Council recognize that peace is inextricably linked with equality between women and men".¹ This statement had an immediate effect, which was to mobilise a coalition of women's peace groups and international human rights organisations² to work towards the goal of convincing the Security Council to hold an Open Session on the issue of women, peace and security. The Women's International League for Peace and Freedom (WILPF) took the lead role in the NGO Working Group, in striking contrast to the scepticism of many of its members during the 1930s about the Security Council's predecessor, the Council of the League of Nations, who dismissed it as "an imperialist corporation of the Great Powers".³

Given the women's peace movement's long history of distrust of mainstream military and diplomatic institutions, which has meant it has worked largely from the outside or the margins of international institutions, Ambassador Chowdury's Statement, and then the NGO's efforts to engage with the Security Council, struck me as remarkable. Even more surprising, these efforts bore fruit, as evidenced by the unanimous adoption, on 31 October 2000, of Security Council Resolution 1325 on Women, Peace and Security.⁴ The Resolution calls for, *inter alia*, the increased participation of women in decision-making relating to the prevention, management, and resolution of conflict.⁵ Since its adoption, the Resolution has been the focus of continuing engagement of women's NGOs with the Security Council and it has been used by many local and transnational women's groups to make the case for their inclusion in peace negotiations and post-conflict decision-making – in Kosovo, Afghanistan, Sierra Leone and most recently Iraq.⁶

The adoption of Resolution 1325 and the activity that it has generated suggest many lines of inquiry, but, for present purposes, my question is whether any increased participation of women in peace-making and peace-building that results from the Resolution will help to destabilise the gender stereotypes that have played such a central role in maintaining the secondary status of women which, as Ambassador Chowdury acknowledged, is "inextricably linked" to the legitimation and perpetuation of war. The answer to this question has important implications for the ongoing efforts to achieve world peace and women's equality.

It is probably too early in the life of the Resolution to really make an assessment of whether the Resolution will challenge militaristic gender stereotypes. Needless to say, there has been considerable resistance to its full implementation. But at the same time, perhaps fueled by this resistance, women's peace groups have eagerly embraced the Resolution. Largely through their efforts, the Resolution has

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¹ "Peace Inextricably Linked with Equality Between Women and Men Says Security Council, in International Women's Day Statement," Press Release SC/6816, 8 March 2000.

² Five non-governmental organisations were initially involved in this lobbying: the Women's International League for Peace and Freedom (WILPF); International Alert; Amnesty International; Women's Commission for Refugee Women and Children, and the Hague Appeal for Peace.

³ Leila Rupp, *Worlds of Women: The Making of an International Women's Movement* (Princeton University Press, Princeton NJ, 1997) 213. Rupp notes that the membership of WILPF was divided on the issue of support for the League of Nations and had never managed to resolve the question.

⁴ "Women, Peace and Security," SC Res. 1325, UN Doc. S/RES/1325 (31 October 2000).

⁵ *Ibid* para.1.

⁶ "Women and Men Working in Equal Partnership for the Future of Iraq: An Advocacy and Action Plan," *1325 PeaceWomen E-News*, vol.22, 18 April 2003, 3. The NGO Working Group web site lists many other initiatives to address women's active participation in post-conflict reconstruction in Iraq. See, <http://www.peacewomen.org/resources/Initiativeslist.html>.

opened up a new space for the discussion of gender issues in the context of armed conflict and in the search for peaceful solutions.

Backdrop to the adoption of Resolution 1325

Resolution 1325 is one of a string of thematic resolutions that the Security Council has adopted in the context of the rapidly expanding interpretation of its powers that has occurred in the post Cold War period.⁷ Other resolutions have highlighted the problems of HIV-AIDS,⁸ children⁹ and civilians¹⁰ in the context of armed conflict. They reflect efforts by the Security Council to legitimate the social policy dimensions of its expanded agenda and to humanise its public face. These efforts are, I believe, a response to the criticisms of the Security Council that were mounting during the 1990s of, for example, its secretive methods of work;¹¹ its lack of democracy; the absence of institutional checks on its powers;¹² as well as its intrusion into areas of responsibility of other UN organs, associated more with governance than policing.¹³ The Security Council has also adopted new procedures and practices designed to increase its openness and expand its consultative reach, of which the phenomenon of the Open Session, like that held on women, peace and security, is one.

Apart from Resolution 1325, it is instructive to note that the other thematic resolutions only made reference to women as a “vulnerable group” in need of protection. These references resulted from concerted efforts by women over many years to have war-time sexual abuse openly acknowledged and addressed by the international community, including by way of criminal punishment, and are therefore an immensely important achievement. However, the lack of other representations of women, as community leaders and promoters of peace for example, indicated the gender conservatism of the Security Council’s new agendas. Along with the small number of references to women in other Security Council resolutions, all of which depict women exclusively as victims of sexual violence,¹⁴ the possibility that the Security Council might also recognise women’s agency in their own protection and in the resolution of armed conflicts, would seem to have been foreclosed, despite the tireless advocacy of women’s peace movement in this regard as well.

Indeed, when the NGO Working Group initially approached Security Council members about the Open Session idea, the majority were resistant.¹⁵ The efforts of the NGOs were aided by another of the Security Council’s new practices – that of conducting field visits to areas of conflict - which the NGO Working Group found had “sensitized” Security Council members to the profound realities of the

⁷ Security Council Summit Meeting at level of Heads of State, adopted a Statement, UN Doc. S/23500 (31 January 1992), which declared that the absence of military conflict does not of itself ensure international peace and security, and that problems of an economic, social or ecological kind may also become threats to international peace and security.

⁸ SC Res. 1308, UN Doc. S/RES/1308 (July 2000).

⁹ SC Res. 1261, UN Doc. S/RES/1261 (25 August 1999); SC Res. 1314, UN Doc. S/RES/1314 (11 August 2000); and SC Res. 1379, UN Doc. S/RES/1379 (2001). Each builds on the previous resolution(s) addressing more actors and issues.

¹⁰ SC Res. 1265, UN Doc. S/RES/1265 (17 September 1999); and SC Res. 1296, UN Doc. S/RES/1296 (19 April 2000).

¹¹ Michael Reisman, “The Security Council’s First Fifty Years” (1995) 89 *American Journal of International Law* 506, 518-519, observes that in the early 1990s, the Security Council changed its earlier practice of meeting in public for most purposes, to meeting publicly for the limited purposes of adopting resolutions already agreed upon or providing an opportunity for Presidential Statements, which reflect the consensus reached in closed sessions.

¹² *Questions of the Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v UK; Libya v US), ICJ, 1992, 3. In this case the International Court of Justice declined to decide whether, and in what ways, it might be competent to review Security Council actions taken under Chapter VII.

¹³ Martti Koskenniemi, “The Police in the Temple: Order, Justice and the UN: A Dialectical View,” (1995) 6 *European Journal of International Law* 325.

¹⁴ SC Res. 827, UN Doc. S/RES/827 (1993), expressing concern about ‘massive, organized and systematic detention and rape of women’ in the former Yugoslavia.

¹⁵ Interview with Felicity Hill, former Executive Officer of WILPF, at the time of the interview, working for UNIFEM, New York, 3 May 2002.

everyday civilian experience of armed conflict.¹⁶ Their plan was also assisted by the timely release of the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operation, on 31 May 2000.¹⁷ The Declaration observed that, despite the rhetoric, women had not been given a full role in peacekeeping operations and that “the principle of gender equality must permeate the entire [peacekeeping] mission”.¹⁸ The Plan of Action recommended, in great detail, specific actions to be taken to ensure gender equality at all levels and stages, and in all aspects of peace missions.¹⁹ In relation to the Security Council, it recommended that “resolutions setting up and extending peace support operations should incorporate a specific mandate on gender mainstreaming”,²⁰ and that that a gender affairs unit “should be a standard component of all [peacekeeping] missions”.²¹

The NGO Working Group was also aided by a lucky coincidence of supportive members “inside” the Security Council who formed a critical mass.²² In addition to Ambassador Chowdhury, the representatives from Jamaican, Namibia, Canada, the United Kingdom²³ and the Netherlands were supportive from the start.²⁴

The Open Session of the Security Council, which eventually took place on 24 October, was an unparalleled event at which over forty official statements were made in support of a resolution that would promote the incorporation of a gender perspective into all the work of the Security Council. A striking feature of almost every statement was the emphasis on women’s participation in peace negotiations, in addition to recognising women’s suffering as victims of war, including the appalling levels of sexual abuse that accompany armed conflict. Canada’s statement put it thus:²⁵

We must also ensure that our focus is not restricted to issues of the victimization of women – vital as it is to grapple with them. We must also address ourselves to the positive contribution that women ... can and do make to conflict prevention and post-conflict peacebuilding.

The Namibian statement went even further by suggesting that the “mindset, especially of men, must change and give way to new thinking and a new beginning for the UN in the field of conflict resolution and peacekeeping”.²⁶ Also unparalleled was the applause from the spectators in the gallery, noted by the US Ambassador Nancy Soderberg as the first time she had heard applause in the chamber of the Security Council.²⁷

Resolution 1325, which was unanimously adopted a week later, bears many marks of the international women’s peace movement. It would seem that feminist activism had indeed moved from the margins of military diplomacy to its inner sanctum.

¹⁶ Ibid 6.

¹⁷ GA, 55th Sess., A/55/138, S/2000/693. The Windhoek Declaration and Namibia Plan of Action resulted from a seminar organised by the Lessons Learned Unit of the Department of Peacekeeping Operations of the UN Secretariat, hosted by the government of Namibia, 29-31 May 2000.

¹⁸ Windhoek Declaration, 31 May 2000, paras 2 and 3.

¹⁹ Namibia Plan of Action, 31 May 2000, proposes that the “equal access and participation” of women should be ensured “at all levels and stages of the peace process” (point 1).

²⁰ Ibid point 2.

²¹ Ibid point 4.

²² Hill interview, above n 15, 3.

²³ Canada and the United Kingdom had jointly financed the production of training materials on gender for military and civilian personnel engaged in peacekeeping, in collaboration with the Lester Pearson Peacekeeping Training Centre. The materials are available on line at <http://www.gendrandpeacekeeping.org>.

²⁴ Hill interview, above n 15.

²⁵ Statement by Ambassador Paul Heinbecker, Permanent Representative of Canada to the United Nations, to the United Nations Security Council on Women, Peace and Security, New York, October 24, 2000.

²⁶ Statement by Honourable Dr Theo-Ben Girirab, MP, Minister for Foreign Affairs, Information and Broadcasting, during the Security Council Open Debate on Women, Peace and Security, United Nations, New York, 24 October 2000.

²⁷ Statement by US Ambassador Nancy Soderberg, US Special Representative to the United Nations for Political Affairs, in the Security Council, on the issue of Women and Peace and Security, October 24, 2000 (revised – as delivered).

What does Resolution 1325 contain and what effects has it had?

There can be no doubt that, since its adoption in October 2000, Resolution 1325 has provided a highly productive focus for women's peace advocates, both within the UN system and outside it, in the settlement of disputes and post-conflict reconstruction.²⁸ The NGO Working Group has worked hard to publicise the Resolution, distributing thousands of copies in pamphlet form and organising many consultations and workshops to promote its use. A highly informative web site has been established²⁹ and a fortnightly newsletter has been produced since May 2002,³⁰ which keep people abreast of the activity associated with the Resolution and foster ongoing transnational and local activism. Particularly striking has been the eagerness of local women's peace groups, in the midst of conflicts and post-conflict reconstruction, to embrace the Resolution and the possibilities it offers. In addition to those already mentioned, it has provided leverage for women's groups in Angola, Burundi, the Democratic Republic of the Congo, Liberia, Nepal, Sierra Leone, the Southern Caucasus (Armenia, Azerbaijan and Georgia), Somalia and many other places, to assert the importance of their participation in peace processes, though not always with success. I do not think it is an overstatement to say that, in the hands of women's groups, what started its life as a mere Security Council Resolution has metamorphosed into a kind of "feminist manifesto" – an astounding achievement in anyone's estimation and a hopeful development in the struggle for peace.

Within the UN, the Resolution has been honoured and reaffirmed in many ways, including follow-up Security Council Presidential Statements.³¹ It has been referred to in other Security Council resolutions³² and a further Open Session on Conflict, Peacekeeping and Gender was held on 25 July 2002.³³ Gender Advisers were appointed in UN Peacekeeping Missions in the Democratic Republic of Congo (MONUC),³⁴ Sierra Leone and East Timor (UNTAET). An Inter-Agency Task Force on Women, Peace and Security was established to promote the integration of gender perspectives in all the peace and security work of the UN and an intergovernmental group, called the Friends of Women, Peace and Security, came together to support implementation of the Resolution.³⁵

In addition, two important studies have been produced as a result of the Resolution. The first, the Secretary-General's Study on Women, Peace and Security, reviews the activities of the UN and its specialised agencies, funds and programs in response to armed conflict in light of Resolution 1325.³⁶ The second, an independent study commissioned by UNIFEM, examines the impact of armed conflict on women and the contributions women have made to peace-building.³⁷ Together the studies provide an important store of information upon which to base further actions and initiatives related to

²⁸ See, NGO Working Group, *Resolution 1325: One Year On*, October 2001, <http://www.peacewomen.org/un/UN1325/since1325.html>, and NGO Working Group, *Resolution 1325: Two Years On*, October 31, 2002, <http://www.peacewomen.org/un/UN1325/NGOreport.html>.

²⁹ See <http://www.peacewomen.org>.

³⁰ See *1325 PeaceWomen E-News*, <http://www.peacewomen.org/news/1325News/1325ENewsindex.html>. As of 27 May 2003, the newsletter was available on-line in 20 languages with plans to include a further 6 languages underway.

³¹ Statement by the President of the Security Council, "Security Council Reaffirms Support for Enhanced Women's Role in Conflict Prevention, Resolution," S/PRST/2001/31, 31 October 2001; Statement by the President of the Security Council, 31 October 2002, S/PRST/2002/32.

³² SC Res. 1379, UN Doc. S/RES/1379 (2001) (see, also, SC Res. 1265 (1999) and SC Res. 1296 (2000), above n 10; SC Res. 1324, UN Doc. S/RES/1324 (2000); SC Res. 1445, UN Doc. S/RES/1445 (2002); draft resolution on Iraq, R556 (2003)).

³³ For statements presented at the Open Session, see:

<http://www.peacewomen.org/un/sc/genderandpeacekeeping2002/genderconflictpeacekeeping.html>.

³⁴ SC Res 1445 (2002) re: MONUC, made 2 references to gender concerns, points 12 and 19

³⁵ "Friends of Women, Peace and Security," *1325 PeaceWomen E-News*, vol.3, 28 June 2002, p.4.

³⁶ *Women, Peace and Security*, Study submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), New York: United Nations, 2002.

³⁷ Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building*, New York: United Nations Development Fund for Women, 2002.

Resolution 1325, which, as the authors of the UNIFEM study observe, has given a new “political legitimacy” to the long history of women’s peace activism.³⁸

Indeed, the Resolution strongly endorses one of the key demands of the women’s peace movement, by urging, as its starting point, the need for increased representation and participation of women in decision-making related to the prevention, management and resolution of disputes.³⁹ In taking this stand, the Resolution attributes political agency to women in the realm of military affairs, albeit an agency that was called for as long ago as 1931 by a resolution of the League of Nations⁴⁰ and has been reiterated since then in numerous other soft law instruments. In its representation of women’s agency, the Resolution finally marks a break in the long tradition in the Security Council of casting women exclusively as a vulnerable group, or as victims of sexual violence, in the context of armed conflict. The Resolution also expresses the willingness of the Security Council to ensure that its own missions consult with local and international women’s groups,⁴¹ and urges that peace agreements support “local women’s peace initiatives and indigenous processes for conflict resolution”,⁴² which, if implemented, would open new spaces for promoting alternative approaches to dispute resolution at the local level. However, although a reference to *equal* participation does appear in its preamble,⁴³ the text of the Resolution does not urge the equal representation of women, unlike the Namibia Plan of Action. It is also silent on the question of women’s involvement in the Security Council itself. So, while the call for women’s participation is at the fore of the Resolution, it is a somewhat circumscribed call and is not expressed in mandatory language.

The Resolution also responds to the anti-violence agenda of the women’s peace movement by recognising that civilian women and children have increasingly become the targets of armed conflict and form the “vast majority” of those who bear its brunt.⁴⁴ The text acknowledges the recent developments in international humanitarian law that have accepted that genocide, crimes against humanity and war crimes include crimes involving sexual violence and other forms of gendered violence, and urges the exclusion of these crimes from amnesty agreements⁴⁵ (In fact, it is the first Security Council Resolution that makes any reference to amnesties). It also calls for special measures to be taken to protect women and girls from gender-based violence during armed conflict.⁴⁶ These statements by the Security Council will help to ensure that gendered crimes are never again swept under the carpet, although the recent findings of the UNIFEM study, that “the militarism of society breeds new levels of violence [against women]” and that “impunity for these crimes becomes endemic”,⁴⁷ indicates that persistent and sustained efforts will be required for the foreseeable future. The Security Council also responds to calls that it should be attentive to the gender-differentiated consequences of its own decisions⁴⁸ by asserting, in the Resolution, its “readiness” to consider the potential impact on the civilian population, especially women and girls, of measures short of the use of force, taken under Article 41.⁴⁹ Unfortunately, it was apparently not “ready” to extend such considerations to its use of forceful measures taken under Article 42.

³⁸ Ibid 3.

³⁹ SC Res. 1325, above n 4, paras 1-4.

⁴⁰ The “Spanish Resolution,” so-called because it was introduced by the Spanish delegation, was adopted by the 12th Assembly of the League of Nations on 24 September 1931. It read: “The Assembly, convinced of the great value of the contribution of women to the work of peace and the good understanding between the nations, which is the principle aim of the League of Nations, requests the Council to examine the possibility of women cooperating more fully in the work of the League.”

⁴¹ SC Res. 1325, above n 4, para 15.

⁴² Ibid para 8(b).

⁴³ Ibid preamble para 4, expresses “the importance of their [women’s] equal participation and full involvement”.

⁴⁴ Ibid para 4.

⁴⁵ Ibid para 11.

⁴⁶ Ibid para 10.

⁴⁷ Rehn and Sirleaf, above n 37, vii.

⁴⁸ Anne Orford, “The Politics of Collective Security” (1996) 17 *Michigan Journal of International Law* 373, 385, calls for building into decision-making processes consideration of the different effects that the decision to impose economic sanctions or to authorise the use of force may have on women. She also urges that the consequences of those decisions for women should inform the assessment of their effectiveness or success.

⁴⁹ SC Res. 1325, above n 4, para 14.

Although the adoption of Resolution 1325 signifies an important advance for the international women's peace movement, when measured against the movement's aspirations it is wanting in many respects. The most glaring problem is its failure to make any reference to disarmament,⁵⁰ which has been of "essential importance" to women's peace activists. Even the Security Council's own Charter responsibilities, under Article 26, to establish systems to regulate arms, do not rate a mention. This compares most unfavorably with the commitments made in the Beijing PFA, wherein states identified reducing excessive military expenditure and controlling the availability of armaments as a strategic objective.⁵¹ The UNIFEM study picks up on this point and urges the Security Council to implement Article 26.⁵² Nor does the Resolution make any mention of developing non-violent forms of conflict resolution or of fostering a culture of peace, despite the resounding endorsement of such strategies in the Beijing PFA.⁵³ Yet the goals of disarmament and the peaceful resolution of disputes are of key importance to changing the gender discourse of militarism. As the Under-Secretary for the UN Department for Disarmament Affairs has observed: "[w]hen women move forward, and when disarmament moves forward, the world moves forward. Unfortunately, the same applies in reverse: setbacks in these areas impose costs for all."⁵⁴

Although, as a result of Resolution 1325, some progress has been made towards involving women directly in processes of conflict resolution and peace-building, each instance has taken a massive international and local effort to achieve and has often been later eroded. For example, with respect to Afghanistan, which was the first major testing ground for the Resolution, it took a huge international effort to have even two women included in the Bonn Conference that followed the defeat of the Taliban in 2001, and the reconstruction efforts which have since taken place have largely resulted in re-entrenching warlords.⁵⁵ Women in Afghanistan are still waiting for the participation encouraged by Resolution 1325 to eventuate and are "neither secure nor safe".⁵⁶

Kosovo provides another example. A memo, from the Kosovo Women's Network to the Security Council delegation that visited Kosovo in December 2002, details women's across-the-board exclusion from post-conflict decision-making, despite the many formal commitments that have been made to involve them.⁵⁷ The memo also makes reference to the failure of UNMIK to arrange for an earlier Security Council delegation to meet with women's groups in 2001. This earlier situation had been addressed only because Ambassador Chowdury, the delegation head, took action himself and met with the women at 10.30 one night in his hotel room,⁵⁸ which resulted in a Presidential Statement of support for the Kosovo women's efforts to foster peace.⁵⁹

There are countless further examples of the formal commitments, made as a result of Resolution 1325, not translating into action that ensures a decision-making role for women.⁶⁰ Yet research is showing that women everywhere are "taking risks" in their local communities to promote alternative methods of building peace and organising security.⁶¹ That women are *already* substantially involved in peace-making and peace-building, makes the continuing failure to include them in official decision-making

⁵⁰ There is actually one reference to disarmament, but it is in the limited context of the post-conflict reintegration of ex-combatants. See SC Res. 1325, above n 4, para 13.

⁵¹ Beijing Platform for Action, Strategic Objective E.2. See, further, para 143(f)(i), where governments undertake to "work actively towards general and complete disarmament under strict and effective international control".

⁵² Rehn and Sirleaf, above n 37, 121.

⁵³ Beijing PFA, above n 51.

⁵⁴ Department for Disarmament Affairs, *Gender Mainstreaming Action Plan*, New York: United Nations, April 2003, 1, quoting comments by Under Secretary-General Jayantha Dhanapala on 8 November 2002. The plan "sets out the next phase in DDA's ongoing effort to explore the overlap, relevance and potential synergy between efforts to promote disarmament and efforts to promote gender equality".

⁵⁵ Lesley Abdela, "No Place for a Woman," *The London Times*, Op-Ed, 29 April 2003.

⁵⁶ Rehn and Sirleaf, above n 37, 2.

⁵⁷ *1325 PeaceWomen E-News*, vol.16, 17 January 2003, 4-5.

⁵⁸ "NGO Working Group on Women, Peace and Security," *PeaceWomen E-News*, vol.2, 14 June 2002, 4.

⁵⁹ Presidential Press Statement of support for efforts of Kosovo women SC/7007.

⁶⁰ Rehn and Sirleaf, above n 37, vii, report "the wholesale exclusion of women from peace processes," and at 84, that "[t]ime and time again women described the wonderful documents that had been created and signed – and the failure to implement most of what had been promised".

⁶¹ *Ibid* 2.

processes even more indefensible. Their exclusion may well have something to do with the fact that many of their efforts break the official patterns of peace resolution by working across factions, clans, ethnic divisions and national borders.⁶² An early example of the ability of women to find, in the commonality of their gender, a solidarity that allows them to work together across the lines of a conflict was the Hague Women's Congress, in 1915, which drew together women from all the belligerent and neutral states in their quest to bring about a quick resolution of World War I hostilities.⁶³ It could also be related to the regularity with which women's equality and disarmament are fundamental to many women's peace initiatives.⁶⁴

But, gender democratisation, even the equal representation of women, will not *necessarily* lead to decision-making that is any less militaristic, as the example of women's suffrage has shown.⁶⁵ Unless women's participation involves a change in substance as well as form, assumptions that privilege already dominant ideas will continue to shape the decision-making process.⁶⁶ As the NGO Working Group told the Security Council on the second anniversary of the adoption of the Resolution, "peacebuilding is a two-fold process requiring both the deconstruction of the structures of violence and construction of the structures of peace".⁶⁷ It might well be expected that women's participation in conflict resolution will improve women's political status, and therefore their security, in post-conflict societies.⁶⁸ But if women's contribution is understood narrowly as an extension of their "natural" maternal roles, their participation, while valued as a "domesticating" influence, will have done little, if anything, to challenge the structures of violence and the traditional framework of gender relations that supports those structures. Without building a new culture of peace, based on gender equality, it is likely that women will again be politically marginalised, once they have completed the task of re-domesticating men, and therefore face continued gender insecurity in the post-conflict situation.

Therefore, it is important to build on the scattered commitments to substantive gender equality that are made in the Resolution, in order to urge that women's participation involves a shift in the thinking, as well as in the membership, of decision-making bodies. This new thinking needs to reject the stereotypes that make war "men's business" and legitimate views that prioritise non-militaristic solutions to potential and actual conflicts, that are all too often marked as "feminine" and thereby dismissed. As Carol Cohn has observed, "it is the commitment and ability to develop, explore, rethink, and revalue those ways of thinking that get silenced and devalued that would make a difference".⁶⁹

Conclusion

There seems little doubt that the Resolution has opened a new space, which gives women peace activists more of a presence in Security Council affairs than ever before. It has created important leverage for grass roots women's peace movements, who have been completely excluded from official decision-making, as the numerous examples of imaginative use of the Resolution attest. While this new presence does not, by itself, present a challenge to the gender stereotypes of war, the Resolution does represent a shift that requires a more cordial relationship between the Security Council and women's peace movements. While this cordiality is not the same as a commitment to disarmament and women's

⁶² Ibid 75, referring to women in the Mano River countries, the Middle East, Latin America, East Timor, the Balkans and the Great Lakes region of Africa; further, at 78 they describe how Somali women chosen to represent the five traditional clans in peace negotiations, presented themselves as a "sixth clan" because they believed that peace would only come from cross-clan reconciliation.

⁶³ Anne Wiltsher, *Most Dangerous Women: Feminist Peace Campaigners of the Great War*, (Pandora, London, 1985).

⁶⁴ Rehn and Sirleaf, above n 37, 76-78.

⁶⁵ See, further, Cynthia Enloe, *The Morning After: Sexual Politics at the End of the Cold War*, (University of California Press, Berkeley, 1993) 23.

⁶⁶ Dianne Otto, "Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women," (1993) 3 *Transnational Law and Contemporary Problems* 372.

⁶⁷ "Statement of the NGO Working Group on Women, Peace and Security," presented to Security Council members at the Arria Formula on 23 October 2002, *1325 PeaceWomen E-News*, vol.12, 1 November 2002, 5.

⁶⁸ Orford, above n 48, 389.

⁶⁹ Carol Cohn, "War, Wimps, and Women: Talking Gender and Thinking War," in Miriam Cooke and Angela Woollacott (eds), *Gendering War Talk*, (Princeton University Press, Princeton NJ, 1993) 227, 239.

equality, the official importance that it attributes to gender issues is nevertheless a milestone in the long struggle towards a more peaceful world.

Yet, while the Resolution marks a major repositioning of the concerns of the women's peace movement, it falls a long way short of achieving their full inclusion. It is also possible that, by representing the Security Council as an ally in the cause of peace, the women's peace movement lends a new "gender legitimacy" to the Security Council's work at a time when its legitimacy is waning. But even partial inclusion, designed to serve institutional agendas, can be an opportunity. If it is correct that the legitimacy of the Security Council, albeit in a small way, has come to depend on the confidence of women's peace activists, then women have gained some new power in international relations. Exercising this power for progressive ends, as experience has already shown, is dependent on the involvement of independent women's movements, working in local communities as well as in transnational alliances.

My question as to whether the Resolution destabilises the gender stereotypes of militarism that play such a central role in maintaining the secondary status of women is, as I indicted, put too soon to answer. But the precious few references to women's equality and human rights in the Resolution fall well short of recognising that peace and women's equality are "inextricably linked". In the absence of commitments to disarmament and building a culture of peace, there is the risk that women are imagined only as playing expanded roles in the existing militarised world order. While this may create worthwhile short-term opportunities for women to assume non-traditional roles, unless accompanied by changes in traditional gender expectations, it is unlikely to advance gender equality in post-conflict societies or the cause of peace in the longer term.⁷⁰

Any thinking and action that aims to solve the problems of women and war is bound to raise intractable contradictions, given the symbiosis between militarism and women's inequality. While the need to act is so urgent, it is difficult to justify spending time on a critical analysis of the work of the NGO Working Group and others who have managed to utilise Resolution 1325 in ways that reduce the unthinkable sufferings that war brings to women and men. As I speak, the atrocities of war continue, and precisely because of their gendered impact, gender continues to be a powerful basis for organisation in the cause of peace. As yet, there is no end in sight, despite a century of the best efforts of women's peace activists. Therefore it is of the utmost importance to cast a critical eye over those efforts in the hope that new insights might help to bring the terrible consequences of war and of women's inequality to an end.

Recent events, which have seen the US, UK and other members of the "Coalition of the Willing" militarily intervene in Iraq without the authorisation of the Security Council, have seriously undermined its legitimacy and authority. Let us hope that the adoption of Resolution 1325 does not prove to be another example of women gaining entry to a previously male-dominated arena just as the power shifts elsewhere.

⁷⁰ Rehn and Sirleaf, above n 37, 2.

‘Do Rights Do Wrong?’: This and Other Awkward Questions

Fleur E. Johns*

Introduction

Glancing through a syllabus that I had prepared for an international human rights law course, one colleague quipped that a scheduled discussion on human rights in Australia would make for ‘a short class’. Much is made of Australia’s isolation as the only nation in the common law world without a comprehensive statutory or constitutional scheme for human rights protection. Yet, for all their paucity in Australian law, human rights appear to be everywhere in contemporary Australian legal consciousness. Two commentators – one a member of the bench and the other an academic – remarked recently that ‘the [Australian] judiciary [has become] more conscious of rights, and more willing to give effect to them where possible’.¹ The same commentators went on to urge ‘reconsideration’ of ‘the training and patterns of thought of [Australian] lawyers ... so that they may be better equipped to think, reason and argue in terms of rights’.²

This paper interrogates the sense, with which these and similar comments are inflected, that Australian law becomes (or might become) more ‘progressive’ as and when it affirmatively assimilates principles of international human rights law. This paper will consider the rise of human rights in Australian jurisprudence over the past three decades and briefly survey the constituencies on whose behalf human rights claims have been made before Australia’s highest court. In view of these observations, the following questions will be raised. What ‘work’ have human rights been doing in Australian jurisprudence? What concerns and aspirations are attendant upon human rights’ internalisation in Australian law? Should moves towards assimilation of human rights into Australian law be regarded as a ‘journey of enlightenment’, as a member of the Australian High Court has suggested?³ Should Australian lawyers, on this basis, continue to adhere to the hallowed path on which we are apparently journeying? Should we, instead, consider exploring other routes, other vehicles, perhaps even other maps?

Part II of this paper will provide a snapshot of the phenomenon alluded to above – the growing propensity for arguments invoking human rights to be aired and be given judicial consideration in Australian courts. The focus of this glimpse will be the High Court of Australia. Preliminary data will be presented as to the incidence of references to ‘human rights’ in judgments of High Court members. Parallel information will also be provided as to the constituents on whose behalf these arguments have been mounted.

Part III of this paper will turn to the political and scholarly debates surrounding this apparent rise in human rights consciousness within Australia. Without doing justice to the full range or substance of these debates (ably summarised elsewhere), I will present a typology of some of their recurrent features and points of dispute.⁴ This exercise will lead me to contend that debates surrounding the

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¹ John Doyle & Belinda Wells ‘How Far Can the Common Law Go Towards Protecting Human Rights?’ in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 17-74, 71-72.

² Ibid. See, also, George Williams, *A Bill of Rights for Australia* (2000) 11 (‘The current lack of protection for fundamental rights in Australia, combined with ignorance of the few rights that we do possess, presents a compelling case for reform’); Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) (‘the most urgent task is to devise an Australian system to protect human rights’).

³ Michael Kirby, ‘Whither Human Rights? An Address to the Graduating Class’ (2001) 5 *University of Western Sydney Law Review* 25, 41.

⁴ For a fulsome account of the status and influence of human rights in Australian constitutional law, see George Williams, *Human Rights under the Australian Constitution* (1999). On the bill of rights debate in

internalisation of human rights in Australian law are fixated to a considerable degree upon the fragility of that which we understand as “the law”, and the need to reinvigorate that law in accordance with pragmatic understandings of change.⁵ As such, these debates remain curiously distanced from the rhetorical and material impact of human rights claims in Australian courts, and the constituents whose hopes, troubles and interests are bound up with those claims.

In Part IV, attention will turn to some questions that often seem to go unasked in the debates outlined in the foregoing part. Has the internalisation of human rights to date resulted in any significant transformation in the range and type of claims tenable in Australian law? How, if at all, has the proliferation of rights-talk in Australian law shifted, opened up or otherwise affected judicial attitudes towards particular issues or claimants? Analysis of these questions will be developed by reference to a passing instance of international human rights law at its day-to-day work in Australian law – namely, the case of *Pearce v. The Queen*.⁶

Finally, Part V will reflect upon this paper’s review of the impact of rights-talk in Australian law. Far from evidencing the law’s progressive ‘enlightenment’, I argue, contemporary calls for human rights’ assimilation into Australian law may signal an attempt to *combat*, by rational pragmatic means, upsurges of violent and shameful memories associated with the work of Australian law. Appealing to legal rights and their promise of righteousness may be one way of grappling, obliquely, with an ever-present awareness of the role that the ‘rule of law’ has played in our history of dispossession, slaughter, exclusion and internment. One objective of rights-talk may be to alleviate a painful and perplexing sense of law’s historic (and continuing) culpability – a sense rekindled by the contemporary re-enactment of violence, racism and imprisonment in the deserts, on the coasts and in the outer suburbs of our collective consciousness. In view of these contentions, Part V will ask, should less emphasis be placed on alleviating guilt through rights’ legal and political incantation and more on confronting the memories, experiences and intuitions that are pricking that guilt?

Australia, see Haig Patapan, ‘Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia’ (1997) 21 *Melbourne University Law Review* 497; James Allan & Richard Cullen, ‘A Bill of Rights Odyssey for Australia: The Sirens are Calling’ (1997) 19 *University of Queensland Law Journal* 171; Michael Kirby, ‘The Bill of Rights Debate’ (1994) 29(12) *Australian Lawyer* 16; Philip Alston (ed), *Towards an Australian Bill of Rights* (1994); James Thomson, ‘An Australian Bill of Rights: Glorious Promises, Concealed Dangers’ (1994) 19 *Melbourne University Law Review* 1020; Hilary Charlesworth, ‘The Australian Reluctance About Rights’ (1993) 31 *Osgoode Hall Law Journal* 195; Brian Galligan, ‘Australia’s Rejection of a Bill of Rights’ (1990) 28 *Journal of Commonwealth and Comparative Politics* 344.

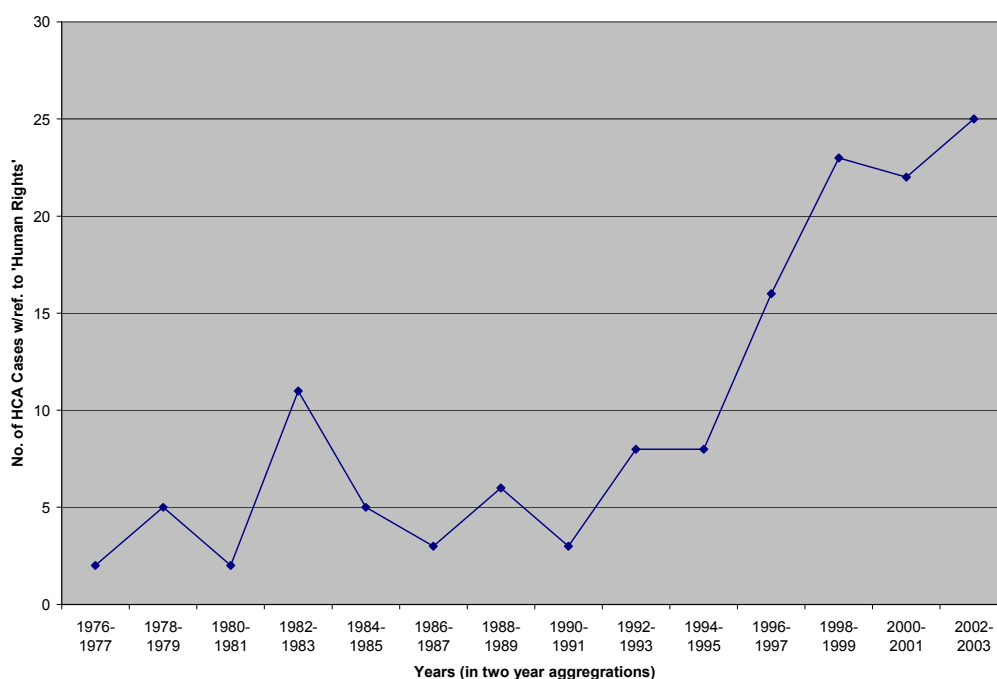
⁵ Pragmatism refers here to claims and assumptions derived from the philosophical movement that emerged in the last decades of the nineteenth century, gained precedence during the progressive era of the early part of the twentieth century, and experienced a renaissance in the late twentieth century. In brief, pragmatism advocates a cooperative search for truth (or possibilities for truth) grounded in problem situations, in lieu of radical doubt or the pursuit of certainty. Action and perception are rooted in unreflective beliefs – beliefs that encounter resistance and devastation in the world. The reconstruction of these beliefs in the face of worldly change depends, it is said, upon creative action against the established patterns of unreflective habit. Such creative action takes place in problem situations that demand resolution. Pragmatic truth can only be realised in these situations through a process of agreement or the success of an action, rather than through correspondence with a determined or determining reality. See, generally, George Herbert Mead, *Mind, Self and Society* (1934); Charles Sanders Peirce, *The Essential Peirce: Selected Philosophical Writings* (Nathan Houser & Christian Kloesel (eds) 1992); John Dewey, *On Experience, Nature, and Freedom: Representative Selections* (Richard J. Bernstein (ed) 1960); William James, *Pragmatism, in Focus* (Doris Olin (ed) 1992); Horace S. Thayer, *Meaning and Action: A Critical History of Pragmatism* (2nd ed, 1981). For a fascinating account of the friendships, antagonisms and characters threaded through the history of American pragmatism, see Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (2001). For an account of the contemporary influence of legal pragmatism, see Brian Z. Tamanaha, ‘Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction’, (1996) 41 *American Journal of Jurisprudence* 315; Steven D. Smith, ‘The Pursuit of Pragmatism’ (1990) 100 *Yale Law Journal* 409. For an insight into the pragmatic thinking of one member of the High Court of Australia, see M. H. McHugh, ‘The Law-making Function of the Judicial Process’ (Pts 1 & 2) (1988) 62 *Australian Law Journal* 15, 116. See, generally, Frank Carrigan, ‘A Blast From The Past: The Resurgence Of Legal Formalism’ (2003) 27 *Melbourne University Law Review* 163.

⁶ *Pearce v The Queen* [1998] HCA 57.

Rights on the rise

Rights are on the rise in Australian law. I will not, for the purpose of this paper, review the various ways in which international human rights law and more generalised notions of human rights have informed the development and interpretation of Australian law to date.⁷ I do, however, posit that jurisprudence emanating from the High Court of Australia over the past three decades has been replete with a progressively escalating number of references to the phrase ‘human rights’. To test this hypothesis, I undertook an electronic search of High Court cases for those in which the term ‘human rights’ appeared. This inquiry yielded 160 cases spanning the years 1949 to 2003.⁸ The results of this basic survey are summarised in the following graph. This graph indicates the number of High Court judgments including references to ‘human rights’ in each two-year period from 1976/1977 to 2002/2003. By virtue of the selection of this time frame, the 1949 case *R v Wallis* has been excluded from the graph.⁹ The graph also excludes 21 cases containing references to ‘human rights’ without any substantive discussion of principles or questions of human rights. These cases involved, for example, the citation of authority with the words ‘human rights’ in the title, such as *Brandy v Human Rights And Equal Opportunity Commission and Ors*.¹⁰

References to ‘human rights’ in judgements of the High Court of Australia, 1976-2003



Clearly, the 138 cases plotted on the graph above are not the *only* cases in which rights have animated the Australian judicial imagination at the High Court level, let alone at other levels.¹¹ Nevertheless,

⁷ Williams, above n 4. See, also, Geoffrey Kennett, ‘Individual Rights, the High Court and the Constitution’ (1994) 19 *Melbourne University Law Review* 581; Michael Kirby, ‘The Role of International Standards in Courts’ in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty* (1995) 82-93.

⁸ See Appendix.

⁹ *R v Wallis* (1949) 78 CLR 529.

¹⁰ *Brandy v Human Rights And Equal Opportunity Commission and Ors* (1995) 127 ALR 1.

¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 is an example of the High Court broaching the topic of ‘rights’ in Australian law at some length without explicit reference to the term ‘human rights’. Noteworthy examples of judicial discussion of human rights principles in other courts include *Nulyarimma v Thompson* (1999) 165 ALR 621; *Soulitopoulos v LaTrobe University Liberal Club* [2002] FCA 1316; *Wickham v Canberra District Rugby League Football Club Limited* [1998] ACTSC 95; *McBain v State of Victoria* [2000] FCA 1009. See, generally, Martin Flynn, *Human Rights in Australia: Treaties, Statutes and Cases* (2003).

these cases afford an indicative sample of the hopes, pleas and experiences that are being hitched to human rights in Australian law. The putative beneficiaries of each of the human rights claims made in these judgments from 1976 to 2003 may be categorised (in obtuse terms) as set forth in the following table. The cases yield a total of 141 categories of beneficiary, since in some cases a ‘human rights’ argument was postulated by more than one party to the case.

Putative beneficiaries of ‘human rights’ arguments considered in judgments of the High Court of Australia, 1976-2003

Criminal defendants/persons under investigation	37
Refugees/asylum-seekers/immigrants	27
Aboriginal people/groups/individual ATSIC officials	18
For-profit corporations (non-tax-related claims)	14
Children (in family law, paedophilia-sentencing cases, etc.)	9
Individual litigants alleging judicial bias etc.	7
Individual and corporate tax payers	6
Individuals defamed	5
Union members/non-members	3
Persons with HIV	2
Persons with intellectual or physical disabilities	2
Barristers/legal practitioners	2
Political activists (duck-hunting advocate; anti-nuclear protester)	2
Medical patients	2
Unmarried women	1
Married couples	1
Female employees	1
Individual property-owners	1
Aged persons	1
Total	141

This summary would seem to confirm two prevailing assumptions as to the impact that human rights may have in Australian law – assumptions expressed by such leading commentators as Professors Hilary Charlesworth and George Williams. The first of these relates to rights’ apparent facility to redress a ‘legal history ... littered with laws that [have] discriminated against particular groups’.¹² The second derives from rights’ supposed capacity to protect vulnerable or disadvantaged minority groups from domination perpetrated or tolerated by the democratic majority.¹³ These assumptions might be taken to be confirmed by the prominence in the foregoing table of recognised targets of discriminatory laws (aboriginal people and immigrants, for example). So too might one read the prominence of minority groups the isolation of which has tended to appease the fears and prejudices of the majority (such as criminal defendants or persons with HIV).

The mere fact that the graph featured above inclines upwards, and that the foregoing table contains many victims of historic and contemporary subordination, might be regarded as evidence that rights-talk is rendering Australian law more sensitive to pleas and predicaments of the historically, socio-economically and politically disadvantaged. This appears to be the perception on the basis of which many commentators are proceeding. Australian courts’ greater amenability to human rights arguments is widely understood (invoking the title of a 1994 book on the subject) as a gradual, albeit discontinuous, ‘retreat from injustice’.¹⁴

At the same time, however, commentators proceeding from different starting points have documented the rise of a ‘new right’ (in the sense of politically conservative) account of history and difference in

¹² Charlesworth, above n 2, 38. See, also, Williams, above n 2, 9 (‘Any student of Australian history will be aware of the danger that parliaments can pose to civil liberties’).

¹³ Charlesworth, above n 2, 38-39. Charlesworth maintains that the unmitigated sway of majority power is compounded by the Australian political system’s inflection with the ideology of utilitarianism (an ideology concerned with achieving the greatest good for the greatest number). See, also, Williams, above n 4, 45.

¹⁴ Nick O’Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law* (1994).

Australian society – the mounting predominance of a politico-legal sensibility bound to ‘standards of formal equality espoused in the 1960s’.¹⁵ That very High Court that, according to the graph above, is supposedly continuing a trend towards recognising and upholding the human rights of indigenous and other minority groups has contributed to a body of native title law, for example, that, by a court member’s own admission, ‘leave[s] everyone dissatisfied and many disappointed’.¹⁶ Argumentative positions in the debate surrounding the proliferation of human rights language in Australian law remain curiously obdurate in the face of such negative assessments of the work of Australia’s newly rights-conscious judiciary to date.

Human rights in Australian law: A typology of contemporary debate

Scholarly and popular calls for the internalisation of human rights in Australian law take various forms. Some argue for the introduction of a comprehensive statutory scheme of human rights protection, learning from the United Kingdom’s Human Rights Act 1998 (UK) and/or New Zealand’s Bill of Rights Act 1990 (NZ).¹⁷ Some contend that statutory entrenchment should ideally segue into constitutional entrenchment.¹⁸ Some favour bolstering pre-enactment scrutiny of legislation for compliance with international human rights conventions to which Australia is a party.¹⁹ Some advocate interpretive importation, whether in judicial decision-making or otherwise – ‘thinking more about how international human rights norms might be interpreted and deployed...in [Australia’s] political and legal institutions’.²⁰ As indicated above, this paper can do justice to neither the full range of substantive concerns nor the many nuances of the debate surrounding these intersecting proposals.²¹

This paper *will*, nevertheless, evoke the tenor and pitch of this debate by highlighting some matters with which it seems particularly preoccupied. In short, this debate seems focused to a considerable degree upon the relative fragility of faith in that which is understood as ‘the law’ from time to time, and the constant danger of that law’s obsolescence. As such, contemporary debate about human rights’ place in Australian law seems particularly concerned with the renewal and reaffirmation of ‘the law’ in opposition to that which is classified as not-law (or not-law-enough). In other words, an extraordinary amount of the energy in this debate seems dedicated to the assurance of Australian law’s modernity and its presence in the moment.

As with the various proposals yielded by discussion of human rights’ role in Australian law (outlined above), readings of Australian law’s modernity within this debate take different directions. On occasions, studies of human rights’ protection in Australian law seek to affirm that law’s responsiveness to political processes ‘properly’ staged elsewhere – that is, the suppleness, relevance and rationality of Australian law and the satisfactorily modern state of the parliamentary democracy

¹⁵ Heather McRae, Garth Nettheim, Laura Beacroft and Luke McNamara, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2003), 70.

¹⁶ *Wilson v Anderson* (2002) 190 ALR 313, 345 (per Kirby J). See, eg, *Members of Yorta Yorta Aboriginal Community v State of Victoria* (2002) 194 ALR 538. The Chairman of the Aboriginal and Torres Strait Islander Commission (ATSIC) remarked that ‘[t]he High Court decision on the Yorta Yorta appeal proves once again that the native title system...has been a complete failure for Aboriginal and Torres Strait Islander peoples’: Geoff Clark, Chairman of ATSIC, ‘Native Title System Means Legal Dispossession of Indigenous people’ (Press Release, 12 December 2002).

¹⁷ See, eg, Megan Davis, George Williams, ‘A Statutory Bill of Rights for Australia? Lessons from the United Kingdom’ 22(1) *University of Queensland Law Journal* 1(2002). For comparison of the Australian and New Zealand political environments with respect to rights’ protection, see John Craig, ‘The “Bill of Rights” Debate in Australia and New Zealand: A Comparative Analysis’ 8 *Legislative Studies* 67 (1994).

¹⁸ Charlesworth, above n 2, 70-71. See, also, Dr Sev Ozdowski OAM, ‘The Relevance of Human Rights in Contemporary Australia’ Australian Human Rights Commissioner (Speech to the Activating Human Rights and Diversity Conference: Global and Local Voices, Byron Bay, 1-4 July 2003).

¹⁹ David Kinley, ‘The Legal Dimensions of Human Rights’, in David Kinley (ed), *Human Rights in Australian Law* (1998), 2-25, 21-22.

²⁰ Sarah Pritchard, ‘The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice’ [1995] *Australian Journal of Human Rights* 2, 136.

²¹ See above n 4 for further literature.

that it helps to sustain.²² Elsewhere, Australian law is deplored as arcane and out-of-step with the humanist faith of the modern era on the basis of its apparent imperviousness to rights-based updating.²³ In either case, however, inquiry tends to congregate around a rather narrow set of propositions. These rhetorical assembly points are summarised in the following table, together with a brief encapsulation of alternate versions currently in circulation.

A typology of recurrent propositions in debate concerning the role of human rights in Australian law

1 <i>Writings in Favour of more Vigorous or Explicit Protection of Human Rights in Australian Law</i>	2 <i>Writings Defensive of the Constitutional, Statutory and Judicial Status Quo Regarding Rights' Protection</i>
<i>(a) Politics and social change are primarily matters for government and/or other 'public' institutions.</i>	
Critical attention and reformist effort should be directed towards statutory and/or constitutional amendment.	Parliament is the most appropriate forum in which to negotiate and effect political change.
<i>(b) Legal text is highly malleable and interpretation is more significant a directive force than authorship; through interpretation, law is forever adapting to those changing contexts that afford its interpretive background.</i>	
Rights may be shaped and reshaped over time as circumstances require. The choices made in the course of their interpretive development should be brought into the foreground of public consciousness.	The common law is sufficiently agile to remain responsive to changing social and economic contexts and 'problems' that they yield. Rights' enshrinement would artificially arrest law's development in this regard.
<i>(c) Law needs to be more attentive to particularism; excesses of universalism are to be avoided.</i>	
Law needs to become more open to the claims and experiences of particular marginalised and minority groups within Australian society.	The distinctive properties of Australian law and the sovereign authority of Australian governmental institutions need to be defended against over-reaching external influences.
<i>(d) Law needs to be comprehensive, continuous and consistent; excesses of particularism are to be avoided.</i>	
Piecemeal legislative reform towards the protection of human rights is undesirable and unsatisfactory. The integration of human rights law into Australian law needs to be effected in a comprehensive and coherent manner.	The inter-temporal continuity of Australian law needs to be upheld, regardless of the particular predilections of the present time. Disproportionate focus on the judicial branch of government would likewise be disruptive of constitutional equilibrium. Judges have limited capacity for comprehensive social and political oversight and as such are ill suited to manage rights-based balancing of conflicting socio-economic goals and demands.

To contend that the debate surrounding human rights protection in Australian law revolves around these recurring tenets, and that these tenets span both 'sides' of this debate, is not to argue for its uniformity or advocate its resolution in consensus. The experiences, motivations, styles and perceptions of participants in this debate undoubtedly diverge in ways that are significant. Nor is to maintain that the debate may satisfactorily be reduced to two opposable 'sides'. To highlight some points to which this debate returns *is*, however, to challenge the notion that the upward inclination of the graph in Part II signifies progressive adaptation to social change exterior to law's narratives of

²² See, eg, James Allan, 'Paying for the Comfort of Dogma' 25 *Sydney Law Review* 63, 73 ('In a well-established democracy like Australia, important rights, important human interests, can be (and generally are) as well – if not better – protected *without* a bill of rights').

²³ See, eg, Charlesworth, above n 2, 76 ('It seems ironic that Australia still clings to a 19th century British faith that Parliament is a natural and perfect protector of human rights when Britain itself has discarded this conviction').

progress. It is not to deride that debate as futile, or to condemn its participants for self-indulgence or folly. It is an act of classification informed less by diagnostic than by semiotic thinking.²⁴

A characteristically late modern debate

If the debate surrounding the place of human rights in Australian law does map out as I have drawn it, there could be a number of different ways of explaining this. Perhaps I, as reader and writer, have amassed into tabular form that which might otherwise present as a tangle of differences. Perhaps that which I am characterising is more indicative of a particular *method* of argument than it is of the arguments that I purport to describe. Logic, culture, habit, training, politics or preference might be the brace or glue to this assemblage. Another way in which we might read the preoccupation with modernity that I have attributed to this field of debate is *as a concern redolent of late modernity itself* – that is, of late modernity as a particular style, mood or zeitgeber.²⁵

According to the latter account, insistence upon the susceptibility of social ‘wrongs’ to correction by expert institutional or policy design is a noteworthy modernist feature of this debate. One might note also this debate’s apparent fixation on law/non-law oppositions – law as a means of resolving political conflict; law assessed in relation to a non-law world of socio-economic inequity; law as an outcome of negotiations staged elsewhere. The suspicion of stasis and impulse towards forward movement with which this debate is inflected also support this characterisation. So too is this debate’s modernism evidenced by its apparent resolve to bring law into ever-closer contact with a transitory realm of the ‘real’, whether understood as ‘context’ or ‘society’. So, James McFarlane writes of Modernism:²⁶

Initially, the emphasis is on fragmentation, on the breaking up and the progressive disintegration of those meticulously constructed “systems” and “types” and “absolutes” that lived on from the earlier years of the century, on the destruction of the belief in large general laws to which all life and conduct could be claimed to be subject. As a second stage – though, as in the case of all of these changes, never in obedience to any tidy or consistent chronological pattern – there came a restructuring of parts, a re-relating of the fragmented concepts, a re-ordering of linguistic entities to match what was felt to be the new order of reality...Finally, in its ultimate stages, thought seemed to undergo something analogous to a change of state: a dissolving, a blending, a merging of things previously held to be forever mutually exclusive. A sense of flux, the notion of continuum, the running together of things in ways often contrary to the dictates of simple common sense...alone seemed able to help in the understanding of certain bewildering and otherwise inexplicable phenomena of contemporary life.

All the while, though, the defence of Australian law’s modernity in relation to its protection of human rights seems curiously divorced from the ‘reality’ that it would have law touch. Questions of Australian law’s capacity to yield redistributions of resources or power – to translate ‘rights’ into meaningful privileges and to probe the allocation of privilege in terms of ‘rights’ – remain largely unasked and unanswered.

Some awkward questions

Why do those who concern themselves with promoting human rights in Australian law not tend to scrutinise the rhetorical or material ‘successes’ and ‘failures’ to date of the normative claims that they would champion? Those who *oppose* human rights’ integration into Australian law readily compile accounts of rights-based interpretation around the world and the negative impacts with which it is ostensibly associated.²⁷ Their principal objections lie with the augmentation of judicial power, the

²⁴ See Roland Barthes, *The Semiotic Challenge* (Richard Howard trans., 1988); Duncan Kennedy, ‘A Semiotics of Legal Argument’ in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (1994) Vol. III, Book 2, 309-325.

²⁵ See Nathaniel Berman, ‘Modernism, Nationalism, and the Rhetoric of Reconstruction’ (1992) 4 *Yale Journal of Law & the Humanities* 351.

²⁶ James McFarlane, ‘The Mind of Modernism’ in Malcolm Bradbury & James McFarlane (eds), *Modernism: A Guide to European Literature 1890-1930* (new ed, 1991), 71-93, 80-81.

²⁷ See, eg, Tom Campbell, K.D. Ewing & Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001).

judicialisation of politics, and the politicisation of judicial law-making that they envisage resulting from a more whole-hearted turn to human rights in Australian law.²⁸

Those who advocate further movement towards rights-based modes of judicial interpretation and legislative enactment tend, however, to answer these objections in relatively general terms. Some point, for example, to the international human rights obligations by which Australia is already bound and decry their incomplete or haphazard fulfilment.²⁹ Others counter that ‘the current Australian constitutional system already accords considerable power to judges’ and that ‘[n]o clear line exists between legal and political decision-making...the politics of judicial choice between rival interpretations of words cannot be eradicated’.³⁰ In addition, considerable effort has been made to trace the doctrinal plight of human rights in Australian constitutional law.³¹ This line of inquiry has been pursued both to refute the irrelevance of human rights to Australian law and to argue for civil and political rights already recognised in the Australian Constitution to be given more ‘meaningful operation’.³²

However, the literature that promotes rights’ further integration into Australian law reveals relatively few attempts critically to assess the effects of rights-based modes of legal thinking to date in Australian settings. As a result, the widespread perception that human rights amount collectively to ‘good’ remains for the most part undisturbed by those who might offer a sophisticated and sympathetic understanding of the various ways in which this equation might be challenged, qualified or rethought. This is almost certainly a strategic choice on such persons’ part, yet it is nonetheless a choice that this paper sets out to question.

A case study: *Pearce v. The Queen*

Of the many cases cited in the appendix to this paper, *Pearce v. The Queen* represents a relatively minor, humdrum instance of human rights at work in Australian law.³³ As such, it affords an ideal setting in which to chart the possibilities, gestures and impulses that are triggered by the most quotidian of ‘rights-talk’ in the Australian High Court.

The appellant in this case, Mr. Douglas Pearce, was indicted in the Supreme Court of NSW. He had been charged, *inter alia*, with maliciously inflicting grievous bodily harm with intent to do the victim grievous bodily harm, and breaking and entering the dwelling-house of that victim and, while in that house, inflicting grievous bodily harm. Before the primary judge, the appellant sought a stay of the proceedings as oppressive or an abuse of process on the ground that they placed him in double jeopardy. Pearce had been charged for two crimes arising from substantially the same facts – his breaking into the victim’s home and beating the victim. This application was rejected and the appellant was sentenced on each of the two disputed counts to 12 years of penal servitude, to be served concurrently with each other (but cumulatively with a sentence imposed for another offence). An appeal from this sentence to the Court of Criminal Appeal was dismissed, but special leave was granted for an appeal to the High Court of Australia.³⁴

A majority of the High Court allowed the appeal by a vote of 4:1. In a joint judgment, Justices McHugh, Hayne and Callinan opined that the sentence doubly punished the defendant for a single act (namely, infliction of grievous bodily harm) and was therefore flawed either as contrary to ‘good sentencing practice’ or to a positive rule of law against any individual being placed in double jeopardy.³⁵ They also found that the sentencing otherwise involved an error to the extent that the primary judge failed to take into account the differences in conduct being punished in each instance,

²⁸ See, eg, Allan, above n 22.

²⁹ See, eg, Dianne Otto, ‘From “Reluctance” to “Exceptionalism”: The Australian Approach to Domestic Implementation of Human Rights’ (2001) 26 *Alternative Law Journal* 219.

³⁰ Charlesworth, above n 2, 73.

³¹ The leading text in this regard is Williams, above n 4.

³² *Ibid* 245.

³³ *Pearce v The Queen*, above n 6.

³⁴ *Ibid* 1 (per McHugh, Hayne and Callinan JJ).

³⁵ *Ibid* 14.

before subjecting appellant to two, concurrent 12 year terms.³⁶ Justice Gummow concurred, agreeing that the sentencing process had miscarried by failing to take into consideration what Justice Gummow characterised as a ‘rule of practice’ against duplication of penalty for what is substantially a single act.³⁷

Justice Kirby was the only judge to invoke human rights principles in the course of his judgment and also the only judge who voted to dismiss the appeal. Justice Kirby agreed with the rest of the High Court that the ‘risk’ of double jeopardy merited consideration at a number of points throughout a criminal proceeding. He endorsed the majority’s sensitivity to the danger of ‘the State with all its resources and power...mak[ing] repeated attempts to convict an individual for an alleged offence, thereby subjecting him [or her] to embarrassment, expense and ordeal and compelling him [or her] to live in a continuing state of anxiety and insecurity’.³⁸ Justice Kirby also agreed that the sentencing by the primary judge was defective in that insufficient attention was given to the risk of double punishment.³⁹ Nevertheless, Justice Kirby concluded that the total sentence imposed was not, ‘in the brutal circumstances of the offences’, a sentence made in error.⁴⁰ The reasoning of the primary judge was ‘defective’, but the orders were ‘right’ and should therefore be left undisturbed, Justice Kirby maintained.⁴¹

Justice Kirby’s dissenting judgment in the *Pearce* case, like the judgments of those in the majority, was reasoned on the basis of common law principles and authorities. Nevertheless, in the course of his judgment, Justice Kirby made three references to human rights principles. First, he noted that the rule against double jeopardy has been recognised ‘as one of the rules of universal human rights’. In this respect, he cited Article 14(7) of the International Covenant on Civil and Political Rights, Article 4(1) of Protocol Number 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 8(4) of the American Convention on Human Rights.⁴²

Secondly, he cited a decision of the United Nations Human Rights Committee as authority relevant to the question whether the prohibition on double jeopardy transcends sovereign state boundaries.⁴³ The question whether considerations of double jeopardy only prohibited revisitation in any one state of an offence previously adjudicated *in that state* was, however, ultimately one that Justice Kirby elected to leave to another day.⁴⁴

Thirdly, Justice Kirby invoked human rights more generally in his characterisation of certain historical common law pleas in bar as assertions of ‘a *right* [of the accused] to be relieved of a second criminal prosecution or charge’. According to Justice Kirby’s assessment, this characterisation underlined the need for clarification as to the circumstances in which such a right might lawfully be enforced.⁴⁵

There are a number of ways in which one might assess the impact of these scattered instances of ‘rights-talk’ in Justice Kirby’s judgment in *Pearce v The Queen*. It might be maintained that Justice Kirby’s oft-celebrated adoption of a ‘human rights perspective’ here encouraged personalisation of the parties and fostered a more context-attentive, wide-angle view of the crime. Justice Kirby refers to Mr. Pearce as ‘a 33 year old Aboriginal Australian of disadvantaged background’. The victim of Mr.

³⁶ Ibid 15.

³⁷ Ibid 22-23.

³⁸ Ibid 31 (quoting *Green v United States* 355 US 184, 187-188 (1957)).

³⁹ Ibid 52.

⁴⁰ Ibid.

⁴¹ Ibid 53.

⁴² Ibid 25, n 99. See *International Covenant on Civil and Political Rights* (opened for signature 19 December 1966) GA Res 2200A (XXI), 999 UNTS 171 (entered into force 23 March 1976; entered into force for Australia 13 November 1980 except Article 41 which entered into force on 28 January 1993); *Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 22 November 1984) ETS No 117 (entered into force 1 November 1988); *American Convention on Human Rights* (opened for signature 22 November 1969) 1144 UNTS 123 (entered into force 18 July 1978).

⁴³ *Pearce v The Queen*, above n 5, 41 n 172 (citing UN Human Rights Committee, *AP v Italy*, UN Doc CCPR/C/Op/2 (1990)).

⁴⁴ *Pearce v The Queen*, above n 6, 41.

⁴⁵ Ibid 50.

Pearce's crime is likewise identified as 'Mr. William Rixon, then aged 72 years'. The reader of Justice Kirby's judgment learns that, as a result of the crime, Mr. Rixon lost the use of his left eye, suffered brain damage, and was confined to a nursing home where he was reduced to 'a mere shadow of the man that he was before the assault'. Justice Kirby also places the crime in the town of Yamba, New South Wales, where Mr. Rixon lived alone in a house which Mr. Pearce entered at night 'armed with a heavy wooden object'. One learns too from Justice Kirby's judgment that the crime yielded a mere \$45, taken from Mr. Rixon's wallet.⁴⁶ In the judgments of the other members of the High Court, no such scene-setting is attempted and the two protagonists are referred to merely as the 'appellant' and the 'victim'. Justices McHugh, Hayne and Callinan confine their description to the following: 'The appellant broke into the victim's home and beat him.' Justice Gummow declines to elaborate, referring the reader to the facts 'detailed in the judgments of the other members of the Court'.⁴⁷

In addition, it might be contended that the interjection of international human rights law provides Justice Kirby with a rationale and an inspiration for clarifying and strengthening the protection that the common law otherwise affords individuals against the danger of double jeopardy. For example, Justice Kirby rejects a narrow rule of double jeopardy that would only prohibit double *punishment* for the same crime. Instead, he prefers a reading of the authorities that yields a prohibition on duplication in trial, prosecution and/or punishment. Justice Kirby justifies this reading in part on the basis that such a rule would be inconsistent with terms of Article 14(7) of the International Covenant on Civil and Political Rights.⁴⁸

Furthermore, one might read Justice Kirby's judgment in *Pearce v The Queen* as more frank in respect of the sort of society that it cherishes, by virtue of its attention to human rights concerns. Professor George Williams' study of human rights under the Australian Constitution supports such an interpretation. Professor Williams asserts that the High Court's 'new-found concern for human rights' has been a 'key factor in [the] process of exposing the policy underpinnings of the Court's decision-making'.⁴⁹ One might focus in this regard on Justice Kirby's discussion of the 'extreme violence to Mr Rixon' and his weighing of the injustice done to the victim against the 'theoretical possibilit[y]' that injustice might have resulted from the primary judge's sentencing approach. Vindication of 'theoretical' injustice not occasioned in this instance did not, in Justice Kirby's judgment, warrant disregard for the need to prevent the sort of random violence actually wielded against Mr. Rixon. By comparison, the following quotation offered by Justices McHugh, Hayne and Callinan sounds rather legalistic and insensible (even though it might easily have been cited in support of Justice Kirby's finding):⁵⁰

[T]he criminal law...has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility...To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements.

Yet the gestures of societal out-reach and impulses of humanisation that one might attribute to Justice Kirby in *Pearce v The Queen* sit uneasily with any close reading of the effect of his reasoning in terms of its allocation of authority. In each of the foregoing instances, that which presents itself as a gesture towards the right-bearing individual constituent ultimately serves to devolve greater authority upon the judge and the prosecutor than upon the purported right-holder. Thus, Justice Kirby reasons that:⁵¹

[T]he rules to be applied [against double jeopardy] should be simple and such as to provide the judge with the powers appropriate to the circumstances to protect an accused against the risks of repeated prosecution and the risk of double punishment in respect of the same offence.

⁴⁶ Ibid 26-27.

⁴⁷ Ibid 1, 17.

⁴⁸ Ibid 31.

⁴⁹ Williams, above n 4, 246.

⁵⁰ *Pearce v The Queen*, above n 6, 13 (quoting Sir John Barry, *The Courts and Criminal Punishments* (1969) 14-15).

⁵¹ Ibid 33.

Justice Kirby maintains that confidence must be placed in ‘judicial dut[ies]’, ‘judicial function[s]’ and ‘judicial discretion’ when seeking relief from ‘injustice or oppression occasioned by the bringing of further proceedings, the oppressive inclusion of overlapping charges or the subjection of a person to double vexation and the peril of double punishment.’ So too should ‘those who represent accused...be alert to [the judicial] facility when they scrutinise the indictment containing the charges which the prosecution brings.’⁵² The appeal to rights seems to translate into an appeal for faith in the expertise and ‘alert[ness]’ of a technocratic legal elite. Justice Kirby’s incidental references to human rights in the *Pearce* case seem to do more to locate the judge (and the legal profession of which the judge is a part) in a place of cosmopolitan learning and ever-expanding technical authority than to reposition or bolster the status of the accused.⁵³ The effect of this may not be to augment the political power of the judiciary in the manner that conservative commentators tend to fear – I am inclined to agree with Professor Hilary Charlesworth that power is, in any event, ubiquitous in legal decision-making.⁵⁴ Rather the effect of Justice Kirby’s style of rights-based decision-making is to endorse and validate the ‘corrective’ hold that legal professionals and other right-bearing ‘experts’ seek to retain on the power, identity, body and land of ‘a 33 year old Aboriginal Australian of disadvantaged background’.

In this instance, it is the law and bearers of legal expertise that seem to be the primary beneficiaries of the deployment of human rights language in the High Court. Rights language seems to affirm the cosmopolitan righteousness and benevolence of the law, rather than to shift or extend the range of its insights or sensitivities. The incantation of the appellant’s identity markers (his status as a ‘33-year old Aboriginal Australian of disadvantaged background’) and the graphic recitation of his crimes serve only to magnify the reader’s sense of distance from this person. Instead, the reader is encouraged to follow Justice Kirby’s erudite wanderings from the Roman forum, through the deserts of the Old Testament and the court of King Henry II, to the British House of Lords, the Constitutional Court of India and the Supreme Court of the United States.⁵⁵ Mr. Pearce, the right-bearer, fades into inconsequentiality amid this fabulous panorama of the world’s defenders of rights of which Justice Kirby becomes one.

Conclusion

The trail being blazed by international human rights law through Australian law is much more circuitous and poorly lit than the single example of *Pearce v The Queen* suggests.⁵⁶ Both within and beyond the High Court, much is being done, with the best of intentions, under the rubric of human rights. I do not wish to suggest, by my reading of Justice Kirby’s judgment in *Pearce v The Queen*, that he or any of the other members of the High Court bench are acting in bad faith when they entertain human rights arguments. I have no reason to believe that judges or practitioners of human rights law in Australia are deliberately and deceptively advancing their own interests while purporting to advance others.

I *do* wish to suggest, nevertheless, that before embarking upon Justice Kirby’s ‘journey of enlightenment’ in any particular case, one should be mindful of the solipsistic propensities of human rights law.⁵⁷ One might recall, in this regard, that the post-WWII human rights law regime was shaped in part by a desire to expunge the unrelenting horrors of the Holocaust and to renew the legitimacy of

⁵² Ibid 47, 50.

⁵³ In relation to ‘ever-expanding technical authority’, see David Trubek et al, ‘The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas’ (1994) 44 *Case Western Reserve Law Review* 407. See, also, Torbjorn Vallinder, ‘The Judicialization of Politics – A World-Wide Phenomenon: Introduction’ (1994) 15 *International Political Science Review* 91; Ran Hirschl, ‘The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions’ (2000) 25 *Law & Social Inquiry* 91; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989). Charlesworth, above n 30 and related text.

⁵⁵ *Pearce v The Queen*, above n 6, 24-25, 31, 39-40.

⁵⁶ See Williams, above n 2, 245 (‘The High Court’s interpretation of constitutional rights presents a complex picture’).

⁵⁷ Kirby, above n 3.

collective claims to ‘humanity’.⁵⁸ Human rights’ links to the darkest and most troubling properties (or neuroses) of humanism might give us pause before issuing calls to integrate international human rights law more thoroughly into Australian law. From where does our confidence that the work of human rights is necessarily a work of ‘good’ or ‘enlightenment’ emanate? The words of Jean Paul Sartre are salutary in this regard:⁵⁹

Liberty, equality, fraternity, love, honour, patriotism and what have you. All this did not prevent us from making anti-racial speeches about dirty niggers, dirty Jews and dirty Arabs. High-minded people, liberal or just soft-hearted, protest that they were shocked by such inconsistency; but...with us there is nothing more consistent than a racist humanism since the European has only been able to become a man through creating slaves and monsters.

Perhaps we need to probe further the range of possible encounters between that which we understand as international human rights law and that which we understand as Australian law, rather than seeking to collapse them into each other at the earliest possible opportunity. The capacity of the former, still ‘alien’ regime to shock, to disrupt, to put at risk the established order of legal thought in Australia is an opportunity not to be squandered in the rush to partake of the contemporary flourishes of legal cosmopolitanism. Rights-talk has become the way that an increasing number of Australian lawyers and legal scholars direct themselves *away* from intuitions of complicity in the prosaic tragedies that surround us. Rights-talk orients us instead towards a future of comfort, clarity, light and modernity. The ‘righting’ of Australian law promises to elevate it above complacency and parochialism, to connect it with something broader, cleaner, grander and more honourable. Before we accept this promise, however, and hurry onward on the rights-lit path to ‘enlightenment’, there is time and occasion to turn back and fumble into the dark. It may be that the faces of the slaves and monsters that we encounter there will be our own.

Appendix: High Court cases containing references to “human rights”

R v Wallis (1949) 78 CLR 529; *NSW v. The Commonwealth* ; *Victoria v The Commonwealth* ; *Queensland v The Commonwealth* ; *South Australia v The Commonwealth* ; *Western Australia v The Commonwealth*; *Tasmania v The Commonwealth* (1975) 135 CLR 337; *R v Wilson, Ex Parte Witness T* (1976) 135 CLR 179; *Salemi v Mackellar (No. 2)* (1977) 137 CLR 396; *Western Australian Turf Club v Federal Commissioner Of Taxation* (1978) 139 CLR 288; *Dugan v Mirror Newspapers Ltd.* (1978) 142 CLR 583; *Dowal v Murray* (1978) 143 CLR 410; *McInnis v R* (1979) 143 CLR 575; *Mcgraw-Hinds (Aust.) Pty. Ltd. v Smith* (1979) 144 CLR 633; *Johanson v Dixon* (1979) 143 CLR 376; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266; *Attorney-General (Vict.) ; Ex Rel. Black v The Commonwealth* (1981) 146 CLR 559; *R v Sweeney; Ex Parte Northwest Exports Pty. Ltd.* (1981) 147 CLR 259; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *R v Darby* (1982) 148 CLR 668; *Rochfort v Trade Practices Commission* (1982) 153 CLR 134; *Perry v R* (1982) 150 CLR 580; *Neal v R* (1982) 149 CLR 305; *Hammond v The Commonwealth* (1982) 152 CLR 188; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR; *Viskauskas v Niland* (1983) 153 CLR 280; *Pyneboard Pty. Ltd. v Trade Practices Commission* (1983) 152 CLR 328; *Commonwealth of Australia v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1; *Sorby v The Commonwealth* (1983) 152 CLR 281; *Baker v Campbell* (1983) 153 CLR 52; *In the Matter of an Application to the Family Court of Australia in the Marriage of Bernard Anthony Cormick and Janice Brenda Cormick, Amanda Jayn Salmon* (1984) 156 CLR 170; *The Police Service Board v Russell John Morris/Robert Colin Martin* (1985) 156 CLR 397; *Gerhardy v. Brown* (1985) 159 CLR 70; *Kioa v West* (1985) 159 CLR 550; *Controlled Consultants Pty. Ltd. v Commissioner for Corporate Affairs* (1985) 156 CLR 385; *Attorney-General (N.T.) v Maurice* (1986) 161 CLR 475; *J. v. Lieschke* (1987) 162 CLR 447; *Dao v Australian Postal Commission* (1987) 162 CLR 317; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Davis v The Commonwealth* (1988) 166 CLR 79; *Mabo v The State Of Queensland* (1989) 166 CLR 186; *Street v Queensland Bar Association* (1989) 168 CLR 461; *Australian Iron and Steel Pty. Ltd. v Banovic* (1989) 168 CLR 165; *Chan v Minister For Immigration And Ethnic Affairs* (1989) 169 CLR 379; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion's Case)* (1992) 175 CLR; *Australian Capital Television Pty. Limited and the State of New South Wales v The Commonwealth* (1992) 177 CLR 106; *Dietrich v R* (1992) 177 CLR 292; *Nationwide News Pty. Limited v Wills* (1992) 177 CLR 1; *Chu Kheng Lim v The Minister For Immigration, Local Government And Ethnic Affairs* (1992) 176 CLR 1; *Waters*

⁵⁸ See, eg, *Universal Declaration of Human Rights*, GA Res 217A, 3rd session 183rd plenary meeting, UN Doc A/180, 71 (1948), Preamble: ‘Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.’

⁵⁹ Jean Paul Sartre, ‘Preface’ in *Frantz Fanon, The Wretched of the Earth* (Constance Farrington trans, 2nd ed 1968) 7-26.

v Public Transport Corporation (1992) 173 CLR 349; *Mabo v The State Of Queensland (No.2)* 175 CLR 1; *Sykes v Cleary* (1992) 176 CLR 77; *Environment Protection Authority v Caltex Refining Co. Pty. Limited* (1993) 178 CLR 477; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *Theophanous v The Herald and Weekly Times Limited* (1994) 182 CLR 104; *Brandy v Human Rights And Equal Opportunity Commission and Ors* (1995) 127 ALR 1; *Louis James Carter v The Managing Partner, Northmore Hale Davy and Leake* 129 ALR 593 (1995); *Victoria, South Australia & Western Australia v Commonwealth* [1995] 9 Leg Rep 6b; *DPP (Cth) v Kainhofer* (1995) 185 CLR 528; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; *Re Registrar, Social Security Appeals Tribunal* (1995) 130 ALR 163; *Western Australia v The Commonwealth, The Wororra Peoples v Western Australia, Biljabu v Western Australia* (1995) 183 CLR 373; *Grollo v Palmer* (1995) 184 CLR 348; *Snowdon v Dondas (No.2)* (1996) 188 CLR 48; *North Galanjanja Aboriginal Corp and the Waanyi People v Queensland* (1996) 185 CLR 595; *Lindon v Commonwealth (No 2)* (1996) 136 ALR 251; *Walsh v Tattersall* (1996) 188 CLR 77; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Breen v Williams* (1996) 186 CLR 71; *Leask v The Commonwealth* (1996) 187 CLR 579; *Rodney Croome v Tasmania* (1997) 191 CLR 119; *Thorpe v Commonwealth of Australia (No3)* (1997) 144 ALR 677; *Residential Tenancies Tribunal of New South Wales & Henderson, Re* (1997) 190 CLR 410; *Australian Federal Police, Commissioner of v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Re East & Ors; I W v City of Perth* (1997) 191 CLR 1; *'Applicant A' v Minister of Immigration and Multicultural Affairs* (1997) 142 ALR 331; *Ousley v R* (1997) 192 CLR 69; *Newcrest Mining (WA) Limited v The Commonwealth of Australia* (1997) 190 CLR 513; *BRS v R* (1997) 191 CLR 275; *De L v Director-General, N S W Department of Community Services (No2)* (1997) 190 CLR 207; *Kruger v The Commonwealth; Bray v The Commonwealth* (1997) 190 CLR 1; *Mann v O'Neill* (1997) 191 CLR 204; *Levy v State of Victoria* (1997) 189 CLR 579; *Ex parte Nguyen* [1998] HCA 73; *Chakravarti v Advertiser Newspapers Limited* [1998] HCA 37; *Nicholas v R* [1998] HCA 9; *Sinanovic v R* [1998] HCA 40; *Director of Public Prosecutions v B* [1998] HCA 45; *Pearce v R* [1998] HCA 57; *R v Swaffield; Pavic v R* [1998] HCA 1; *H A Bachrach Pty Ltd v The State of Queensland* [1998] HCA 54; *Gray v Motor Accident Commission* [1998] HCA 70; *Gould v Brown* [1998] HCA 6; *Kartinyeri v The Commonwealth* [1998] HCA 22; *Re Minister for Immigration and Multicultural Affairs & Anor; Ex Parte SE* [1998] HCA 72; *Joosse v Australian Securities and Investment Commission* [1998] HCA 77; *Attorney-General for the Commonwealth v Tse Chu-Fai* [1998] HCA 25; *Qantas Airways Limited v Christie* [1998] HCA 18; *Ex parte Abebe* [1998] HCA 10; *Commonwealth of Australia v State of Western Australia* [1999] HCA 5; *Boland v Yates Property Corporation Pty Limited; Webster v Yates Property Corporation* [1999] HCA 64; *AMS v AIF and AIF v AMS* [1999] HCA 26; *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; *Sue v Hill* [1999] HCA 30; *Eso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67; *X v The Commonwealth* [1999] HCA 63; *Re Colina; Ex parte Torney* [1999] HCA 57; *Byrnes v R; Hopwood v R* [1999] HCA 38; *Attorney-General of the Commonwealth v Breckler* [1999] HCA 28; *Northern Territory of Australia v GPAO* [1999] HCA 8; *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs* [1999] HCA 14; *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Li* [2000] HCA 11; *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55; *R v Hughes* [2000] HCA 22; *Smith v ANL Limited* [2000] HCA 58; *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36; *Allesch v Maunz* [2000] HCA 40; *Johnson v Johnson* [2000] HCA 48; *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* [2000] HCA 63; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* [2001] HCA 23; *The Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56; *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7; *Cheung v R* [2001] HCA 67; *Cabal v United Mexican States [No 2]* [2001] HCA 43; *Azzopardi v R* [2001] HCA 25; *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* [2001] HCA 39; *Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; *Brodie v Singleton Shire Council* [2001] HCA 29; *KRM v R* [2001] HCA 11; *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; *Rosenberg v Percival* [2001] HCA 18; *Re Minister for Immigration and Multicultural Affairs; Ex parte P T* [2001] HCA 20; *Cabal v United Mexican States* [2001] HCA 42; *Ryan v R* [2001] HCA 21; *Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration* [2001] HCA 30; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; *Regie National des Usines Renault SA v Zhang* [2002] HCA 10; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; *Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attor* [2002] HCA 16; *Dow Jones & Company Inc. v Gutnick* [2002] HCA 56; *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28; *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; *De Sales v Ingrilli* [2002] HCA 52; *U v U* [2002] HCA 36; *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7; *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; *Luton v Lessels* [2002] HCA 13; *Roberts v Bass* [2002] HCA 57; *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; *Wilson v Anderson* [2002] HCA 29; *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30; *Pasini v United Mexican States* [2002] HCA 3; *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer C* [2002] HCA 49; *TKWJ v R* [2002] HCA 46; *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; *Cattanach v Melchior* [2003] HCA 38; *Re Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 1; *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; *Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11; *Heron v R* [2003] HCA 17; *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28; *Austin v the Commonwealth of Australia* [2003] HCA 3.

The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies

Devika Hovell*

It is a natural reflex to bridle at criticism from the outside – particularly when criticism levels the charge at Australia that it has violated human rights. However, in Australia's response to decisions by United Nations human rights treaty bodies, this defensive reflex has become more in the nature of a concentrated campaign of defiance. On paper, Australia is a champion of the international human rights framework. Australia is a party to all the major UN human rights treaties, and has recognised the competence of five of the UN treaty bodies charged with monitoring state compliance with these treaties.¹ Yet, while Australia has agreed to the rules and acknowledged the umpire, it consistently refuses to comply with the umpire's decision. While, on paper, Australia contributes significant support to the international human rights framework, in practice, Australia contributes more to the great human rights paradox, referred to by Falk,² that many prominent countries adopting human rights treaties basically believe that human rights are only relevant for other countries. Contrasting Australia's approach to its own human rights issues with its recent approach to countries such as Iraq, Afghanistan and Zimbabwe, it is hard to resist the impression that the Australian government view human rights as an item produced purely for export.

The first part of this paper will examine the set of responses consistently employed by the government as a rejoinder to decisions of the UN human rights treaty bodies. The inadequate nature of many of these responses is self-evident. However, the response used most often and with the greatest effect is that of Australia's sovereignty. By employing what is essentially an international legal construct, the government has been successful in stonewalling human rights issues and in portraying the international human rights framework as an unjustifiable intervention into Australia's domestic affairs.

The second part of the paper will examine the relationship between Australian sovereignty and the international human rights framework, focussing in particular on the UN Human Rights Committee. This makes plain that, while the sovereignty strategy appears to be working on the level of rhetoric, it is legally flawed. In the human rights context, sovereignty has become a red herring with a poisonous bite, distracting attention from some of the more fundamental issues involved in the balance between human rights and government policy.

Governmental response to human rights treaty bodies: a potted summary

In its early relationship with the UN human rights treaty bodies, Australia showed a willingness to accommodate advice that it had acted inconsistently with fundamental rights under the Covenant, and to take steps domestically to address this. In *Toonen v. Australia*,³ the first successful complaint against Australia, the Committee determined that Tasmanian laws criminalising homosexual practices arbitrarily interfered with Mr Toonen's right to privacy. The then-government's response to this decision was positive, in spite of the political dilemma created by Tasmania's initial refusal to amend the offending

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¹ Australia has also recognised the competence of the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Committee against Torture. Australia has so far elected not to recognise the competence of the Committee on the Elimination of Discrimination Against Women, the Sub-Committee on the Prevention of Torture or the Committee on the Protection of the Rights of All Migrant Workers and their Families.

² Richard Falk, *Human Rights Horizons* (2000), 57.

³ *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

provisions of its law. Nevertheless, using its authority under the external affairs power, the Commonwealth government passed legislation to give effect to the Committee's decision.

Following the change in government in 1996, Australia's relationship with the UN human rights treaty bodies has been on an incremental decline. When considered collectively, our recent response to criticism from the human rights treaty bodies, has been more in the nature of a state-sized tantrum. Australia's response has employed the full arsenal of tantrum ploys, from "did not" to "you're not the boss of me" to "we're not playing anymore...and we want our ball back". As with most responses of this character, the goal of the response is not to answer the charge, but to deflect attention from it.

"Did not"

The government rejected out of hand the findings of the Committee in the second successful complaint against Australia in *A v. Australia*. The official response by the government read:

"[T]he Government does not accept that the detention of Mr A was in contravention of the Covenant, nor that the provision for review of the lawfulness of that detention by Australian courts was inadequate. Consequently, the Government does not accept the view of the Committee that compensation should be paid to Mr A."⁴

The same approach was taken in response to the recent decision by the CERD Committee in *Hagan v. Australia*.⁵ The government refused to follow the Committee's decision, stating that "[t]he Government notes that the committee is not a court and its views are not binding".

In addressing this response, it is important to acknowledge that the government correctly states the position that the decisions of the UN treaty bodies are not binding. However, they provide the most authoritative interpretation of Australia's obligations under the International Covenant on Civil and Political Rights ("ICCPR"), an instrument which is binding on Australia. By failing to follow the Committee's decision, Australia will need to mount a more robust defence than the non-binding nature of the Committee's decisions to avoid the presumption that it is in violation of its binding international legal obligations under the ICCPR.

"Pick on somebody else why don't you"

In response to criticisms contained in the Committee's concluding observations on Australia's periodic report to the Committee on the Elimination of Racial Discrimination,⁶ the Attorney-General defended Australia's conduct on the following basis:⁷

If you're comparing [mandatory sentencing laws and treatment of asylum seekers] with arbitrary arrest, detention and execution and having your arms chopped off for belonging to the wrong political party, almost every issue in Australia seems to pale into insignificance.

Similar sentiments were expressed by the Prime Minister:⁸

⁴ Attorney-General the Hon Daryl Williams and Minister for Immigration and Multicultural Affairs the Hon Philip Ruddock, "Australian Government responds to the UN Human Rights Committee" (Press Release, 17 December 1997).

⁵ Committee on the Elimination of Racial Discrimination, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2002).

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

⁷ ABC Television, "Treaty stand", *Lateline*, 29 August 2000 <<http://www.abc.net.au/lateline/s168973.htm>>.

I mean I'm not going to have a situation where people are denigrating the human rights reputation of Australia. Australia's human rights reputation compared with the rest of the world is quite magnificent. We've had our blemishes and we've made our errors and I'm not saying we're perfect. But I'm not going to cop this country's human rights name being tarnished in the context of a domestic political argument.

The position appears to be that, while Australia is content to be part of an international crusade against the worst violators of human rights, it pays little regard to violation of rights within its own ranks. The effect of this approach is to reduce human rights standards to the lowest common denominator. Indeed, if such an approach were adopted by all developed nations, the result would be that the rights of individuals within developed democracies would truly achieve (to adopt the Attorney-General's term) "insignificance".

"We're not playing anymore...and we want our ball back"

The CERD Committee's concluding observations also prompted a number of provocative comments from the Prime Minister and members of his Cabinet that Australia might withdraw from the Committee process. In an interview on the 7.30 Report, Mr Howard said:⁹

Well, we're not denying their [UN treaty bodies] right to criticise if they want to, but we can monitor and control the extent to which we work with the committees. I mean it's a free world, well it's a free world for most, it's certainly a free country in Australia and if people want to criticise this country they have a right to do so, but we're not going to be a part, willingly, of a process where we don't believe proper regard is paid to expressions of view by the elected government.

The government subsequently softened its stance, moving towards a commitment to assist in reform of the UN treaty body system. While initial proposals for reform read more in the nature of a steady withdrawal from the system (among the first reforms proposed were decisions to take "a more economical and selective approach" to treaty committees, to deny requests from Committee on Human Rights mechanisms for visits and to refuse to sign the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women), Australia remains involved in the process of reform currently being run out of the United Nations.

"You're not the boss of me"

By far the most prevalent mechanism employed by the government to rebut adverse decisions against Australia is the resort to Australian sovereignty as a defence to allegations of human rights violations against Australia.

In response to the CERD Committee's concluding observations on Australia's periodic report, the Prime Minister remonstrated:¹⁰

Australia decides what happens in this country through the laws and the parliaments of Australia. I mean in the end we are not told what to do by anybody. We make our own moral judgments.

In a separate interview, the Prime Minister made comments in a similar vein:¹¹

⁸ ABC Radio, "Interview with Sally Sara", *AM Programme*, 18 February 2000, <<http://www.pm.gov.au/news/interviews/2000/AM1802.htm>>.

⁹ ABC Television, The Hon John Howard MP Television Interview with Kerry O'Brien, *7.30 Report*, 30 August 2000 <<http://www.pm.gov.au/news/interviews/2000/interview428.htm>>.

¹⁰ ABC Radio, "Interview with Sally Sara", *AM Programme*, 18 February 2000, <<http://www.pm.gov.au/news/interviews/2000/AM1802.htm>>.

I mean, can't these things be resolved by Australians in Australia and not us having to dance attendance on the views of committees that are a long way from Australia...I mean we are mature enough to make these decisions ourselves.

In a remarkable interview, Australia's Minister for Foreign Affairs exhibited a worrying perspective on human rights (and, at the very least, undermined the Prime Minister's aforementioned pronouncement on the government's maturity) when he addressed the following thinly-veiled threat to the UN human rights treaty bodies:¹²

If a UN Committee wants to play domestic politics here in Australia, then it will end up with a bloody nose.

In no uncertain terms, the message has issued from the Australian government: we are a sovereign state, and international human rights law should keep out of domestic affairs. On the one hand, these quotes, drawn largely from media releases, can be dismissed as political rhetoric. On the other hand, the argument of sovereignty is employed with alarming regularity to oppose Australia's engagement with the international community (most memorably in the brinkmanship over Australia's ratification of the Statute of the International Criminal Court) and has considerable persuasive force with the Australian population. The unfortunate effect is that obedience to international human rights norms is being portrayed as in some way "un-Australian". Accordingly, it is crucial to unpack the concept of sovereignty, and consider whether it is an adequate response to refute decisions of the UN human rights treaty bodies. The following analysis will focus on one such treaty body, the Human Rights Committee, which possesses the full complement of powers vested in the human rights treaty bodies.

Australian sovereignty and the Human Rights Committee

Australia's relationship with the United Nations Human Rights Committee spans barely a decade. On Christmas Day 1991, the Optional Protocol to the ICCPR entered into force for Australia, granting the Committee the competence to hear complaints from individuals alleging human rights violations against Australia. Since then, the Committee has handed down decisions in 29 claims concerning Australia. Of these, only eight claims proceeded to a merits determination,¹³ with the Committee striking out the other claims on admissibility grounds. Only five of those claims which proceeded to the merits have been decided against Australia.¹⁴ In light of these statistics, it is perhaps surprising that the Human Rights Committee has recently been the subject of such negative attention in the Australian context. On a legal analysis, it is particularly surprising that focus of much of this criticism has been the violation of Australian sovereignty occasioned by the Committee's decisions. Indeed, when one examines the structural underpinnings of the Human Rights Committee, it can be seen that Australia's sovereignty has been comprehensively protected in four main ways.

¹¹ Lincoln Wright, "Howard Softens Stand on UN", *The Canberra Times*, 3 April 2000.

¹² ABC Television, "Australia headed for bottom of the human rights barrel", *7.30 Report*, 31 March 2000, <<http://www.abc.net.au/7.30/stories/s115193.htm>>.

¹³ *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994); *A v. Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *ARJ v. Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997); *GT v. Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 (1997); *Winata v. Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001); *Rogerson v. Australia*, Communication No. 802/1998, UN Doc CCPR/C/74/D/802/1998 (2002); *C v. Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Love et al v. Australia*, Communication No 983/2001, UN Doc CCPR/C/77/D/983/2001.

¹⁴ *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994); *A v. Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Winata v. Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001); *Rogerson v. Australia*, Communication No. 802/1998, UN Doc CCPR/C/74/D/802/1998 (2002); *C v. Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).

Australia's signature and ratification of Optional Protocol

Australia signed the ICCPR on 13 August 1990. Under Article 2 of that Covenant, Australia voluntarily entered into an obligation “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in [the Covenant]”. On 25 September 1991, Australia voluntarily entered into another commitment, the First Optional Protocol to the ICCPR. Under this Protocol, Australia recognised the competence of the Human Rights Committee “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”.

Signature and ratification of a treaty is a voluntary action under which a state knowingly contracts to uphold certain obligations. Complying with a treaty does not entail a violation of sovereignty. To the contrary, the World Court described a state's entry into international obligations as “an attribute of State sovereignty”.¹⁵

It is notable that the Committee consistently refuses to decide any matter which relates to events prior to the entry into force of the Optional Protocol for Australia.¹⁶

Requirement for the exhaustion of local remedies

The Committee sets itself up as a measure of last resort to be utilised only when all avenues available within the state have been exhausted. This means that an individual must resort to all available legal procedures available in Australia before he or she will be entitled to bring a matter before the Human Rights Committee. In this way, the Committee only provides a remedy where the Australian legal system fails to provide a remedy itself.

The Committee enforces this requirement strictly. In eight of the 29 matters against Australia, the claim or part of the claim was held inadmissible on grounds the complainant had failed to exhaust domestic remedies.¹⁷ For example, the Committee dismissed the claim by Michelle Lamagna on the ground that the domestic remedies, while exhausted in respect of the issue brought before the Committee, had been brought in the name of her company, rather than in her own name.¹⁸ In *A v. Australia*,¹⁹ the complainant's claim was held partly inadmissible on the ground the complainant had failed to challenge the constitutionality of the statutory provision in question before the High Court of Australia, a remedy which, while available, was considered unlikely to be effective. The Committee held that “mere doubts about the effectiveness of

¹⁵ S.S. Wimbledon (United Kingdom, France, Italy and Japan v. Germany), 1923 P.C.I.J. Ser A No 1, 25.

¹⁶ *Love, Bone, Craig and Ivanoff v. Australia*, Communication No 983/2001, UN Doc CCPR/C/77/D/983/2001 (2003) (as to claim by Bone, Craig and Ivanoff); *Peter Hesse v. Australia*, Communication No 1087/2002, UN Doc CCPR/C/75/D/1087/2002 (2002); *Barry Hart v. Australia*, Communication No 947/2000, UN Doc CCPR/C/70/D/947/2000 (2000); *Francis Perera v. Australia*, Communication No 536/1993, UN Doc CCPR/C/53/D/536/1993 (1995); *KLB-W v. Australia*, Communication No 490/1992, UN Doc CCPR/C/47/D/490/1992 (1993); *AS and LS v. Australia*, Communication No 499/1992, UN Doc CCPR/C/47/D/499/1992 (1993).

¹⁷ *Sunil Dixit v. Australia*, Communication No 978/2001, UN Doc CCPR/C/77/D/978/2001 (2003); *Rogerson v. Australia*, Communication No. 802/1998, UN Doc CCPR/C/74/D/802/1998 (2002); *Robert Collins v. Australia*, Communication No. 881/1999, UN Doc. CCPR/C/76/D/881/1999 (1999); *Gheorghe Pasla v. Australia*, Communication No 751/1997, UN Doc CCPR/C/65/D/751/1997 (1999); *Michelle Lamagna v. Australia*, Communication No 737/1997, UN Doc CCPR/C/65/D/737/1997 (1999); *Leonard Lindon v. Australia*, Communication No 646/1995, UN Doc CCPR/C/64/D/646/1995 (1998); *A v. Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *X v. Australia*, Communication No 557/1993, UN Doc No CCPR/C/57/D/557/1993 (1996).

¹⁸ *Michelle Lamagna v. Australia*, Communication No 737/1997, UN Doc CCPR/C/65/D/737/1997 (1999).

¹⁹ *A v. Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

local remedies or the prospect of financial costs involved did not absolve the author from pursuing such remedies”.²⁰

Margin of appreciation doctrine

The “margin of appreciation” doctrine has been recognised most famously in the jurisprudence of the European Court of Human Rights. The concept provides national authorities with a certain measure of discretion in the application of certain guaranteed rights on the basis that they are best placed to evaluate local needs and conditions. While the Committee jurisprudence reflects no express adoption of this doctrine, Schmidt argues:²¹

[A]ssuming that it is central to ‘margin of appreciation’ considerations to require that any State interference with a certain protected right be ‘proportional’ to the interest served, then a number of views adopted by the Committee display at least implicit ‘margin of appreciation’ components.

Such an implicit recognition is found in *Toonen v. Australia*,²² where the Committee considered the fact that Article 17 allowed for some infringement of the right to privacy if there are reasonable grounds. The Committee acknowledged Australia’s argument that domestic social mores may be relevant to the reasonableness of an interference with privacy. The Committee referred to the state party’s recognition that:²³

[T]here is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society.

The consideration of Australia’s particular legal and social situation represents at least an acknowledgement that the domestic context is relevant to the Committee’s determination of rights violations.

Non-binding decisions

Finally, Australian sovereignty is protected by the absence of enforcement powers of the Committee. As noted above, the decisions of the Human Rights Committee are not formally binding, such as those of a court of law. In determining the legal effect of the decisions of the Human Rights Committee, it is necessary to explore their effect on two levels: the international level and the domestic level.

At the domestic level, the decisions of the Committee have no direct legal effect. They cannot be enforced under the Australian legal system. Rather, domestic bodies have a discretion to utilise the decisions to effect changes in domestic law in two ways. First, decisions of the Human Rights Committee provide an impetus for the Commonwealth to invoke the external affairs power under section 51(xxix) of the Constitution (the external affairs power) to legislate to bring Australian law into conformity with the ICCPR (as happened in the *Toonen* decision). Second, decisions of the Human Rights Committee may be utilised by the Australian judiciary as a persuasive source of interpretation of the Covenant for courts to

²⁰ Ibid para 6.4.

²¹ Schmidt, “The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments” in Harris and Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995), 657.

²² *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

²³ Ibid para 6.7.

take into account in their interpretation of statutes and the common law.²⁴ The decision by domestic bodies cannot be said to violate Australia's sovereignty. To the contrary, such a decision would amount to an exercise of sovereignty.

Equally, at the international level, the decisions of the Committee are not binding on Australia. The Committee cannot enforce Australia's compliance with its decisions, nor instruct Australia as to the measures it must take to comply. Instead, the Optional Protocol framework leaves states with a measure of discretion as to the measures they may take in response to the Committee decisions. Consequently, the Committee process is more justifiably criticised for being overprotective of state sovereignty.

Used effectively, the decisions of the Committee provide an important and persuasive guide to the interpretation of the ICCPR. The fact that these decisions are non-binding does not amount to a licence to ignore the decisions, or erect straw man arguments to distract attention from them. States parties performing their obligations under the Optional Protocol in good faith will publicise the decisions so as to encourage informed debate on the issue of rights protection within the domestic population. Moreover, as discussed above, Australia's discretion to refuse to comply with the Committee's decisions should be exercised with careful regard to the fact that failure to comply with the decision attracts the presumption that Australia is in violation of its obligations under the ICCPR, obligations which are binding on Australia under international law.

Taking sovereignty out of the equation

In conclusion, it can be seen that, if the decisions of the Human Rights Committee are to be attacked, it should not be on the ground of violation of Australia's sovereignty. When the concept of sovereignty is unpacked, little is revealed except that sovereignty does not provide a normative roadmap for the means and extent to which human rights should be recognised by the Australian political and legal system.

The government's use of sovereignty is not merely incorrect, it is disingenuous. Sovereignty has for too long been used as a decoy to deflect attention from Australia's human rights violations. This is brought into stark relief when one considers two recent decisions finding human rights violations on the part of the government, one by an international committee and one by a domestic court. In April in *Hagan v. Australia*,²⁵ the CERD Committee found that the use of the word "nigger" on a grandstand in Toowoomba was racially offensive and should be taken down. The government refused to follow the Committee's decision on the basis that the issue had been considered by Australian courts, and that the government was "confident that Australia's domestic processes, which found no racial discrimination in this case, are second to none in the world".²⁶ However, in August this year, when an Australian court found that detaining children was unlawful, the government's position on the Australian court system was very different. The Minister for Immigration, Philip Ruddock, retorted that the courts were acting "in excess of their power" and that "arrangements that the parliament intended should operate [were] being unwound by judicial actions".²⁷ Mr Ruddock has made similar comments in relation to the Federal Court and High Court. At a meeting of the Commonwealth Lawyers' Association in London, he stated that it should be the Parliament that decided Australia's laws, not what he termed "unelected and irresponsible officials" of the courts.²⁸

²⁴ See, eg, *Minister for Immigration v. Al Masri* [2003] FCAFC 70 (15 April 2003), [146-148] (Black CJ, Sundberg and Weinberg JJ); *Johnson v. Johnson* (2000) 201 CLR 488, 501-502 (Kirby J); *Commonwealth v. Hamilton* (2000) 108 FCR 378, 387 (Katz J).

²⁵ Committee on the Elimination of Racial Discrimination, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2002).

²⁶ Ashleigh Wilson, "Canberra to defy UN on 'nigger' sign", *The Canberra Times*, 24 April 2003.

²⁷ "I'll try to keep children locked up: Ruddock", *Sydney Morning Herald*, 1 August 2003.

²⁸ "Ruddock ambushed over refugee stance", *Sydney Morning Herald*, 23 April 2002.

This exposes that the government's concern is not with sovereignty: it is with human rights protection. It is difficult to avoid the conclusion that sovereignty is used as a shield to mask a broader reluctance on the part of the government to assure human rights protection to certain groups in society. This is not to cast the government as entirely ill-intentioned. When human rights come up against the hip pocket, or other issues with which the majority of Australians are concerned, it will often be more economical, efficient and less complex for our policy-makers to pursue policy aims without concerning themselves with human rights protection. However, respect for human rights is not a question of politics to be weighed up in the political balance. It is a question of international law, compliance with which underpins our status as a responsible member of the international community.

If the government is serious about resolving human rights issues in Australia, it will take steps to incorporate human rights protections into our domestic legal system to avoid the need to resort to international committees. Until then, decisions of the Human Rights Committee, and other UN treaty bodies, will remain important contributions to the dialogue relating to Australia's respect for human rights. Indeed, they must be better utilised to inform domestic debate about the human rights implicated in government policy. It is time for the government to address the question of alleged violation of human rights as a domestic issue which requires explanation on grounds other than sovereignty. In this way, the challenge of implementation of human rights may come to be regarded as a new priority of domestic policy, not an ornament of foreign policy.

A Defence of the Refugee Convention Definition of Refugee

Kristen Walker*

Introduction

In laypersons' language, a refugee is a person fleeing from some harm in their home country – this could be flood, famine or human rights abuses.¹ In international law, however, under the Convention Relating to the Status of Refugees (the Refugee Convention), a refugee is defined in a more limited way. Article 1A(2) of the Refugee Convention, as modified by the 1967 Protocol, defines a refugee as a person who:

[o]wing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country....

This definition has two key elements:

1. The person must be fleeing persecution on the basis of race, religion, nationality, political opinion or membership of a particular social group; and
2. The person must be outside their home country.

It is only to such people that parties to the Refugee Convention owe obligations.

Each of these requirements excludes from the definition of refugee people who may be in dire need of assistance – people who have not escaped their home country, and people fleeing harm other than persecution for a Convention ground, such as natural disaster or generalised human rights abuses. Yet such people might be in dire need, need just as great as those fleeing persecution for a Convention ground. So why should they not be entitled to rights under the Refugee Convention? Surely they arouse our compassion and our moral obligations just as much as those fleeing persecution for a Convention ground?

My goal in this paper is to offer an argument defending the limited definition of refugee in the Refugee Convention. It has been argued that the limited definition is unjustifiable because it draws lines between groups of people whose need is morally equivalent.² I want to challenge that argument.

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¹ For example, the *Concise Oxford Dictionary* defines a refugee as "a person taking refuge, esp in foreign country from religious or political persecution, or from war, earthquake etc".

² See, eg, Andrew Shacknove, "Who Is a Refugee?" (1985) 95 *Ethics* 274, 274; Isabelle Gunning, "Expanding the International Definition of Refugee: A Multicultural View" (1989-90) 13 *Fordham International Law Journal* 35; Ved P Nanda, "Refugee Law and Policy" in Ved P Nanda (ed) *Refugee Law and Policy: International and US Responses* (1989) 3, 9.

A normative analysis of the refugee definition

The first step in my analysis is to accept that states have a legitimate interest in restricting immigration. This may be controversial. However, states owe duties to their citizens to provide various basic goods, such as an adequate standard of living, protection from violence, participation in community decision-making and so on. If the number of people in a state becomes too great, these basic goods cannot be provided.³ Thus states have a legitimate interest in limiting immigration, although it is often invoked where the threat to the state's ability to provide the basic goods is illusory or manufactured. But the fact that states misuse this argument does not render the argument invalid.

Yet even if it is accepted that states can limit immigration, it is also accepted that there are certain people that a state must not return to their home country – and this obligation translates, in many cases, into an obligation to allow such persons to enter. This obligation is embodied in the Refugee Convention, but it applies only to those fitting the definition of refugee. Why is it that states must offer refuge to some who are in need, but may reject others whose need is morally equivalent?

Shacknove has argued that persecution is a sufficient but not necessary condition for refugee status, and that the same reasons that require us to accept Convention refugees apply to all who are deprived of basic needs.⁴ At one level this argument is persuasive: the need of a person who is persecuted will in many cases be equivalent to the need of a person who is starving or at risk in war. If we owe one a duty of assistance, surely we owe the other a duty also?

The principle of mutual aid is often invoked by those advocating a broader approach to the definition of "refugee".⁵ This principle suggests that states should assist those in need who do not fit the definition of refugee. That principle requires that, where a person is in dire need and we can assist her with little cost to ourselves, we have a moral duty to do so. The need that can enliven this moral duty can stem from persecution, but equally it can stem from flood, famine or war. The Refugee Convention does not require states to assist all those in need, thus it does not fully embody the mutual aid principle.

But I argue that the moral duty on states generated by the principle of mutual aid does not require that all persons in need are or should be accepted as refugees under the Refugee Convention. My argument has two parts. First, not all persons in need require the same kind of assistance from the international community; and second, special harm is caused by persecuting people on the basis of race, religion, political opinion or membership of a social group.

³ See Peter Singer and Renata Singer, "The Ethics of Refugee Policy" in Mark Gibney (ed), *Open Borders? Closed Societies? The Ethical and Political Issues* (1988) 111, 123-4; Joseph Carens, "Refugees and the Limits of Obligation" (1992) 6 *Public Affairs Quarterly* 31, 33. Michael Walzer makes a similar argument, though he also justifies restrictions on immigration on the basis that "restraint of entry" protects the "politics and culture of a group of people committed to one another and to a shared life", a claim I find less persuasive: Michael Walzer, *Spheres of Justice* (1983) 39.

⁴ Shacknove, above n 2, 277.

⁵ Singer & Singer, above n 3; Walzer, above n 3, though Walzer concludes that the principle of mutual aid is qualified if the numbers become too large, because the cost to ourselves then becomes too great. So if a state were to find itself overwhelmed by refugees, so that it would provide only the most basic of services to its own citizens, then the moral duty to accept all the refugees seeking asylum is negated — a state need only accept those it can accommodate. If course, there is room for debate about what kind of level services would have to drop to in order to a state to truly be overwhelmed in this way. This is discussed in Walzer and in Singer and Singer, but is beyond the scope of this paper.

Not all persons in need require the same kind of assistance from the international community

Turning to the first argument, that not all persons in need require the same kind of assistance. Persons fleeing natural disasters are genuinely in need, and thus states have a moral duty to assist such persons. But the kind of assistance required to deal with a natural disaster is generally quite different from the kind of assistance required by a person fleeing persecution. Thus, the moral obligation does not require states to provide the kind of assistance provided under the Refugee Convention – non-refoulement,⁶ rights to work,⁷ rights to welfare⁸ and ultimately, the possibility of naturalisation.⁹

Rather, the moral duty on third states in relation to natural disasters is to assist the person's home state in dealing with the crisis, through provision of food, shelter, and the rebuilding of institutions and infrastructure. Fundamentally, people fleeing natural disaster may look to their home state for assistance,¹⁰ and their home state may look to the international community for assistance. The person's ties with their home state have not been broken by the natural disaster and assistance can be provided in situ.¹¹

Thus one important aspect of the Convention definition is the severance of the bond of protection between the refugee and their home state.¹² Where that bond has not been severed, the appropriate state to provide assistance to those in need is the home state, with assistance from the international community.

Persecution for a Convention reason involves a special kind of harm that warrants special protection

Human threats to life or liberty can be distinguished from natural disasters because they may involve the severance of the bond between the home state and individual, and so assistance required will often be different – it may be for refuge, not for assistance in situ. So this appears to generate moral obligations on states to offer refuge – a moral obligation that the Refugee Convention does not fulfill, as it distinguishes between those who need refuge because of Convention-based persecution, and those who need refuge for some other reason. This brings me to the second part of my argument: that persecution for a Convention reason involves a special kind of harm that can legitimately be given protection ahead of other, more generalised human rights abuses.

This argument requires me to return briefly to my initial point that states may legitimately restrict immigration. If it is accepted that state parties cannot, either singly or even in concert, accept into their territory every person in dire need of assistance – and on a more pragmatic level, that states will not do so – then some way to distinguish those in need is required.

I argue that there is something special about persecution for a Convention ground that justifies offering special protection to persons fleeing such persecution, and not offering protection to others whose need at an individual level seems equivalent. I argue that persecuting a person for reasons of race, religion, political opinion or membership of a social group is one of the most egregious forms of human rights abuses and thus assistance to such persons should be a priority, notwithstanding that others are also in need. Threats to liberty or safety that result from a person's race, religion, political opinion or membership in a social group are used as a trigger for Convention protection because of a consensus among states parties to

⁶ Article 33.

⁷ Articles 17-19.

⁸ Articles 20-24.

⁹ Article 34.

¹⁰ However, if a state were to deny assistance to persons affected by a natural disaster on the basis of a Convention ground that would permit a claim for refugee status under the Convention.

¹¹ Arisitide Zolberg, Astri Suhrke and Segio Aguayo, *Escape From Violence: Conflict and the Refugee Crisis in the Developing World* (1989) 33, 271.

¹² See Atle Grahl-Madsen, *The Status of Refugees in International Law* (Vol 1, 1966) 95-101; Shacknove, above n 2, 275, 278; Zolberg et al, above n 11, 33.

the Convention that the infliction of serious harm for a Convention reason is particularly egregious and something against which the international community should offer protection.

There is, I argue, a strong moral argument that justifies treating persecution for Convention reasons as qualitatively different from other forms of persecution or other human rights violations. Race, religion, political opinion and membership in a social group have historically, and continue to be, used as the basis for singling out individuals and groups for elimination from society altogether. This was clearest in Nazi Germany, where race, religion, political opinion and membership of a social group were used as bases for extermination of Jews, communists, gypsies and homosexuals. And it was in part the history of the Holocaust and its aftermath that drove the drafting of the Refugee Convention.

Yet even where persecution is not intended to eliminate a particular group altogether, it nonetheless is especially egregious as it helps to maintain the position of members of such groups as subordinate and as second-class citizens.¹³ Thus although persecution for some other reason, or violence during a civil war, will be experienced as harmful by the victim, the damage such persecution does is more limited. Convention persecution, be it for reasons of race, political opinion, religion or membership of a social group, harms all members of the stigmatised group by creating a fear of similar treatment and confirming the subordinate status of the group.¹⁴ Human rights violations directed against an individual for other reasons do not produce such an effect.

In this sense, persecution for a Convention reason violates the right to equality that all persons should enjoy regardless of race, religion, political opinion or group membership.¹⁵ To paraphrase Kahan, such persecution has a distinctive meaning that makes it worthy of special condemnation. “That meaning is that the victim and those who share his identity are not full members of society.”¹⁶

I argue, then that there is a plausible basis for restricting protection under the Refugee Convention to those fleeing persecution for a Convention ground. I do not argue that there are no others in need of refuge. But if states cannot assist all such persons, then they can choose to offer refuge to those who are at risk of the most egregious form of human rights abuses: persecution for a Convention ground.

Conclusion

In defending the Convention definition of refugee, I do not want to suggest that the Convention is a sufficient expression of the duties owed by states to people in need in other states. It clearly is not. Nor do

¹³ Here, I draw a limited analogy with hate crime legislation that imposes heavier penalties for crimes based on prejudice against a particular race or religion. Such legislation deals with activities that are already crimes, such as assault and murder. It does not deny that such crimes should be punished regardless of the motivation of the accused. But the imposition of heavier penalties on those who commit assault or murder because of their victim’s race or religion recognizes the insidious nature of racial and religious intolerance in society and singles such intolerance out for additional individual responsibility. See, eg, Michael Blake, “Geeks and Monsters: Bias Crimes and Social Identity” (2001) 20 *Law and Philosophy* 121; Andrew Altman, “The Democratic Legitimacy of Bias Crime Laws; Public Reason and the Political Process” (2001) 20 *Law and Philosophy* 141; Dan Kahan, “Two Liberal Fallacies in the Hate Crimes Debate” (2001) 20 *Law and Philosophy* 175; Frederick Lawrence, “The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes” (1994) 93 *Michigan Law Review* 320; Kent Greenawalt, “Reflections on Justifications for Defining Crimes by the Category of Victim” [1992/93] *Annual Survey of American Law* 617.

The debates about hate crime law, however, are different from those around refugee law, as hate crime law involves, on one view, punishing a person for their thoughts (ie. the motivation for their crime). Refugee law, on the other hand, does not involve punishing the persecutor — only offering asylum to the victim. Thus much of the debate about hate crime laws is not directly relevant to refugee law.

¹⁴ Altman, above n 13, 164-5.

¹⁵ See, eg, International Covenant on Civil and Political Rights, Articles 2, 26.

¹⁶ Dan Kahan, “The Secret Ambition of Deterrence” (1999) 113 *Harvard Law Review* 416, 464.

I want to suggest that states may choose to admit as few refugees as they choose. The principle of mutual aid suggests that states' obligations to admit refugees are far more onerous than this – requiring states to admit as many refugees as they can support without compromising the provision of basic services to their own communities. Australia's current level of approximately 12,000¹⁷ is clearly well below the level the principle of mutual aid would suggest.¹⁸

What I have argued is that, in a context where states can and will restrict immigration, the offer of protection to a limited class of individuals as defined in Article 1A(2) can be justified even though it does not offer protection to all those in need. This argument suggests that the solution to the problems of other persons in dire need – those fleeing natural disaster, poverty, war or generalised human rights abuses – is not to try to include such persons within the framework of the Refugee Convention. Such a strategy is impractical, as it ignores the fact that states already consider their obligations under the Convention too onerous. Nor is the solution to renegotiate the Refugee Convention to encompass a broader category of persons, as states are unlikely to broaden the scope of the Convention in any renegotiation.

Rather, several approaches are needed:

- we must press states to adhere to their obligations under the Refugee Convention, not water them down;
- we must strengthen the existing role of the UNHCR, which already assists refugees falling outside the Convention definition;
- we must impose duties of assistance on developing states to assist states experiencing poverty or natural disasters; and
- we must work towards new international arrangements to deal with the problems caused by poverty, war or natural disaster;
- and we must try to address the causes of refugee flows, not just their results.

¹⁷ The Australian government in 2001-2 allocated a cap of 12,000 places in its humanitarian program, which encompassed both refugees and those seeking admission on other humanitarian grounds. See Department of Immigration and Multicultural Affairs, Media Release, "Minister Warns That Illegal Arrivals Threaten Australia's Humanitarian Program", 27 April 2001, http://www.minister.immi.gov.au/media_releases/media01/r01046.htm (accessed 25 January 2002).

¹⁸ A discussion of the number of refugees states should accept is beyond the scope of this paper, but for a spirited discussion of the question see Singer and Singer, above n 3, 125-128.

Evaluating Australia's treaty-making process

Madelaine Chiam*

In 1996, in response to anxiety about the domestic impact of international law, the Australian government introduced reforms to Australia's treaty-making process.¹ The reforms were designed to address a number of criticisms about Australia's treaty-making practice, including that it resulted in a loss of sovereignty for Australia; that Parliament's desultory role in the process made it democratically deficient; and that the process lacked accountability and transparency.

Since the introduction of the reforms, the furore over Australia's treaty-making practices has largely dissipated. The public, in the form of both non-government organisations and individuals, as well as Parliamentarians, are enthusiastic participants in the revised treaty-making mechanisms. A 1999 government review of the reforms concluded that they have "greatly improved scrutiny, transparency and consultation in the treaty-making process, and community awareness of treaties".² These positive signs notwithstanding, it is my contention that the 1996 reforms have not properly addressed at least one of the original critiques about Australia's treaty-making practice, that of the democratic deficit. As such, the reforms have failed to ease the anxiety evident in Australia's approach to international law.

Democratic Deficit

The argument that Australia's treaty-making process was democratically deficient had two aspects: first, that the Executive's ability to assume new international obligations without involving Parliament was 'undemocratic'³ and second, that submitting Australia to the jurisdiction of international committees isolated Australian electors from decisions that directly concerned them.⁴ It is the first of these criticisms that is the subject of this note.

On their face, the 1996 reforms have alleviated any democratic deficit that arose from Parliament's earlier minimal role in relation to international law. All treaty actions proposed by the government are now tabled in Parliament for 15 or 20 sitting days before binding action is taken.⁵ Each tabled treaty is accompanied by a National Interest Analysis (NIA), which outlines information including the obligations contained in the treaty and the benefits for Australia of entering into the treaty. All tabled treaties are also subject to the scrutiny procedures of the Joint Standing Committee on Treaties (JSCOT), a committee created by the 1996 reforms.⁶ Parliament's role in Australia's treaty-making process has become quite significant and very public.

It is not clear, however, that this enhanced role for Parliament has actually made Australia's treaty making practices more 'democratic'. A proper analysis of this question would mean examining the

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¹ See Minister for Foreign Affairs and the Attorney-General, 'Government Announces Reform of Treaty-Making', (Media Release FA-29, 2 May 1996).

² Commonwealth, *Review of the Treaty-Making Process* (August 1999) 10, <<http://www.law.gov.au/agd/Attorney-General/Treaty-Making%20Process.htm>> at 7 July 2003.

³ See, eg, Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995), Chapter 14.

⁴ See, eg, Sir Ninian Stephen, 'The Expansion of International Law: Sovereignty and External Affairs', *Sir Earle Page Memorial Trust Lecture* (15 September 1994) quoted in 'Making Rules for the World' (March 1995) *Australian Lawyer* 14.

⁵ The Minister for Foreign Affairs, 'Greater Transparency for Treaty-Making Process', (Media Release FA114, 20 August 2002). Treaty actions which the Minister for Foreign Affairs certifies to be particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests, are exempted from this requirement.

⁶ The other two aspects of the reforms were the establishment of the Treaties Council comprising the Prime Minister, Premiers and Chief Ministers; and the establishment, on the internet, of the Australian Treaties Library.

reforms against what democracy means in Australia today and is beyond the scope of this note. I propose, however, still to offer a few thoughts about the issue through an examination of Executive action.

An important element of the democratic deficit critique was a concern about the Executive's constitutional power to assume international obligations. Proponents of this argument seemed to want to introduce a check on the Executive's unlimited power in relation to international policy. Giving Parliament a formal role in scrutinising treaties before they were ratified by the Executive was thus one means of attempting to check this exercise of Executive power. It may be possible then to measure whether or not the 1996 reforms have addressed the democratic deficit through examining:

- (a) the extent to which the Parliamentary mechanisms can and have restrained the exercise of the Executive's treaty-making power; and
- (b) the extent to which there is greater accountability of the Executive to Parliament in relation to its treaty-making activities.

Restraint on Executive power

The 1996 reforms contain no formal legal impediments to the Executive's ability to assume international obligations. The Joint Standing Committee on Treaties, which is responsible for scrutinising all proposed treaty action, has only an advisory role. The government maintains that JSCOT's power lies in the potential political ramifications of its recommendations. The Australia Foreign Minister, for example, has said that "any government would need to think very carefully of the political consequences before it ignored a unanimous JSCOT recommendation."⁷ It is hard to test the accuracy of this statement however. To date, JSCOT has almost always recommended that the government take binding action in relation to the treaties scrutinised. Indeed, in the 24 reports (and nearly 100 treaties) considered between December 1999 and July 2003, JSCOT has recommended ratification of all but one of the treaties. And even in the case of that one treaty, ratification was recommended after Treasury provided further and better particulars as to the net benefit of the treaty to Australia.⁸

It is reasonably clear that JSCOT does not regard itself simply as a rubber stamp for Executive action. In Report 52, for example, the Committee expresses concern that the practice of introducing implementing legislation before the completion of JSCOT inquiries could undermine the proper functioning of that process.⁹ And yet, the Committee is politic in its approach to reports and has tended to make recommendations that will be adopted by government over a strong stance that may be ignored. This approach makes it unlikely that the government will have to face the spectre of a unanimous JSCOT recommendation that conflicts with government policy.

There are two further factors that weigh against the ability of Parliament to restrain the exercise of Executive power. The first of these is the timing of JSCOT scrutiny. Treaties are generally referred to JSCOT when they have been signed by the Executive, but before ratification. Parliament is thus coming in at the end of the process, when the Executive has completed the difficult task of negotiation and there is no longer scope to influence the terms of the treaty. As the protagonists in a recent Senate Estimates meeting put it:¹⁰

Senator Cook: [This] is an elegant way of saying that the treaties committee can offer commentary but it cannot vary or change any element of the treaty.

⁷ Minister for Foreign Affairs, 'Treaties and Community Debate: Towards Informed Consent' (Speech delivered at the Launch of the Australian Treaties Database, Canberra, 20 August 2002).

⁸ See Julie Bishop, 'Statement concerning Report 46: Treaties tabled March 12 2002' (26 June 2002) <http://www.aph.gov.au/house/committee/jscot/12march2002/tabspeech.pdf> at 28 August 2003.

⁹ Joint Standing Committee on Treaties, Parliament of Australia, *Report 52: Treaties Tabled in March 2003* (2003) 54-55.

¹⁰ Senate Foreign Affairs and Trade Legislation Committee, Parliament of Australia, *Estimates*, 3 June 2003, 253.

Mr Deady (main trade negotiator): That is correct. Yes.

Parliament is able to scrutinise the consultation that occurred in relation to the negotiation of a particular treaty. JSCOT, in fact, recently secured a commitment from the government that NIAs will contain a list of all agencies consulted in relation to treaty action.¹¹ This focus on consultation enhances the transparency of the negotiation process, but it does little to influence the outcome of those negotiations.

The second factor weighing against Parliament's ability to influence Executive action is the volume of work faced by JSCOT. Many members and senators already have significant workloads and secretariats are generally considered understaffed. There is therefore a question over the ability of JSCOT members to digest fully the treaties, the National Interest Analyses and any relevant public submissions, before producing a properly analytical report. The quality of some of JSCOT's reports seems to reflect these workload issues. It is not uncommon, for example, for a JSCOT report on a treaty to mirror the descriptive text of the NIA, without adding much by way of independent analysis.

It seems, therefore, that the 1996 reforms have not provided a means through which Parliament can influence the Executive's determination of international policy.

Executive accountability to Parliament

My observations of the JSCOT process suggest that the National Interest Analyses and the public hearings conducted by JSCOT provide the best opportunity for ensuring Executive accountability to Parliament. Although the quality of the NIAs varies depending on the department responsible for drafting them, and the questioning by JSCOT members can sometimes be superficial, there is value in the fact that the hearings occur and that the justifications for Australia's entry into treaties are a matter of public record.

In contrast, there seems little to be gained from government responses to JSCOT reports. The government is obliged to provide a response to reports, but not within a specified period. Thus, government responses have usually been given between 6 and 18 months after the release of a report.¹² In addition, because JSCOT has rarely recommended against taking binding action on a treaty, the government has been able to avoid taking action in direct conflict with JSCOT recommendations. It has also thus avoided ever needing to have explained such action.

Reception of international law in Australia

Another issue relevant to my analysis of Australia's treaty-making process is the extent to which this process has affected Australia's relationship with international law. This broad issue is the subject of a joint project in which I am currently involved. In a forthcoming article, my colleagues and I argue that Australia displays deep anxieties about international law: both because it is perceived as undermining our 'sovereignty' and because international law is seen an intrusion from 'outside' into Australia's self-contained and carefully bounded legal system.¹³

From this perspective, the 1996 reforms, and JSCOT in particular, can be seen as an attempt to control the influence of international law in Australia. By putting all treaties through the domestic parliamentary process, the 'outside' influence of international law becomes instead both known and manageable within the Australian system. In theory, then, the 1996 reforms should have reduced anxieties about the reception of international law in Australia. Have they done so?

¹¹ Commonwealth, *Government response to Report 50 of the Joint Standing Committee on Treaties*, 19 June 2003.

¹² See <http://www.aph.gov.au/house/committee/jsct/report.htm> for a list of JSCOT reports and dates of government responses.

¹³ Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* (forthcoming).

On one crude measure, they haven't. The federal Labor government signed 361 treaties between 1990 and 1995, whereas, in a similar period after the introduction of the 1996 reforms, the Coalition government signed 304 treaties (between 1997 and 2002). Further, the government has an inconsistent attitude towards international law. On the one hand, it has displayed particular anxiety about the international human rights regime. Some good examples of this include the tumult over Australia's ratification of the ICC, the government's open suspicion of the UN human rights committees, Australia's refusal to sign the Optional Protocol to CEDAW and its vote in ECOSOC against the adoption of a Protocol to the Torture Convention. At the same time, the government has been an enthusiastic participant in the international trading system. In a 2003 Press Club Address, the Foreign Minister described Australia's commitment to the WTO as 'unswerving' and also emphasised Australia's desire to pursue bilateral free trade agreements where they can offer 'improved opportunities for Australian industry'.¹⁴

What then does this tell us about the impact of the 1996 reforms on the reception of international law in Australia?

First, I think we can say that the reforms have had a minimal impact on the formation of Australia's international policy. That prerogative remains firmly in the hands of the Executive, both formally and practically.

Second, I think we can see the 1996 reforms as a means through which the government has been able to channel Australian concerns about international law, without necessarily addressing the basis of those concerns. Since the reforms were introduced, the public fears about Australia's adoption of international obligations have eased considerably. Members of the public and NGOs regularly make submissions to JSCOT and the Committee plays an important role as a forum through which the electorate can voice opinions about international treaties. And this is despite the fact that, as I have argued, nothing has really changed in relation to the way in which Australia's international policy is made.

The JSCOT process has the added advantage, for the government, of dealing only with treaties that the government is considering ratifying. It does not act as a forum in which opinions about government policy more generally can be voiced. There is no mechanism through which Parliament, or the electorate, can scrutinise Executive decisions not to become party to a treaty, like the decision on the CEDAW optional protocol. As such, the 1996 reforms effectively legitimise government decisions to participate in international treaties, without ever raising questions about its decisions not to.

Conclusion

This note is not meant to suggest that the 1996 reforms have been wholly unsuccessful. The reforms have considerably improved the transparency of the treaty-making process and have contributed to a public sense of participation in that process. We should be wary, however, of regarding the reforms as the definitive means of regulating Australia's relationship with the international order. I have tried to identify in this note how the 1996 reforms have failed to address some of the original concerns about Australia and treaty-making, in particular the democratic deficit critique. The procedural nature of the reforms also means that they mask the problems that remain in the substantive question about Australia's relationship with international law. More work must be done to explore in detail the tensions in Australia's relationship with international law in order that a more comprehensive solution may be found.

¹⁴ Alexander Downer, 'Security in an Unstable World' (Speech delivered at the National Press Club, Canberra, 26 June 2003).

Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere

Wendy Lacey*

Introduction

The relevance of international law (and human rights law in particular) to the exercise of judicial discretions within Australia has received comparatively little attention in analyses of the nexus between international and domestic law.¹ This may be attributed to the fact that judicial discretions are either provided under common law or statute, and thus, may be considered as subject to the accepted means by which Australian courts may use international law to interpret statutes and to develop and shape the common law. However, it is more likely that the lack of substantive commentary is a reflection of the relative absence (at least until recently) of both case law and statutory provisions specifically directed at the issue of judicial discretion and international law.

In recent years, an emerging jurisprudence has been evident in Australia where the courts have begun to consider the role that international legal standards may play when an individual judge exercises a judicial discretion.² This trend in the case law reflects the growing significance of this method of utilising international human rights law in litigation, the potential of which is likely to be increasingly realised in the coming years.³ The impetus for this development cannot be linked to one factor alone, but must be seen as a consequence of many factors, and in the context of broader legal and political developments. These factors include: the express statutory acknowledgement of the relevance of international human rights instruments to the exercise of judicial discretions;⁴ the judicial consideration of discretions granted under both common law and statute within the framework of accepted methods for utilising international law in Australia;⁵ consideration of the relevance of the *Teoh*⁶ doctrine to judicial decision-making;⁷ and the legitimacy of international human rights standards to the values adopted and espoused by individual judges in carrying out their judicial functions.⁸

The recent decision of the Full Court of the Family Court of Australia in *B & B v Minister for Immigration and Multicultural and Indigenous Affairs*⁹ provides a telling example of the potential for international human rights law to influence both the content of, and the manner in which, discretionary

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¹ See, however, Hookey, John, 'The Prompt Trial Right: Australian Isolationism and International Law' (1994) 1 *Australian Journal of Human Rights* 117-139; Eastman, Kate & Ronalds, Chris, 'Using Human Rights Laws in Litigation: A Practitioner's Perspective', in Kinley, David (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, Sydney, 1998); Shearer, Ivan, 'The Relationship Between International Law and Domestic Law', in Opeskin, Brian R., & Rothwell, Donald R., (eds.), *International Law and Australian Federalism* (Melbourne University Press, Melbourne, 1997) at 61; Brennan, Sir Gerard, 'The Role and Rule of Domestic Law in International Relations' (1999) 10 *Public Law Review* 185-195, at 190.

² Eastman & Ronalds, *ibid.*

³ Eastman & Ronalds, *ibid.* 326, 330.

⁴ For example, Evidence Act 1995 (Cth) s 183.

⁵ On the right to a fair trial and the discretion to stay proceedings in serious criminal cases: *Dietrich v The Queen* (1992) 177 CLR 292. On the discretion to grant bail, the right to privacy, and the strict statutory construction of a provision making a taped conversation admissible in certain proceedings: *Director of Public Prosecutions v Serratore* (1995) 38 NSWLR 137.

⁶ *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁷ *Wickham & Ors v Canberra District Rugby League Football Club Ltd v Ors* [1998] ACTSC 95 (10 September 1998), per Miles CJ at para 68.

⁸ See, Kirby, MD, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514-532 at 525-526.

⁹ [2003] FamCA 451 (19 June 2003).

powers may be exercised by judges. In that case, the statutory jurisdiction of the Family Court of Australia in relation to the welfare of children (or what has traditionally been known as the *parens patriae* jurisdiction at common law) was held to rest partially on the external affairs power of the Commonwealth, with specific reference to the UN Convention on the Rights of the Child. The decision of the Full Court determined that the Family Law Act 1975 (Cth) authorised the making of discretionary orders by the Court in relation to children of illegal immigrants currently being held in detention centres throughout Australia. In exercising this discretionary power under s 67ZC, the Court could have recourse to the Articles contained in the Convention on the Rights of the Child. The matter itself has been remitted back for re-trial before a single judge of the Family Court, though the Minister has been granted a certificate to appeal directly to the High Court. Whatever the outcome, the case highlights the potential significance of international law upon the exercise of judicial discretions, and places the spotlight on judges, and the manner in which they may legitimately use international instruments in carrying out their judicial role.

It has often been acknowledged that universally accepted human rights norms provide the most obvious standards to which Australian judges may refer, and that point is perhaps even more apt in the context of judicial discretion. In the instances where judges retain specific discretions, the task most often involves the weighing up of some broad public interest with the interests of the individual. In a functional sense, discretion is often used by both legislators and judges to achieve fairness in process as well as outcome. It enables judges, who are best placed to consider the particular facts of any given case, to identify what fairness may require in the circumstances. Judicial discretion enables the law to be applied flexibly and to accommodate different scenarios in the name of fairness. In this context, discretion is one of the tools employed to alleviate the problems associated with the application of fixed legal rules in different circumstances. For human rights advocates, it represents a valuable component in any legal system, and in this sense, has a natural affinity with international human rights standards.

Yet, discretion may also be viewed from another perspective. Inherently, the existence of discretion implies the absence of fixed legal rules, and the capacity for individual choices to be made by judges. Thus, it encapsulates the potential for both abuse and for the exercise of discretion based on the personal or subjective views of particular judges. The phrase, '[w]here law ends, tyranny begins', would spring to the minds of many lawyers in this context. But few discretions are ever absolute, and most are subject to stringent guidelines (whether statutorily prescribed or developed by judges over time). In addition, all judicial discretions are subject to review by a superior court – albeit on limited grounds, but nonetheless, appealable.

To the extent that discretions should be subject to guidelines regulating their exercise, and that judges are entitled to develop such guidelines, the role of international law is important in another sense. International standards may lend legitimacy to the values espoused by judges in carrying out their judicial functions, particularly in instances where the law is ambiguous or silent, as with discretions. As Justice Kirby has stated (extra-judicially), '[a] decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community than if they are simply derived from the experience and predilections of a particular judge'.¹⁰ Resort to international law may, therefore, help to both add legitimacy to, and to guide, the exercise of a discretion by a judge.

The legal basis for the law's extension into this area is still to be fully and adequately considered by the courts, including its relationship to the principle espoused in *Teoh*.¹¹ There are a number of approaches adopted by judges in this context, including approaches that fall within the accepted methods for using international law in the interpretation of statutes, and in the development of the common law. In addition, there exists an alternative approach that appears to be based on the decision-making process involved in exercising a judicial discretion. Whether that raises a separate and independent ground for referring to international law, and whether *Teoh* provides any authority for that ground, remains unclear. Indeed, the relevance of the *Teoh* decision to the exercise of judicial discretions is particularly

¹⁰ Kirby, MD, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 524-532 at 525-526.

¹¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

controversial, given the apparent limits of that doctrine to administrative decision-making, and the broader political and constitutional issues raised by that judgment.

The case law, therefore, raises a multitude of questions concerning the legal basis of using international human rights law in the exercise of a judicial discretion, as well as questions regarding its legal parameters and effect. Yet, notwithstanding the uncertainty that surrounds this area of law, there are a number of positive aspects to the existing case law, from which a number of observations may be made. Already, there are discernible trends in the type of cases where international law is more likely to impact on a particular discretion, most notably in the criminal field. With respect to the types of discretions considered in the case law, it is evident that the relevance of international human rights law is not limited to particular discretions or particular contexts, but is potentially very wide and limited only by the circumstances of each case.

The manner in which international human rights law may be used in relation to a discretion is also varied, and extends beyond the interpretation or development of existing discretions granted under statute or common law. Such instances involve interpretation or development of the discretion itself. Indeed, development of the common law may create an entirely new discretion, or extend existing discretions to a new context. In addition, interpretation and development may involve extending the list of matters relevant to the exercise of a discretion, to include human rights contained in international law.¹² Another instance is where the strengthening or development of common law rights occurs, those rights being relevant to the exercise of a discretion.¹³ Also included are instances where a statutory provision (not granting a judicial discretion) is interpreted consistently with international human rights law, in a manner that affects or retains an existing discretionary power.¹⁴ The potential relevance of international human rights standards is, therefore, quite varied and complex.

In respect of the practical effect of using international human rights law in these contexts, one important point must be made. The result, unless involving the development of a particular human right at common law, does not necessarily entail the substantive implementation or recognition of that right under domestic law. The right does not become directly protected and enforceable under Australian law, but has an indirect recognition and potential for effective protection through the exercise of a judge's discretion. The point is significant, as it ensures consistency with current authority on the role of the judiciary in giving domestic legal effect to international law.

International human rights law and the exercise of judicial discretion: recent Australian case law

Both the commentary and case law that deal with the relevance of international human rights law to the exercise of discretionary powers by the judiciary tend to focus on aspects of the criminal justice system. As Garkawe has observed, this fact should come as no surprise:¹⁵

As the criminal justice system is the most prominent and public means by which a state may deprive any person falling under its jurisdiction of their liberty, issues relating to the criminal justice process are intimately connected with human rights issues.

Consequently, many of the relevant cases deal with such issues as: the right to a fair trial generally;¹⁶ privilege against self-incrimination;¹⁷ equality before the law;¹⁸ and various rights which pertain to

¹² *The Queen v Swaffield; Pavic v The Queen* (1997) 192 CLR 159 at 213, per Kirby J at 212-213.

¹³ *R v O'Neill* (1996) 2 Qd R 326; *Ousley v The Queen* (1997) 192 CLR 69, per Kirby J at 142; *Allesch v Maunz* (2000) 203 CLR 172, per Kirby at para 35-36; *Regina v Stringer* (2000) 116 A Crim R 198, per Adams J at paras 68-75; *Registrar Court of Appeal v Craven (No 2)* (1995) 120 FLR 464, per Kirby J at paras 9-10.

¹⁴ *Director of Public Prosecutions v Serratore* (1995) 38 NSWLR 137 per Kirby P at 142, 148.

¹⁵ Garkawe, Sam, 'The Criminal Justice System: International Influences' (1997) 70 *Reform* 5-10.

¹⁶ *R v O'Neill* (1996) 2 Qd R 326; *McInnes v The Queen* (1978-9) 143 CLR 575 per Murphy J.

¹⁷ *The Queen v Swaffield; Pavic v The Queen* (1997) 192 CLR 159; *R v O'Neill* (1996) 2 Qd R 326.

punishment and sentencing discretions.¹⁹ However, cases outside the sphere of criminal law include matters as diverse as: disputes over contractual terms,²⁰ extradition,²¹ contempt,²² and various family law matters.²³ The human rights argued in these contexts have included the right to work;²⁴ the paramouncy principle in cases involving the interests of children;²⁵ liberty of movement;²⁶ the right to be present at one's case;²⁷ family rights;²⁸ the right to strike;²⁹ and the right to enter and leave one's country freely.³⁰ Though references to international conventions have not been limited to the International Covenant on Civil and Political Rights (ICCPR), that instrument is certainly the one most often referred to by litigants, with the only exception being, perhaps, the Convention on the Rights of the Child (CROC) in family law matters.

As a consequence of the dominance of criminal law cases in the relevant jurisprudence, the particular discretionary powers which have more often been in issue before the courts are those associated with the criminal process. Thus, the case law has focused on various discretions, including: the granting of warrants,³¹ bail,³² parole,³³ adjournments in proceedings,³⁴ and stays in proceedings;³⁵ the determination of sentences, including the length, place and type of imprisonment;³⁶ and discretions to exclude evidence, both at trial and in preliminary proceedings.³⁷ However, discretionary powers of the court in cases involving non-criminal matters have included such diverse discretions as: the power to declare a contract void on public policy grounds;³⁸ the power to grant relief from an employment contract;³⁹ the discretion to grant leave to appeal;⁴⁰ the power to re-open a determination of a lower court granting an acquittal;⁴¹ the discretion to grant interlocutory relief to prevent an abuse of process;⁴² the discretion to

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- ¹⁸ *Regina v Stringer* (2000) 116 A Crim R 198; *R v Haughbro* (1997) 135 ACTR 15.
- ¹⁹ *R v Hollingshed and Rodgers* (1993) 112 FLR 109; *Walsh & Anor v Department of Social Security* (1996) 67 SASR 143; *Bates v Police* (1997) 70 SASR 66; *Sillery v The Queen* (1981) 180 CLR 353.
- ²⁰ *Wickham & Ors v Canberra District Rugby League Football Club Ltd v Ors* [1998] ACTSC 95 (10 September 1998); *National Workforce Pty Ltd & Ors v Australian Manufacturing Workers' Union* [1997] SC of Vic (CA) (6 October 1997).
- ²¹ *Wu v Department of Public Prosecutions & Ors* (1997) 79 FCR 303.
- ²² *Registrar Court of Appeal v Craven (No 2)* (1995) 120 FLR 464.
- ²³ *B v B* (1997) 21 Fam LR 676; *De L v Director-General, New South Wales Department of Community Services & Anor* (1996) 187 CLR 646; *AMS v AIF* (1999) 199 CLR 160; 163 ALR 501; *Allesch v Maunz* (2000) 203 CLR 172; *CJD v VAJ* [1998] HCA 67 (22 October 1998); *ZP v PS* (1994) 181 CLR 639; *Barrios v Sanchez* (1989) FLC 92-054.
- ²⁴ *Wickham & Ors v Canberra District Rugby League Football Club Ltd v Ors* [1998] ATPR 41, 396.
- ²⁵ *CJD v VAJ* [1998] HCA 67 (22 October 1998); *De L v Director-General, New South Wales Department of Community Services & Anor* (1996) 187 CLR 646.
- ²⁶ *Schoenmakers v Department of Public Prosecutions* (1991) 30 FCR 70; *AMS v AIF* (1999) 199 CLR 160.
- ²⁷ *Allesch v Maunz* (2000) 203 CLR 172.
- ²⁸ *Walsh & Anor v Department of Social Security* (1996) 67 SASR 143; *Bates v Police* (1997) 70 SASR 66.
- ²⁹ *National Workforce Pty Ltd & Ors v Australian Manufacturing Workers' Union* (1997) 75 IR 200; [1998] 3 VR 265.
- ³⁰ *Australian Securities and Investment Commission v Ivey* (1998) 29 ASCR 391.
- ³¹ *Ousley v The Queen* (1997) 192 CLR 69.
- ³² *Schoenmakers v Department of Public Prosecutions* (1991) 30 FCR 70; *Wu v Department of Public Prosecutions & Ors* (1997) 79 FCR 303; *Department of Public Prosecutions v Serratore* (1995) 38 NSWLR 175.
- ³³ *O'Shea v Department of Public Prosecutions* (1998) 71 SASR 109.
- ³⁴ *McInnis v The Queen* (1978-9) 143 CLR 575 per Murphy J.
- ³⁵ *Regina v Stringer* (2000) 116 A Crim R 198; *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653.
- ³⁶ *Walsh & Anor v Department of Social Security* (1996) 67 SASR 143; *Bates v Police* (1997) 70 SASR 66; *R v Hollingshed and Rodgers* (1993) 112 FLR 109; *Sillery v The Queen* (1981) 180 CLR 353.
- ³⁷ *McKellar v Smith* [1982] 2 NSWLR 951; *R v O'Neill* (1996) 2 Qd R 326. Cases dealing with s 183 of the Evidence Act 1995 (Cth) include: *R v Truong* (1996) 86 A Crim R 188; *R v Haughbro* (1997) 135 ACTR 15.; *The Queen v Molloy* [1999] ACTSC 118 (9 November 1999).
- ³⁸ *Wickham & Ors v Canberra District Rugby League Football Club Ltd v Ors* [1998] ATPR 41, 396.
- ³⁹ *National Workforce Pty Ltd & Ors v Australian Manufacturing Workers' Union* (1997) 75 IR 200; [1998] 3 VR 265.
- ⁴⁰ *Martin v Office of the Public Advocate* (1999) WASC 1031 (26 March 1999).
- ⁴¹ *Registrar Court of Appeal v Craven (No 2)* (1995) 120 FLR 464.
- ⁴² *Bou-Simon v Attorney-General of the Commonwealth* (1998) FCA 781 (22 June 1998).

grant parenting orders;⁴³ the power to order the return of children;⁴⁴ the discretion to order delivery up of a passport and to prohibit leaving the country;⁴⁵ and the various discretions granted under the Family Law Act 1975 (Cth).⁴⁶

International human rights instruments have, therefore, influenced an array of discretions granted to Australian judges, and in a variety of different legal contexts. While the majority of examples come from the criminal sphere, the principle that international law may legitimately be used in exercising discretions outside the criminal justice system is evident from the case law. The case law itself is not only diverse in respect of the particular issues involved, but also in terms of the judges and courts that have been required to determine these disputes. What is apparent from recent cases, however, is the prominence of certain judges in this area, namely, Chief Justice Miles (formerly of the ACT Supreme Court and Justice of the NSW Supreme Court), Justice Perry of the South Australian Supreme Court, and Justice Kirby of the High Court (formerly of the NSW Court of Appeal).⁴⁷ Justice Kirby's decisions perhaps reflect a more detailed and complex approach to the issue of international human rights law and judicial discretion. This is not surprising, given Kirby J's extra-judicial contribution to discussions on the role of international human rights norms in domestic law. Each of the three judges have espoused a different, though not necessarily inconsistent, view on human rights and discretion. Their approaches will, however, be significant in the future development of an articulated legal basis for linking human rights standards with the exercise of judicial discretion.

Chief Justice Miles

Miles CJ was the first Australian judge to provide a clear and definitive statement proclaiming the relevance of international legal standards to the exercise of discretionary powers by the judiciary. That decision was given in *McKellar v Smith*,⁴⁸ where Justice Miles (as he then was) stated:⁴⁹

...lawyers should not continue to ignore the provisions of the Racial Discrimination Act 1975 (Cth) nor to overlook the possibility that courts may take judicial notice of the ratification by this country of the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child and other international instruments which contain provisions and establish standards which may be relevant to the exercise of judicial discretion.

Following his appointment as Chief Justice in the ACT Supreme Court, Miles CJ reconsidered this principle on a number of occasions,⁵⁰ though two cases concerned s 138 of the Evidence Act 1995 (Cth), which expressly makes the ICCPR relevant to the exercise of a discretion.⁵¹ In *Wickham v Canberra District Rugby League Football Club Ltd*, his Honour stated that:⁵²

[A]dministrative decision makers are required to take into account relevant provisions of a treaty to which Australia is a party, notwithstanding that those provisions are not part of Australian

⁴³ *B v B* (1997) 21 Fam LR 676.

⁴⁴ *De L v Director-General, New South Wales Department of Community Services & Anor* (1996) 187 CLR 646.

⁴⁵ *Australian Securities and Investment Commission v Ivey* (1998) 29 ASCR 391.

⁴⁶ *AMS v AIF* (1999) 199 CLR 160.

⁴⁷ This is not an assertion that no other judge has actively used international legal standards in the exercise of judicial discretion. Indeed, Murphy J did on several occasions: *McInnes v The Queen* (1978) 143 CLR 575 at 593; *Sillery v The Queen* (1980) 180 CLR 353 at 362.

⁴⁸ [1982] 2 NSWLR 951.

⁴⁹ *Ibid* 962.

⁵⁰ *R v Hollingshed and Rodgers* (1993) 112 FLR 109; *Wickham & Ors v Canberra District Rugby League Football Club Ltd & Ors* [1998] ATPR 41, 396; *R v Truong* (1996) 86 A Crim R 188; *R v Haughbro* (1997) 135 ACTR 15.

⁵¹ Section 138 of the Act grants a discretion to exclude improperly or unlawfully obtained evidence, and lists a number of relevant matters for the judge to consider when exercising this discretion. Those relevant factors include, 'whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights': section 138(3)(f).

⁵² [1998] ATPR 41, 396.

domestic law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. ... It is difficult to see why judicial decision makers are not similarly obliged when called upon to exercise discretion or to decide a question of reasonableness: see *McKellar v Smith* [1982] 2 NSWLR 951.

Later, in *R v Haughbro*, a case which concerned s 138(3)(f) of the Evidence Act 1995 (Cth), Miles CJ added the following statement:⁵³

The International Covenant on Civil and Political Rights (the Covenant) to which Australia is a party, is not itself part of the domestic law of Australia, but it has indirect effect in Australia through such statutory provisions as para 138(3)(f) and in the exercise of judicial and quasi-judicial discretions.

The significance of Miles CJ's contribution to the matter of judicial discretions, however, rests on his analysis of the issue, seemingly unrestrained by accepted methods for the use of international law. Miles CJ appears to see international human rights law as relevant to the exercise of judicial discretion, quite independently of common law development and statutory construction to resolve an ambiguity. His approach is seemingly akin to a *Teoh*-like doctrine (absent the use of legitimate expectations), applied to judicial decision-making, as distinct from administrative decision-making. Though this approach lacks the detailed and contextual analysis often contained in the judgments of Kirby J, it is unclear whether Miles CJ is in fact advocating a new and independent basis for the use of international law. The lack of detailed reasoning actually leaves the approach of Miles CJ open to an interpretation that is entirely consistent with Kirby J's. Thus, it may well be that Miles CJ's approach is more conventional than is immediately apparent. However, of the Australian judges to consider the issue, Miles CJ certainly offers the least conventional approach.

Justice Perry

In addition to Chief Justice Miles, Justice Perry of the South Australian Supreme Court has also been prominent in Australian jurisprudence on international law and judicial discretion. Since 1996, Justice Perry has made several references to the role of international human rights law in the exercise of various judicial discretions. His approach has, however, focused specifically on the words contained in statutes, construed according to accepted principles regarding the use of international law. This is unlike the approach of Miles CJ, which appears to rest on an entirely separate principle, based on a *Teoh*-like concept used in the context of judicial decision-making.⁵⁴

The principal case of relevance was the decision in *Walsh & Anor v Department of Social Security*.⁵⁵ In that case, both parents of three children had been convicted of social security fraud and sentenced to terms of imprisonment. Each of the three children suffered from chronic asthma, for which they were regularly hospitalised, and whose medication had always been administered by their mother. An appeal was made against the harshness of the custodial terms, and the manner in which the sentencing discretion was exercised. The particular ground of relevance was whether the sentencing Magistrate had erred in not considering, or alternatively, inadequately considering, whether a conditional release order should be made pursuant to s 20 of the Crimes Act (Cth). Perry J considered that each sentence (considered separately) was well within the sentencing discretion.⁵⁶ However, His Honour then continued:⁵⁷

[T]he case has one unusual feature not present in any of the various cases to which counsel made reference during the course of their submissions. That is, that the sentences, both of which were

⁵³ (1997) 135 ACTR 15, at para 10.

⁵⁴ In saying this, it cannot be said that Miles CJ has merely extended the *Teoh* principle to judicial decision-making, as his approach preceded that High Court decision, and is not premised upon the act of ratification.

⁵⁵ (1996) 67 SASR 143.

⁵⁶ *Ibid* 146.

⁵⁷ *Ibid* 146.

to be served forthwith, would result in three young children, the youngest only just two years of age, being separated from both of their parents during the period of their imprisonment.

After considering the fact that all three children were asthmatic, were regularly hospitalised, and dependent on their mother for receiving their medication, Perry J continued:⁵⁸

In this case, it was particularly important that the learned sentencing Magistrate have regard to the combined effect of the sentences imposed upon both appellants upon the welfare of their children. Common law principles of sentencing would compel consideration of that consequence. The need to have regard to that factor is referred to expressly in s 16A(2) of the Crimes Act, which lists the various matters which the court must take into account in determining the sentence to be passed. One of them (subs (2)(p)) is “the probable effect that any sentence or order under consideration would have on any of the person’s family or dependents”. Various international instruments which have been entered into by Australia emphasise the protection by the society and the State of the family as the natural and fundamental group unit of society, and preservation of the rights of the children. Although such international instruments do not form part of Australian law, they serve to underscore the importance of provisions such as s 16A(2)(p) of the Crimes Act, which where possible, should be construed and applied consistently with them [footnotes omitted].

Perry J considered that, in this case, the provision was clear and unambiguous in its terms, and that on the words of the section alone, the sentencing Magistrate had clearly erred in exercising the discretion.⁵⁹ Thus, resort to international instruments was unnecessary, and the mother’s sentence was changed to a conditional release order.

The approach of Perry J in *Walsh* and other decisions,⁶⁰ is very much premised on the accepted method for using international human rights law in the construction of statutes. In that sense, Perry J’s approach may be distinguished from the approach of Miles CJ, which in many respects, involves a new and independent method through which international law may be relevant domestically. The use of international human rights standards in the exercise of judicial discretion under the approach of Miles CJ, is not premised on a development of the common law, nor on ambiguity in a statutory provision.

Justice Kirby

Of the Australian judges most prominent in the existing jurisprudence dealing with international human rights law and judicial discretion, Kirby J has perhaps adopted the most complex approach. This is undoubtedly reflective of his wider interest and understanding of the nexus between international human rights norms and domestic law. Unlike Miles CJ, who has focused on the link between human rights and the exercise of a particular discretion, Kirby J’s approach to discretions is merely one aspect of a much broader application of international human rights standards to the domestic legal setting. In espousing an approach that accepts the significance of international human rights law in reflecting universally accepted standards and values relevant to the judicial process, Kirby J has acknowledged, in varied ways, the relevance of those standards to a number of judicial discretions. The principal distinction between the two judges, however, is that Kirby J’s analysis is incorporated into his broader approach to the use of international human rights law, whereas Miles CJ has articulated an approach specifically directed at the relevance of human rights law to judicial discretion. Where Miles CJ has tackled the specific question without fully addressing the legal basis of his approach, Kirby J’s judgments offer a detailed legal basis for his general approach, without specifically addressing judicial discretion as a separate issue.

Consequently, the means through which Kirby J has justified the relevance of international standards in this context has varied from case to case, yet has remained consistent with accepted methods for using international law in domestic law. Discretions at common law have been developed to include

⁵⁸ Ibid 148.

⁵⁹ Ibid 147.

⁶⁰ *Hillman v Black* (1996) 67 SASR 490; *Bates v Police* (1997) 70 SASR 66.

international human rights standards as matters relevant to the exercise of the discretion.⁶¹ Statutory provisions have been interpreted in a manner consistent with international human rights instruments, effectively retaining a judicial discretion.⁶² In some cases, reference to a right protected at common law is strengthened by reference to its protection at international law as well, when that right impacts on the manner in which a discretion is exercised.⁶³ And where international human rights law has merely reflected the conflicting values and principles already present in domestic law,⁶⁴ or where an internationally recognised right is simply mirrored in the common law,⁶⁵ Kirby J has acknowledged that reference to international instruments and jurisprudence will not necessarily assist the judge in the exercise of a statutory discretion.

What is perhaps the clearest and most general statement offered by Kirby J in respect of the relevance of international human rights law to the exercise of discretionary powers, is his decision in the case of *AMS v AIF*.⁶⁶ There the court was required to consider an argument put by a mother regarding the relevance of international human rights standards to the exercise of a discretionary power under the Family Law Act 1975 (Cth). That discretionary decision would most certainly have affected the rights of other family members, but was a discretion where the paramountcy principle was to apply. That principle requires that decisions affecting the welfare of a child must give paramount consideration to the child's interests. In considering the mother's argument, Kirby J made the following statements:⁶⁷

I would certainly hold that a judge, exercising jurisdiction of the kind invoked here, may properly inform himself or herself of the general principles of relevant international law. This is especially so where those principles are stated in international human rights instruments to which Australia is a party. However, the difficulty in the present case is that any such consideration would not take the judge very far ... In a sense, the international conventions relevant to this subject merely express the sometimes conflicting principles which are already reflected in Australian law and court decisions ...

Knowledge of the principles of international law may be useful where the amendment of Australia's law has occurred in ways to bring it into conformity with international law. Awareness of international law may also sometimes assist a judge to exercise the applicable statutory powers in a way conformable with basic principle, given the high measure of compatibility which usually exists between the common law of Australia and international statements of fundamental human rights. But save to the extent that the international principles invoked by each party help to put their controversies into a conceptual context and express the basic values which must be taken into account, I do not consider that examination of the international instruments or the jurisprudence which has gathered around them, assist to resolve the problems faced here. International law merely reflects, and repeats, the considerations which give rise to those problems. In this case, it does not throw much light on how they should be resolved.

Other judgments of relevance delivered by Kirby J can be found in the following cases: *Ousley v The Queen* (1997) 192 CLR 69 at 142; *Director of Public Prosecutions v Serratore* (1995) 38 NSWLR 137 at 148; *Allesch v Maunz* (2000) 203 CLR 172 at 184; *The Queen v Swaffield*; *Pavic v The Queen* (1997) 192 CLR 159 at 212; *De L v Director-General, NSW Department of Community Services & Anor* (1996) 187 CLR 640.

Drawing conclusions from the case law

As is evident from jurisprudence in the area of international human rights law and judicial discretion, any trends have occurred more by accident rather than through a considered progression of judicial thought and the development of legal principles across jurisdictions. This is largely due to the fact that

⁶¹ *The Queen v Swaffield*; *Pavic v The Queen* (1997) 192 CLR 159 at 213.

⁶² *Director of Public Prosecutions v Serratore* (1995) 38 NSWLR 137 at 142, 148.

⁶³ *Registrar Court of Appeal v Craven (No 2)* (1995) 120 FLR 464.

⁶⁴ *AMS v AIF* (1999) 199 CLR 160 ; 163 ALR 501 at 545-546.

⁶⁵ *Ousley v The Queen* (1997) 192 CLR 69 at 142.

⁶⁶ (1999) 199 CLR 160 at 195.

⁶⁷ (1999) 199 CLR 218.

individual judges have played important roles in the emerging case law, often in isolation, and in separate jurisdictions. Though they occasionally cite their own previous decisions as authority for their approach, no attempt has yet been made in the case law to reconcile the approaches of different judges and courts that have contributed to Australian jurisprudence on the issue. Consequently, there remain a number of unresolved questions concerning the relevance and impact of international human rights law to the many and varied discretions exercised by judges. Most important, is the actual legal basis upon which legitimate reference may be made to international standards in this context. It is submitted that the approaches taken by Justices Kirby and Perry, situated within the established framework for the judicial reference to, and use of, international legal standards, represents a more acceptable approach. The decision in *Teoh* cannot sustain an extension of the doctrine articulated in that case to the exercise of judicial discretion. The legitimate expectation generated in that case rested on the actions of the executive in ratifying treaties, and only extended to the exercise of administrative discretions exercised by the executive arm of government.⁶⁸

However, the decisions of Miles CJ are significant, in that they directly acknowledge the need for articulating principles regarding the relationship of international standards to the exercise of judicial discretion in Australia. Existing principles speak directly of the judge's role in relation to the interpretation of statutes and the development of the common law, as well as to the administrative decision-maker in exercising discretionary powers. Yet, the clear extension of those same principles to the exercise of a judge's discretionary powers has only been done sporadically, and largely by individual judges in separate jurisdictions sitting alone. Australians generally, and judges specifically, stand to benefit from a clear articulation by the High Court of the relevance of international legal standards to the exercise of judicial discretion. Any such articulation would merely require the extension of existing principles to this context.

In practical terms, the internationally recognised right relevant to the exercise of a discretion will be limited in certain circumstances. As Kirby J acknowledged in cases such as *Ousley*⁶⁹ and *AMS v AIF*,⁷⁰ where international law merely reflects the common law, including instances where rights are numerous and conflicting, international law is likely to be of little assistance to the judge. In addition, the decision of the Family Court in *B v B*⁷¹ raises a question in respect of the degree of acceptance by the international community of various instruments. In that case, the high number of ratifications of the CROC was significant in considering the role that it plays in domestic law. Consistent with the approach of Kirby J, however, the ratification by Australia of instruments recognising universal human rights norms should provide a sufficient basis for warranting resort to such instruments in appropriate contexts. The degree of ratifications lodged in regard to the CROC merely strengthens that basis.

Finally, the legal principles that apply to the exercise of any judicial discretion in Australia, and the grounds upon which such discretions may be subject to review, apply in this context.⁷² The fact that only limited grounds for review are available reflects the nature of discretionary powers and the degree of latitude accepted within that judicial function. The significance of broad legal principles applicable to the exercise of judicial discretion rests on the fact that, irrespective of the legal basis upon which international human rights law is considered relevant, there are limits on the extent to which a discretion can be regulated. While international human rights law may be accepted as a relevant factor to be considered in the exercise of a discretion, the weight and priority attached to that factor in a particular case is determined solely by the judge. Simply because a decision would have been decided differently by another judge, does not make the discretion reviewable at law.⁷³

While the legal basis upon which international human rights law may be referred to in the exercise of judicial discretion cannot rest on the authority of *Teoh*, an additional point of distinction may be made

⁶⁸ On this point, see the decision of Bleby J in *R v Smith* [1998] SASC 6649.

⁶⁹ (1997) 192 CLR 69 at 142.

⁷⁰ (1999) 163 ALR 501 at 545-546.

⁷¹ (1997) 21 Fam LR 676.

⁷² For the fundamental statement of these principles, see *House v The King* (1936) 55 CLR 499, per Dixon, Evatt & McTiernan JJ at 504-5.

⁷³ *House v The King* (1936) 55 CLR 499, per Dixon, Evatt & McTiernan JJ at 504-5.

in relation to that decision. The High Court's decision in *Teoh* was not well received by government, and successive federal governments made a number of attempts to overturn the decision through both executive statements and statutory proposals.⁷⁴ None of these attempts were, however, successful. In respect of certain judicial discretions, the ability of the federal parliament to interfere via statute with the exercise of those discretions may indeed be limited by the Constitution. The notion that implied guarantees may be found in the separation of judicial power under Chapter III of the federal Constitution is a notion that is widely adhered to among constitutional lawyers. However, the view that I adhere to on this matter is that Chapter III protects the inherent powers of the federal courts rather than specifically protecting the rights of individuals.⁷⁵ These inherent powers relate to the ability of superior courts to protect their own processes, an example of which is the power to stay a trial in cases such as *Dietrich v R*.⁷⁶ Other inherent powers include: the power to dismiss an action for unreasonable delay; the power to punish for contempt of court; the power to stay execution of a judgment; the power to dismiss vexatious or frivolous proceedings; and the power to exercise protective powers over children and certain other classes of persons.⁷⁷ Thus, while inherent powers are concerned with the courts rather than individuals, they are powers which are exercised to protect the integrity of the courts' processes, and which may indirectly benefit and protect the interests of individuals affected by those processes.

What is of particular importance in the present context is that inherent powers are discretionary in nature. Thus, when the courts resort to international human rights law in exercising these discretionary powers, and in developing guidelines for their exercise, a constitutional issue emerges. Unlike the situation that arose in relation to *Teoh*, the ability of the federal parliament to pass legislation interfering with the exercise of those discretions will be limited by Chapter III. Specifically, the removal of any of the inherent powers by legislation is likely to be considered unconstitutional, and the capacity to modify or direct the exercise of those powers would be significantly limited. To the extent that any legislative direction or modification was deemed to require the court to act in a non-judicial manner, the legislation would be invalid. The potential relevance of international law in this context is extremely important, therefore, as many human rights are relevant to the exercise of the inherent powers of courts, particularly in criminal and family law matters.

The recent decision of *B and B v Minister for Immigration and Multicultural and Indigenous Affairs*⁷⁸ did not involve an argument that the discretionary power of the Family Court with respect to making orders for the welfare of children (which is based on the *parens patriae* power, and which fell within the inherent jurisdiction on superior courts of common law) was protected under Chapter III of the Constitution. In that case the Chapter III arguments were limited to the validity of prolonged, involuntary detention of children, and which led to the Court questioning the constitutional validity of that detention. It will be interesting to see how the High Court handles such arguments in the future.

From a detailed consideration of the existing case law, it is clear that the potential significance of international human rights law to the exercise of judicial discretions is yet to be fully realised in Australia. The breadth of cases, discretions, and human rights that have already been raised in litigation, are an indication of the potential impact of international law in judicial decision-making. Yet, the realisation of that potential is more likely to occur if the questions surrounding the nature and basis of this legal development are adequately resolved. In answering these questions, the courts will no doubt benefit from a detailed consideration of the contributions already made in this area by several judges, including Justices Miles, Kirby and Perry.

⁷⁴ For a discussion of the political response to *Teoh* see, Lacey W, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29 *Federal Law Review* 219-240.

⁷⁵ See, Lacey W, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57.

⁷⁶ (1992) 177 CLR 292.

⁷⁷ For a list of inherent powers, see Lacey W, above n 75 at 66.

⁷⁸ [2003] FamCA 451.

The New Zealand Courts, Unincorporated Human Rights Treaties and Administrative Law: Presumed Consistent or Taken into Account?

Claudia Geiringer*

Introduction

It is ten years in December since the New Zealand Court of Appeal issued its landmark decision in *Tavita v Minister of Immigration*,¹ a decision that ushered in a new era in the judicial use of international human rights obligations by the New Zealand courts. Although the decision was an interim one, it seemed to signal a significant shift away from received understandings as to the domestic impact of international human rights obligations and to open the way, in particular, for their utilisation by the New Zealand courts in the exercise of their jurisdiction to review administrative action.

The promise of *Tavita* has been met in part. During the intervening decade international law obligations, particularly human rights obligations, have achieved a hitherto unimagined prominence in New Zealand's legal and judicial consciousness. References to the domestic impact of international law obligations now abound in the New Zealand law journals² and in judicial decisions at all levels of the New Zealand court hierarchy.³

There is still, however, a remarkable degree of confusion on the particular point at issue in *Tavita*, that is, the impact of unincorporated international human rights treaties on the exercise of statutorily prescribed administrative powers. In particular, confusion surrounds the relationship between two conceptual models invoked by the Court of Appeal in the post-*Tavita* jurisprudence to explain the relevance of unincorporated international human rights treaties to administrative decision-making: on the one hand, the notion that, where relevant, unincorporated treaties may amount to a mandatory relevant consideration that decision-makers are obliged to have regard to in accordance with the classic *Wednesbury* framework;⁴ and on the other hand, the notion that when interpreting legislation, the courts will presume that Parliament did not intend to legislate contrary to the country's international obligations. These two models are increasingly found side by side in the Court of Appeal jurisprudence but the relationship between them has not been very clearly explicated by that court and, perhaps as a

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¹ [1994] 2 NZLR 257 ('*Tavita*').

² See, eg, Sir Kenneth Keith, 'Harkness Henry Lecture: The Impact of International Law on New Zealand Law' (1998) 6 *Waikato Law Review* 1; Melissa Poole, 'International Instruments in Administrative Decisions: Mainstreaming International Law' (1999) 30 *Victoria University of Wellington Law Review* 91; Alex Conte 'From Treaty to Translation: The Use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand' (2001) 8 *Canterbury Law Review* 54; and the collection of articles on international law located in (1999) 29 *Victoria University of Wellington Law Review*.

³ By way of illustration, an electronic search (conducted on 1 September 2003) on the phrase 'International Covenant' in *New Zealand Law Reports* produced hits in only six cases for the years 1983-1993. The same search produced hits in 68 cases for the years 1993-2003. See, also, Andrew Butler and Petra Butler, 'The Judicial Use of International Human Rights Law in New Zealand' (1999) 29 *Victoria University of Wellington Law Review* 173, 184-189.

⁴ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 ('*Wednesbury*').

result, is not well understood by High Court justices, who are responsible at first instance for the judicial oversight of administrative action.⁵

This would be of little moment if the practical impact of the two models on administrative law was identical. In this paper, however, I suggest that it is not. The two models are analytically distinct and they impact in different ways on administrative decision-making. Whereas the *Wednesbury* model speaks to the decision-making process and the considerations that the decision-maker is required to weigh in reaching a decision, the presumption of consistency is outcome-focussed, requiring the decision-maker to reach a result that is substantively consistent with the relevant international obligation. In some cases at least, this difference in emphasis may affect the substantive outcome. Accordingly, it is incumbent on courts to articulate rather more clearly which of the two models is controlling in the administrative law context and why.

In this paper I set out the two models and explore the analytical differences between them and the different outcomes they promote. I then examine the deployment of the two models in the Court of Appeal and High Court jurisprudence and the lack of clarity that surrounds the relationship between the two models.

This paper is an abbreviated version of a longer paper that is currently in progress. In that paper, I hope to consider in rather more detail the normative issues surrounding deployment of the two models to resolve the interface between domestic and international law in the administrative law context. This paper confines itself more modestly to an attempt to unravel, from an analytical perspective, the current confusion as to the role the two models play in constraining administrative power.

The two models described

The question at issue in *Tavita*⁶ can be posed with greater or lesser degrees of specificity but is, essentially, this: when reviewing the exercise of a statutorily conferred administrative power what use, if any, are the courts entitled (and/or obliged) to make of unincorporated international human rights treaty obligations?

By an unincorporated treaty obligation, I mean one that has been entered into by the New Zealand government – with the consequence that it is binding on New Zealand at international law – but that has not been (or has not been fully) incorporated into New Zealand's domestic legal system. The customary starting point for New Zealand courts when confronted with such obligations is the constitutional maxim iterated by Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario* that the Executive does not, by entering into a treaty, change the law.⁷ According to orthodox constitutional principle, if the performance of a treaty entails the alteration of domestic law, legislative implementation is required to give the obligation domestic effect.

It does not, however, necessarily follow that the treaty is irrelevant. Extreme versions of dualist doctrine, in which domestic law is seen as completely immune from international law influence, are now widely acknowledged to be both descriptively and normatively inadequate.⁸ There may be a range of techniques short of direct enforcement by which the courts can, or perhaps should, promote compliance with international law in any given context.

⁵ In the New Zealand court hierarchy, the High Court (formerly known as the Supreme Court) sits under the Court of Appeal and hears, amongst other things, first tier appeals and applications for judicial review from decisions of many administrative tribunals.

⁶ [1994] 2 NZLR 257.

⁷ [1937] AC 326, 347-348, cited in, eg, *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 280-281.

⁸ See, eg, Murray Hunt, *Using Human Rights Law in English Courts* (1997) 15-16, 41-42, esp fn 136; Ian Brownlie, *Principles of Public International Law* (5 ed, 1998) 55-56.

The question, then, in *Tavita* and like cases is which of these techniques for promoting compliance with international law can appropriately be utilised in the administrative law context? More particularly what role, if any, might unincorporated treaty obligations play in the exercise of the High Court's supervisory jurisdiction to review administrative action?⁹

This paper focuses on the dominant models utilised, to date, in the New Zealand case law. There are two: the '*Wednesbury*' model and the 'presumption of consistency' model.

The *Wednesbury* Model

The first (and dominant) model taps into the well-established administrative law framework best associated with the *Wednesbury* case.¹⁰ For more than half a century, that framework has allowed the courts, when evaluating the reasonableness of administrative action (and therefore its susceptibility to judicial review), to scrutinise the considerations that the decision-maker did or did not have regard to in reaching his or her decision. In particular, the courts have recognised that there are some considerations that are so clearly relevant to the exercise of a particular decision-making power that failure to have regard to them in reaching a decision will be unreasonable.¹¹

The argument, then, is that where an international human rights obligation entered into by the New Zealand government and binding on New Zealand at international law has a bearing on the exercise of an administrative power, it would be unreasonable for the decision-maker to ignore it in reaching his or her decision. The international human rights obligation is a 'mandatory relevant consideration' in the decision-making process.¹²

Tavita is the modern fountainhead for the use of the *Wednesbury* framework to account for the role to be played by unincorporated treaty obligations in administrative decision-making in New Zealand. The case concerned the Associate-Minister of Immigration's refusal to exercise a statutory discretion to allow the appellant, an over stayer, to remain in New Zealand. In defence of the appeal, the Crown's lawyers argued that the Associate-Minister was not required, in reaching his decision, to consider international obligations relating to the protection of children and families. Although Cooke P, delivering the decision of the Court, did not rule on the point,¹³ he expressed scepticism about the Crown's submission, describing it as an 'unattractive argument' that he would have 'hesitation' in accepting.¹⁴

In the years following the *Tavita* decision, the Court of Appeal continued to shy away from any conclusive ruling as to the mandatory relevance of unincorporated international human rights obligations to administrative decision-making, but issued further guidance as to how it might resolve that issue should it be called on to do so in the future.¹⁵ The Court signalled that it would treat the potential mandatory relevance of international human rights considerations to the exercise of administrative power as a matter to be discerned from a reading of the particular statutory power, considered in the scheme of the legislation and in light of the presumption of statutory interpretation

⁹ This was also the question at issue before the Australian High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1985) 183 CLR 273. The notion employed by the *Teoh* court of a legitimate expectation deriving from ratification of treaty obligations has not, however, been favoured in the New Zealand context. [1948] 1 KB 223.

¹⁰ Ibid 228; see also, *CREEDNZ Inc v Governor-General* [1981] NZLR 172, 183 (per Cooke J).

¹¹ When I refer in this paper to the '*Wednesbury* model' or the '*Wednesbury* framework' it is this aspect of the *Wednesbury* decision to which I refer, rather than the general test for administrative law unreasonableness associated with the *Wednesbury* case: *Wednesbury* [1948] 1 KB 223, 229.

¹² The case was adjourned to enable the Associate Minister to reconsider his decision, thus obviating the need for a final ruling: [1994] 2 NZLR 257, 266.

¹³ Ibid.

¹⁴ See, esp, *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 ('*Puli'uvea*') and *Rajan v Minister of Immigration* [1996] 3 NZLR 543 ('*Rajan*').

that legislation is, where possible, to be read consistently with New Zealand's international obligations.¹⁶

Following *Tavita*, the Court of Appeal's coyness about giving a conclusive ruling on the mandatory relevance of international human rights treaties has not, however, been shared by many lawyers, officials, administrative tribunals and, indeed, High Court judges, who have tended to treat Cooke P's observations in *Tavita* as binding authority for the proposition that, at least in the immigration context, international human rights obligations are a mandatory relevant consideration in administrative decision-making.¹⁷ Largely as a result of the *Tavita* decision, New Zealand Immigration Service departmental guidelines now mandate consideration of international human rights protections when key decisions are being made as to a person's immigration status.¹⁸ When such cases reach the courts, the now routine concession by the Immigration Service's lawyers that officials are required to take international obligations into account when making decisions as to immigration status has obviated the need for a more conclusive ruling on the point from the Court of Appeal.¹⁹

The presumption of consistency model

The second model relies on the presumption of statutory construction that so far as its wording allows legislation should be read in a way that is consistent with New Zealand's international obligations.²⁰

That presumption has long been established.²¹ However, its application in the administrative law context (and, in particular, to statutory language that confers power in open-ended and discretionary terms) is somewhat controversial.

In brief, the argument that the presumption does not assist in the administrative law context is that the presumption is inevitably rebutted by statutory language that confers a broad or open-ended power. Patently, a presumption of interpretation can only have a determinative effect on an exercise of statutory interpretation if there is some doubt to be resolved as to the meaning of the statutory language. If the words of a statute are clear beyond all doubt then there is no room for an interpretive presumption to operate (the presumption is rebutted). Specifically, for this presumption to operate, the power-conferring language must be capable, as a matter of statutory interpretation, of being read subject to the gloss: this power must be exercised consistently with the relevant right. The argument, then, is that statutory language that confers power in broad, discretionary terms is not capable of bearing such a gloss. There is nothing ambiguous or uncertain about the conferral of such power. Rather, the very nature of such power, it is argued, is that it cannot be fettered by implied limits. To invoke the treaty obligation as a gloss on the statutory power would, therefore, amount to 'backdoor incorporation' of the treaty obligation.²²

Arguments of this kind were accepted by the New Zealand Court of Appeal in the early 1980s in *Ashby v Minister of Immigration*²³ and, famously, by the House of Lords in *Brind v Secretary of State for the Home Department*.²⁴ Court of Appeal jurisprudence during the late 1990s, however, evinces a far greater degree of receptivity to the possibility that power-conferring language, even when cast in broad terms, *may* (depending on context) be required to be read consistently with international obligations. Whether such language is or is not capable of bearing an international law-consistent interpretation will, it seems, need to be assessed on a case-by-case basis and will depend on an assessment of the

¹⁶ *Puli 'uvea* (1996) 2 HRNZ 510, 516-517, 519; *Rajan* [1996] 3 NZLR 543, 551.

¹⁷ See, eg, *Elika v Minister of Immigration* [1996] 1 NZLR 741, 743-744; *Mil Mohamed v Minister of Immigration* [1997] NZAR 223, 228.

¹⁸ See, most recently, the New Zealand Immigration Service Border & Investigations Humanitarian Questionnaire, esp, Stage Three.

¹⁹ See, eg, *Schier v Removal Review Authority* [1999] 1 NZLR 703, 708.

²⁰ See, eg, *Rajan* [1996] 3 NZLR 543, 551.

²¹ See, eg, *R v Keyn* (1876) 2 Ex D 63, 85.

²² There is also a related argument that the presumption can only be invoked if a prior ambiguity has been identified on the face of the statute – see, eg, Hunt, above n 8, 37-41 – but that argument has had less purchase in the New Zealand context.

²³ [1981] 1 NZLR 222 ('*Ashby*'), 224 (Cooke J), 229 (Richardson J), 231-232 (Somers J).

²⁴ [1991] 1 All ER 720 ('*Brind*'), see, esp, 723 (Lord Bridge); 734 (Lord Ackner).

nature, scope and strength of the international obligation on the one hand, and a construction of the statutory language, read in context, on the other.

The case that most clearly exemplifies this approach is *New Zealand Air Line Pilots' Association v Attorney-General*,²⁵ a case occurring outside the human rights context and involving New Zealand's obligations under the Chicago Convention on International Civil Aviation.²⁶ The blunt assumption found in *Brind* and like cases that statutory language that confers administrative power in open-ended and discretionary terms is 'unambiguous' and therefore incapable of being read subject to a presumption of consistency with international obligations is conspicuously absent from the reasoning in *Air Line Pilots*. Rather, the Court of Appeal signalled the need to assess the potential application of the presumption on a case-by-case basis, bearing in mind 'both the international text and the related national statute.'²⁷

As to the former, factors identified by the Court of Appeal in *Air Line Pilots* as relevant to its assessment of the potential application of the presumption included the 'indeterminacy' of the relevant treaty obligation, its 'very limited binding force' and its 'relative unimportance' in the pantheon of international law obligations compared with, specifically, a treaty protecting fundamental human rights.²⁸ It seems, therefore, that the Court envisaged that the strength of the presumption may vary depending on the international obligation at stake (and, specifically, that it may be at its strongest when the relevant obligation bears on fundamental human rights).

As to the latter, the Court in *Air Line Pilots* considered the potential application of the presumption of consistency to two statutory powers: s 198 of the Summary Proceedings Act 1957 (conferring on a judicial officer the power to grant search warrants) and s 8(2)(c) of Transport Accident Investigation Act 1990 (authorising the Transport Accident Investigation Commission to prepare and publish findings and recommendations in respect of investigations undertaken by it). In reaching the conclusion that the first of these powers was not capable of being construed consistently with the relevant international obligation, the Court clearly placed some weight on the unqualified nature of the statutory language in which the power had been conferred.²⁹ In sharp contrast to *Brind*, however, the Court did not seem to regard the breadth of the statutory language as necessarily sufficient in and of itself to rebut the application of the presumption of consistency. The Court looked as well to the 'relative unimportance' of the international text (discussed above) and, crucially, to what it saw as a fundamental incompatibility between the structure of the international obligation and the dictates of the statutory scheme. The international text did not establish a clear limit on power; rather, it contemplated 'the setting up of a process of decision.'³⁰ The process contemplated by the international text was, however, entirely inconsistent with the statutory scheme, which established a summary power that was to be exercised without notice. Any attempt to read the statute consistently with the relevant international obligation, the Court concluded, would have therefore undermined the very nature and purpose of the statutory power.³¹

Thus, although the Court concluded that s 198 was incapable of being read consistently with the relevant international obligation, it did so not on the basis of a general assumption about the nature of broadly conferred powers but, rather, on the basis of a particularist approach that relied on both a close

²⁵ [1997] 3 NZLR 269 ('*Air Line Pilots*'). See, also, *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, although this case involved interests that were protected by general as well as conventional international law.

²⁶ Although concerning the potential application of the presumption of consistency in the human rights context, the almost contemporaneous decision of the Court of Appeal in *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 is of less assistance because the statutory language at issue was not power-conferring.

²⁷ Ibid 289.

²⁸ Ibid. The relevant obligation was para 5.12 of Annex 13 to the Chicago Convention on Civil Aviation.

²⁹ Ibid 290. Compare, though, with *Rajan* [1996] 3 NZLR 543, 551, where, one year earlier, the same judge, Keith J, equivocated over whether the conferral of a power in discretionary terms supported or negated the reading in of international human rights obligations as a mandatory relevant consideration.

³⁰ *Air Line Pilots* [1997] 3 NZLR 269, 290.

³¹ Ibid.

analysis of the scope and strength of the relevant international obligation and a contextual and purposive reading of the relevant statutory language.

The Court went on to conclude that the second power at issue in *Air Line Pilots*, s 8(2)(c) of the Transport Accident Investigation Act 1990, was capable of being read consistently with the international text.³²

Air Line Pilots, then, signals a rather more nuanced approach to the application of the presumption of consistency in administrative law cases than the blunt assumptions that formed the basis of the *Brind* and *Ashby* cases. The approach taken by the Court to the broad conferral of administrative power is still a cautious one. The Court does not, for example, whole-heartedly adopt the proposition that broadly conferred power is inherently ambiguous and amenable to implied limits. Rather, the Court adopts a middle position, in which the application of the presumption to broadly conferred power is assessed on a case-by-case basis in light of the scope of the relevant international obligation and the relevant statutory text.³³

The two models compared

The interplay between these two models in the Court of Appeal jurisprudence is discussed below. Before doing so, however, I consider the differences in outcome that can, theoretically, result from the deployment of one or other approach. If the two models were simply alternative conceptual frameworks for achieving the same result then the choice of which to deploy would be of purely academic interest. This, however, is not the case. The two approaches have the potential, at least, to result in significantly different outcomes. In particular, the presumption of consistency approach has the potential to result in a more potent constraint on the exercise of administrative power than the deployment of the *Wednesbury* model.

The Essential Difference Between the Two Models

In order to explore the difference between the two models, it is helpful to consider the analogous question of the influence of the New Zealand Bill of Rights Act 1990 ('the Bill of Rights') on administrative decision-making. Section 6 of the Bill of Rights establishes a presumption of statutory construction that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning is to be preferred to any other meaning. By virtue of section 4, that presumption can be rebutted by clearly contrary statutory wording.

The combined effect of sections 4 and 6 of the Bill of Rights is, thus, similar to the effect of the common law presumption of consistency with international obligations. It requires a rights-consistent reading of statutory language to the extent that the text is able to bear it, but preserves the effect of clearly inconsistent statutory wording.

In a seminal article published in 1992, Janet McLean, Mike Taggart and Paul Rishworth considered the potential impact of the Bill of Rights on administrative law.³⁴ The authors identified a number of hoops that needed to be jumped through before the presumption of consistency contained in s 6 of the Bill of Rights could be given effect.³⁵ First, the scope of the relevant right (and the scope of any reasonable limits on the right prescribed by law under s 5 of the Bill of Rights) would need to be established. Once that has been done, it is necessary to consider whether the statutory provision is capable of being read consistently with the right (as read subject to section 5) or whether to do so would be to render the statutory language ineffective or invalid (as forbidden by section 4). If these

³² Ibid 298-299.

³³ For a further helpful discussion of the significance of *Air Line Pilots*, see, Treasa Dunworth, 'Review: Public International Law' (2000) *New Zealand Law Review* 217.

³⁴ Janet McLean, Paul Rishworth and Michael Taggart 'The Impact of the New Zealand Bill of Rights on Administrative Law', in Legal Research Foundation, *The New Zealand Bill of Rights Act 1990* (1992).

³⁵ Ibid 68-69.

hurdles can be successfully cleared and a reading consistent with the relevant guarantee is possible, the authors described the Bill of Rights as a “constitutional trump” that could not be interfered with by the decision-maker. The authors specifically compared the result thus reached on the application of section 6 with the orthodox administrative law hierarchy of irrelevant, permissible and mandatory considerations. The effect of the section 6 presumption of consistency, they pointed out, was more potent than the effect of a mandatory consideration. It is not sufficient under s 6 that the decision-maker simply bears in mind the relevant obligation; rather the obligation is a ‘valid constitutional impediment’ to the exercise of the power inconsistently with it.³⁶

Of course, there are differences between the section 6 presumption and the common law presumption of consistency with international obligations. Because it is a statutory directive, the section 6 presumption trumps common law techniques of statutory interpretation (including, should the two come into conflict, the presumption of consistency with international obligations itself). In contrast, the common law presumption of consistency must jockey for a place amongst other common law techniques of interpretation (and will be ousted by a contrary statutory direction).

The significance of the McLean, Taggart and Rishworth analysis, however, is the insight it provides into the relative potency of a presumption of consistency as a constraint on the exercise of administrative power, as compared to a mandatory relevant consideration. The *Wednesbury* model speaks primarily to the decision-making process: it requires the decision-maker to bear certain interests in mind when making her decision. Having done so, the decision-maker *may* reach an outcome that is consistent with protection of those interests. On the other hand, she may not. This is to be contrasted with a presumption of consistency. Assuming it is not rebutted (and regardless of whether it derives its authority from common law or from statute), a presumption of consistency requires an outcome substantively consistent with the rights or interests it is designed to protect.

By way of illustration, take the following fact situation. Article 7 of the International Covenant on Civil and Political Rights (‘the ICCPR’) guarantees the right to freedom from torture.³⁷ Assume that X, the decision-maker, is charged with the responsibility of deciding upon the methods of interrogation to be used to extract information out of Y. If Article 7 is a mandatory relevant consideration, X will be obliged to consider the existence of that obligation before reaching her decision. It is possible, though, that X might decide that the information to be extracted from Y is of such overriding importance that torture should be included in the available interrogation techniques. That decision would not be reviewable, at least not for failure to consider a mandatory relevant consideration. If, however, X’s authorising statute is to be read subject to a presumption of consistency with international obligations (and assuming the statutory language does not rebut such a rights consistent reading) X cannot lawfully decide to torture Y, regardless of X’s evaluation of the strength of the competing considerations.

To summarise, then, in any given situation, the common law presumption of consistency with international obligations may be inapplicable because the scope of the international obligations, when properly analysed, does not support an alternative reading of the statutory provision; or it may be rebutted because the statutory provision is not capable of being read consistently with the international obligations; or it may fall against a more powerful statutory or common law interpretive direction. If it negotiates these obstacles, however, the presumption cannot be subsumed within a mandatory relevant consideration framework; rather, it mandates an exercise of the power consistent with the international obligation, whatever that may require. The content of the right at international law acts as a limiting gloss on the statutory language that establishes the administrative power.

The point of convergence

This juxtaposition between the *Wednesbury* model, which speaks primarily to process, and the presumption of consistency model, which speaks primarily to outcome, is complicated by the fact that on many occasions, particularly in the human rights context, the underlying right or interest protected by the international instrument will, itself, be process-oriented.

³⁶ Ibid 67-69.

³⁷ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Take, for example, one of the key human rights protections at issue in the immigration cases: Article 3(1) of the Convention on the Rights of the Child.³⁸ It provides that:

[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3 does not dictate an outcome; rather it requires a particular orientation towards decision-making where an interference with the protected interest is at stake. The best interests of the child do not have to be protected as an absolute value; they do, however, have to be accorded primacy in the decision-making process. In this respect, Article 3(1) can helpfully be juxtaposed with Article 7 of the ICCPR discussed above, which mandates a substantive outcome – freedom from torture – in all cases.

Patently, if the underlying international obligation is process-oriented, an application of the presumption of consistency with international law will, itself, dictate a particular procedural orientation rather than an outcome. What, then, are the implications of this for the relationship between the *Wednesbury* model and the presumption of consistency? If consistency with the international obligation requires nothing more than adherence to a process, does that mean that application of the presumption of consistency will achieve exactly the same result as utilisation of the *Wednesbury* framework?

Plainly, that will depend on the particular procedural orientation required by the international instrument, as compared with the procedural orientation dictated by the *Wednesbury* model. The *Wednesbury* framework will not, however, be an effective surrogate for the application of the presumption of consistency in all such cases.

Take, again, Article 3 of the CRC. As the Court of Appeal stressed in *Puli'uvea*, this obligation is stated in 'broad and relative terms' and envisages states parties having some scope to weigh up the delivery of the right with other important social objectives.³⁹ The best interests of the child under Article 3 of the CRC are not the only, nor even paramount, consideration; they are 'a primary' consideration, to be weighed up with other (including other primary) considerations by the relevant official. Parallels can clearly be drawn between the evaluative approaches dictated by Article 3 of the CRC and by the *Wednesbury* model. Under both models, the decision-maker is obliged to take the relevant rights or interests into account but is entitled to weigh them up against other important and relevant considerations.

Notwithstanding this similarity, consistency with Article 3 cannot safely be achieved within the classic *Wednesbury* framework, at least not without one or two key adjustments to that model. The reason for this lies, in particular, in the courts' traditional reluctance to dictate the weight that is to be given to particular considerations within the decision-making process. Under the orthodox framework of *Wednesbury* unreasonableness, the reviewing court will look to see whether a particular consideration was taken into account by the decision-maker. It is left to the decision-maker, however, to decide what weight he or she wants to attach to the consideration. Reviewing courts will not, generally, interfere with that balancing process unless the weight attributed to a particular consideration, or the decision itself, was 'unreasonable' in a sense recognised by administrative law.⁴⁰

At least until recently, the standard of unreasonableness recognised by administrative law has been high and monolithic.⁴¹ Although there is some evidence in recent case law that the New Zealand courts may be moving towards a variegated standard of reasonableness, enabling enhanced scrutiny of

³⁸ ('the CRC'), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

³⁹ (1996) 2 HRNZ 510, 517.

⁴⁰ See, eg, *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457, 477; *South Oxfordshire DC v Secretary of State for the Environment* [1981] 1 WLR 1092, 1099; see, also, the Court of Appeal's express renouncement in *Puli'uvea* of a power to review the 'balance to be struck' between the various considerations: (1996) 2 HRNZ 510, 522.

⁴¹ See, eg, *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537.

reasonableness in human rights cases,⁴² the nature of such enhanced scrutiny, the inquiry it will involve and the extent to which it will facilitate scrutiny of the weight attached to human rights considerations in the decision-making process, is far from certain.⁴³

In contrast, the notion of the primacy of the child's interests has to be seen as saying something about weight. True, the child's best interests are not paramount; true, they are "a" not "the" primary consideration. Nor, however, are they simply "a consideration". The notion of primacy surely speaks to the relative weight that must be attached to the consideration in the decision-making process.

Further, in order to ensure 'primacy' in the consideration given to the child's rights, the courts may well need to examine rather more closely the justifications given by the decision-maker to override the interest. One commentator, Philip Alston has suggested that 'primacy' in Article 3 creates a burden of proof on those seeking to achieve a child-centred result to demonstrate that feasible and acceptable alternatives do not exist.⁴⁴

Thus, even though Article 3 is process-oriented and envisages a large measure of discretion for the state in weighing up protection of the right with other state and societal interests, achieving consistency with Article 3 may well require something more than can be delivered within the traditional structure of *Wednesbury* unreasonableness. The gap between the two models might be further narrowed if the New Zealand courts were to adopt a variegated standard of reasonableness, including 'hard look' review in human rights cases. At least in the absence of such an evolution, however, consistency with Article 3 would seem to require that the primacy of the best interests of the child be protected directly, as a gloss on the statutory language, rather than indirectly, through the vehicle of *Wednesbury* unreasonableness.

In summary, then, if the international human rights protections at stake are process-oriented, there may be a degree of convergence between the presumption of consistency and the *Wednesbury* model. That convergence is not, however, so complete that consistency with all process-based international human rights obligations will be achieved simply by adherence to the traditional *Wednesbury* framework. Rather, the extent of convergence depends on the precise procedural orientation required at international law, as compared with the procedural orientation dictated by the *Wednesbury* model. In particular, to the extent that international human rights guarantees speak to questions of weight and justification, the capacity of the *Wednesbury* model to protect those rights, at least without some modification, is to be doubted.

Deployment of the two models

Given that the decision as to which of these frameworks to deploy has the potential to affect the outcome of administrative decision-making, one would expect to find a clear articulation in the jurisprudence of the basis upon which that decision should be made. In *Ashby*, for example, the conceptual difference between presuming a statutory power to be capable of an international law-consistent meaning and requiring an international obligation to be taken into account in the decision-

⁴² *Pharmaceutical Management Agency Ltd v Rousell Uclaf Australia Pty Ltd* [1998] NZLR 58, 66; see, also, in the British context: *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554. Some commentators, including Professor Michael Taggart, have suggested that the New Zealand courts have already accepted a variegated approach to *Wednesbury* unreasonableness: see, eg, Michael Taggart, 'Review: Administrative Law' [2003] *New Zealand Law Review* 99, 115. Evidence of this in the case law is, however, still somewhat scarce. See, eg, *Singh v Minister of Immigration* [2000] NZAR 223.

⁴³ See *R v Secretary of State for the Home Department, ex parte Daly* [2001] All ER 433, 446, where Lord Steyn suggests that even 'hard look' review for unreasonableness is less suited to addressing questions of balance and weight than the 'proportionality' approach now applicable in the UK context when rights under the European Convention on Human Rights are at stake.

⁴⁴ Philip Alston 'Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1, 13.

making process was clearly appreciated by both counsel and Court of Appeal justices, the argument being put by counsel (and addressed by the Court) on both bases, as clearly framed alternatives.⁴⁵

In the post-*Tavita* jurisprudence, however, the two models have become somewhat intertwined. In a number of cases, particularly in the immigration context, the Court of Appeal has invoked the presumption of consistency in tandem with the *Wednesbury* model but has not clearly explicated the relationship between them. It is not clear from those cases, for example, which model the Court of Appeal considers is controlling and what differences, if any, the Court perceives might result from the decision to deploy one or other framework.

It should at once be acknowledged that the responsibility for this lack of clarity in the post-*Tavita* jurisprudence falls in large part on the shoulders of legal counsel, who have, by and large, failed to grasp the potential of the presumption of consistency in administrative law cases. The *Tavita* case diverted the attention of immigration lawyers almost exclusively towards the potential of the *Wednesbury* framework. Counsel have, at times, banged their heads in frustration against the limitations of that framework (and, in particular, the blindness of the *Wednesbury* model to questions of weight or justification)⁴⁶ but have rarely attempted to invoke the presumption of consistency directly, as an alternative and free-standing framework for utilising international obligations to constrain administrative power.⁴⁷

This section begins with some brief remarks about the *Tavita* case.⁴⁸ I then use the decision of the Court of Appeal in *Puli'uvea*⁴⁹ to explore the lack of clarity that exists in the post-*Tavita* Court of Appeal jurisprudence as to the relationship between the two models. Finally, I consider the effect of this lack of clarity on the High Court in its routine oversight of administrative action in the immigration context.

Tavita v Minister of Immigration

On its face *Tavita* speaks solely to the application of the *Wednesbury* model. Counsel in *Tavita* seem to have put their case solely on the basis that the Minister and the Department were obliged, in deciding whether to remove the appellant from New Zealand, to 'have regard' to relevant international obligations and Cooke P's obiter remarks were, therefore, addressed to that proposition.⁵⁰

There are hints in Cooke P's reasoning, however, that his Honour envisaged a rather more robust framework for the protection of international human rights norms than that which would be offered by an orthodox application of the *Wednesbury* principles and that he had in mind a degree of oversight by the courts of the weight that administrative decision-makers were obliged to place on such norms in the decision-making process. In particular, his Honour concluded a discussion of the jurisprudence of the European Court of Human Rights on the right to respect for family life (jurisprudence that stresses the need for any interference with that right to be justified by a pressing social need and proportionate to the legitimate aim pursued) with the following remarks:⁵¹

It would appear therefore that under the European Convention a balancing exercise is called for at times. A broadly similar exercise may be required under the two international instruments relevant in the present case, *but the rights of the family and the child are the starting point* [my emphasis].

⁴⁵ [1981] 1 NZLR 222, 224 (Cooke J), 229 (Richardson J), 231-232 (Somers J).

⁴⁶ See, eg, the unsuccessful attempt of counsel in *Schier v Removal Review Authority* [1999] 1 NZLR 703, to allege that 'insufficient regard' was given to the child's best interests.

⁴⁷ This statement is based on my 5 years' experience from 1996-2001 acting on behalf of the Immigration Service in *Tavita*-style challenges.

⁴⁸ [1994] 2 NZLR 257.

⁴⁹ (1996) 2 HRNZ 510.

⁵⁰ *Tavita* [1994] 2 NZLR 257, 262. The relevant obligations before the Court in *Tavita* were Articles 23 and 24 of the CCPR and Article 9 of the CRC.

⁵¹ *Ibid* 265.

Invocation of the rights of the family and child as the ‘starting point’ is best understood as speaking to the weight that is to be attached to those interests in the decision-making process and the necessity for justification if those interests are to be overridden. As Professor Michael Taggart has succinctly suggested, ‘[i]n law, as in life, starting points determine end destinations.’⁵² Characterising the rights of the family and child as the ‘starting point’ surely implies an intention to maintain a degree of oversight over the sufficiency of any justifications that are advanced to outweigh the protected right.

Puliu’vea v Removal Review Authority

The notion that the rights of the family and the child are a starting point in immigration decisions was, however, given short shrift two years later by a differently constituted Court of Appeal in *Puliu’vea*.⁵³ ‘In the immigration context,’ the Court observed, ‘the starting point must be the position of the person who is unlawfully in the country or who is being deprived of residency rights’.⁵⁴

The matrix of the *Puliu’vea* case was remarkably similar to *Tavita*. The appellants were over stayers who were seeking to prevent their removal from New Zealand in reliance, in part, on the fact that they had three New Zealand-born children whose interests might be prejudiced by their removal. International obligations concerning the protection of children and families were, again, put squarely before the Court (the submission having been made, in reliance on *Tavita*, that the relevant decision-makers had ‘failed to take into account’ such obligations).⁵⁵ As in *Tavita*, the Court avoided giving any conclusive ruling on the status of such obligations, this time because it was satisfied that any such obligations *had* been adequately addressed in the decision-making process. The Court did, however, give further obiter guidance as to the possible significance of unincorporated obligations in the administrative law context.

The *Puliu’vea* decision is generally regarded as a retreat from the high point of *Tavita*, and with some reason. The *Tavita* case (and, in particular, the passage invoking the rights of the child as a ‘starting point’) had raised expectations of a robust, rights-centred review by the courts of immigration decisions. The *Puliu’vea* court’s categorical rejection of this notion pointed in the opposite direction, suggesting that the Court considered itself tightly constrained by the orthodox *Wednesbury* framework, with its traditional reluctance to address questions of balance, weight or justification. That impression was reinforced by references in *Puliu’vea* to the ‘limits of the judicial review power’,⁵⁶ by the Court’s express disavowal of any power to look at the ‘balance to be struck’ between the various considerations,⁵⁷ and by the Court’s marked reluctance, on the facts of the case itself, to require of the relevant decision-makers any real articulation of their justification for overriding the protected interests.⁵⁸

Yet there is one respect in which the rhetoric of *Puliu’vea* can be read as signalling an advance rather than a retreat from the *Tavita* position, that is, the willingness of the *Puliu’vea* court to invoke the presumption of consistency as an aid to the interpretation of statutory language conferring administrative power. The presumption of consistency was invoked twice in the course of the *Puliu’vea* decision – once in relation to each of the two exercises of statutory power at issue in the case – and in both cases, the Court signalled its preparedness to assume for the purposes of the litigation that the powers at issue were capable of a rights-consistent interpretation.⁵⁹

It is no coincidence that this emergence of the presumption of consistency as a feature of the Court of Appeal’s administrative law jurisprudence corresponded with the arrival onto the Court of Appeal of

⁵² Michael Taggart, ‘Review: Administrative Law’ [2000] *New Zealand Law Review* 439, 446.

⁵³ (1996) 2 HRNZ 510.

⁵⁴ Ibid 517.

⁵⁵ Ibid 513. A somewhat expanded list of rights were invoked before the *Puliu’vea* court: Articles 3(1), 8, 9 and 16 of the CRC and Articles 2(3), 17, 23 and 24 of the CCPR.

⁵⁶ Ibid 518.

⁵⁷ Ibid 522.

⁵⁸ See, esp, the Court’s affirmation of the validity of the second decision before it – the decision of February 1995 – despite the absence of any articulation in the decision of the reasons for overriding the children’s acknowledged interests: ibid 521 and 522.

⁵⁹ Ibid 516-517, 519.

Sir Kenneth Keith, an experienced internationalist. Justice Keith was to become the architect of the lion's share of the post-*Tavita* jurisprudence on domestic uses of international law.⁶⁰ Simultaneously, invocation of the presumption of consistency was to become a routine feature of the Court of Appeal's international jurisprudence, including its jurisprudence on the effect of unincorporated treaties on the exercise of administrative power.⁶¹

Utilisation of the presumption of consistency in *Puli'uvea* and like cases, however, occurs in tandem with the continued utilisation by the Court of Appeal of the *Wednesbury* framework. The presumption of consistency did not replace the language of 'mandatory relevant consideration' in *Puli'uvea*, rather, it was invoked alongside it. The decision, therefore, raises questions about the relationship between the two models. When the *Puli'uvea* court pronounced itself satisfied that international obligations had been adequately addressed in the decision-making process, was it pronouncing itself satisfied that the power had been exercised *consistently* with international obligations or merely that the relevant obligations had been *taken into account*, or both? Which analytical model does the Court of Appeal treat as controlling in administrative law cases and why? If the Court of Appeal is content to utilise both models simultaneously, how does it account for the potential differences in outcome generated by the two models?

There are conflicting textual indications in *Puli'uvea* itself as to whether the Court was ultimately treating the presumption of consistency framework or the *Wednesbury* framework as controlling. For example, the Court's conclusion regarding the first of the two exercises of power at issue in *Puli'uvea* was that 'bearing in mind the limits of judicial review,' the decision at issue did not appear 'obviously to involve a violation of the obligations of New Zealand as set out in the two international texts.'⁶² The Court's apparent conclusion that there was no 'violation' of international law suggests that the Court was satisfied that the power had been exercised *consistently* with international law. The qualifying reference to the 'limits of judicial review', however, raises the possibility that the Court, in fact, considered itself constrained by the orthodox limitations of *Wednesbury* unreasonableness.

The Court's conclusion regarding the second power at issue was even more Janus-like. The Court concluded:⁶³

[t]hroughout the process ... the Immigration Service ... did address those issues which the Convention and Covenant require to be addressed. ... [D]ifferent views will be held about the balance to be struck between the various considerations. That is not however a matter for us. The question which we have to address is whether there is any reviewable error of law in the decisions that have been taken or one of the decisions is so unreasonable that no reasonable immigration officer could have come to it.

The record does not demonstrate any error of law in the sense of failure to give consideration to the relevant requirements of the international texts. In particular the immigration officers did have regard to the position of the children, especially the New Zealand born children, as a primary consideration.

Excepting the final sentence, this passage points towards a straightforward application by the Court of the *Wednesbury* framework, together with that framework's traditional reluctance to address questions of balance, weight or justification. The Court expressly disclaims its ability to look at questions of 'balance' and invokes the familiar language of *Wednesbury* 'unreasonableness' and failure to 'give consideration' to international law.

⁶⁰ He authored the Court of Appeal's decisions in, amongst other cases, *Air Line Pilots* [1997] 3 NZLR 269, *Rajan* [1996] 3 NZLR 543, *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, *Schier v Removal Review Authority* [1999] 1 NZLR 703 and, of course, *Puliu'vea* itself.

⁶¹ For example, the presumption of consistency was invoked by the Court in *Air Line Pilots* [1997] 3 NZLR 269, *Rajan* [1996] 3 NZLR 543 and *Schier v Removal Review Authority* [1999] 1 NZLR 703, all cases involving challenges to the exercise of administrative power.

⁶² (1996) 2 HRNZ 510, 518.

⁶³ *Ibid* 522.

The final sentence, however, points in another direction. The Court pronounces itself satisfied not just that the best interests of the children were ‘taken into account’; but that they were taken into account as a ‘primary consideration’, as required to achieve consistency with the relevant international obligations (and in particular, Article 3(1) of the CRC).

How is this apparent ambiguity in the *Puli’uvea* decision to be made sense of? The most likely explanation is that the Court of Appeal invoked the two models interchangeably because it considered that, at least in the context of the *Puli’uvea* case, the frameworks were functionally equivalent. In other words, the Court considered that ‘consistency’ with the relevant international obligations could be satisfactorily achieved in the particular case through the lens of *Wednesbury* unreasonableness.

This explanation is supported by the decision of the Court of Appeal (again, delivered by Keith J) two months later in the *Rajan* case.⁶⁴ *Rajan* concerned a challenge to the exercise of yet another immigration power, on the grounds that the decision-maker had failed to ‘taken into account’ international obligations protecting children and families.⁶⁵ The Court of Appeal again refused to rule on the point, but did list some of the factors that it considered might either support or rebut an argument that international obligations were a mandatory relevant consideration in the circumstances of the case.⁶⁶ In doing so, the Court listed the existence of the presumption of consistency with international obligations in passing, as one of the factors that supported reading the relevant statutory provision to require international obligations to be ‘taken into account’.⁶⁷

The approach taken to the presumption of consistency in *Puli’uvea* and *Rajan* can be helpfully contrasted with the very different approach that the Court of Appeal (again, Keith J) took to the invocation of the presumption of consistency in *Sellers v Maritime Safety Inspector*.⁶⁸ In that case, involving international protections of freedom of the high seas,⁶⁹ the Court invoked the presumption of consistency directly (and without recourse to the *Wednesbury* framework) to place a substantive constraining gloss on the exercise of administrative power.⁷⁰

It seems, then, that the intertwining of the presumption of consistency and the *Wednesbury* model that has occurred in *Puli’uvea*, *Rajan* and other immigration cases results from a judicial perception as to what is required to achieve consistency with the particular international obligations at stake in those cases, rather than a more general apprehension that the two models can be invoked interchangeably in all cases. This is further confirmed by an examination of the *Puli’uvea* court’s analysis of the scope of the relevant obligations.⁷¹ The rights of children and families protected by the CCPR and CRC are, the *Puli’uvea* court emphasised, ‘broad and relative’. Thus, for example, the best interests of the child are ‘a (not *the*) primary (and not *paramount*) consideration.’⁷² Although it is not spelt out, this analysis of the scope of the relevant obligations seems to be directed at emphasising the amenability of such obligations to absorption within the traditional structure of *Wednesbury* unreasonableness. The obligations at stake are ‘relative’ rather than absolute. They do not require any particular outcome to the decision-making process. Rather, they require certain considerations to be kept in mind by the

⁶⁴ [1996] 3 NZLR 543.

⁶⁵ Ibid 548.

⁶⁶ Ibid 550-552.

⁶⁷ Ibid 551.

⁶⁸ [1999] 2 NZLR 44.

⁶⁹ These international protections were found in general as well as conventional international law.

⁷⁰ Ibid 59-62. See, also, *Air Line Pilots* [1997] 3 NZLR 269, 289: ‘the annex and in particular para 5.12 might place a limiting gloss on, or state a consideration relevant to, the exercise of the power ...’ (confirming that outside the immigration context, Keith J sees the presumption of consistency and the *Wednesbury* model as alternative, rather than synonymous, analytical frameworks); McGrath J in *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577, esp 610, para 103 (drawing a clear distinction between ‘giving effect to’ and ‘having regard to’ international obligations).

⁷¹ To recapitulate, the obligations invoked before the *Puli’uvea* court were Articles 3(1), 8, 9 and 16 of the CRC and Articles 2(3), 17, 23 and 24 of the CCPR.

⁷² (1996) 2 HRNZ 510, 517.

decision-maker. The Court concluded this exploration of the scope of the relevant obligations with its express renunciation of Cooke P's invocation of the rights of the family and child as a 'starting point'.⁷³

For the reasons already explored above, this analysis of the rights at issue in *Puli'uvea* (and in particular, Article 3(1) of the CRC) is, perhaps, unduly reductive. Although the Court correctly identifies the 'relative' nature of the rights at issue, it fails to accord any significance to the notion of 'primacy' in Article 3(1). The reference to primacy must, it has already been suggested, speak to matters of weight and balance and perhaps, as Philip Alston has suggested, places a burden of justification on those seeking to override the protected interest.⁷⁴ This idea of a presumption in favour of the best interests of the child is in accord with Cooke P's characterisation in *Tavita* of the child's rights as a 'starting point'. In contrast, the *Puli'uvea* court's emphasis on the 'broad and relative' nature of the right, together with its renunciation of Cooke P's 'starting point' metaphor, suggest that the Court may have failed to attach significance to the fact that Article 3(1) requires decision-makers to treat the best interests of the child as 'a primary' rather than just 'a' consideration.

Rightly or wrongly, however, the most likely explanation for the *Puli'uvea* court's simultaneous invocation of the presumption of consistency and the *Wednesbury* model is that the Court considered that the 'broad and relative' nature of the relevant international obligations rendered them capable of protection within the *Wednesbury* framework.

The downstream effect

Whatever the reasons for the intermingling of the two models that has occurred in *Puli'uvea* and like cases, those reasons are not well understood by High Court justices, who are responsible at first instance for the judicial oversight of administrative action. The High Court jurisprudence is characterised by significant variations in the intensity with which High Court justices have been prepared to scrutinise administrative action in light of international obligations and a degree of confusion as to the jurisprudential basis upon which this supervision is to occur.

The presumption of consistency is almost entirely absent from the High Court jurisprudence in the immigration context, at least in an articulated form. *Tavita* and *Puli'uvea* are generally treated as binding authorities for the proposition that, in relation to many (if not all) statutory powers exercised in the immigration context, the international obligations protecting children and families are mandatory relevant considerations⁷⁵ and High Court justices have developed a jurisprudence based almost entirely on the language of 'mandatory relevant considerations'.⁷⁶

Notwithstanding the lack of any articulation of the presumption of consistency, some High Court justices have, nevertheless, clearly been influenced by the language of 'primacy' in Article 3(1) of the CRC and have struggled to give it effect. In some cases, justices have expressly claimed a responsibility to ensure 'appropriate', 'sufficient' or 'substantial' weight is given to the internationally protected interests;⁷⁷ and have on occasion drawn an express link between the need to place substantial weight on the relevant interests and the language of 'primacy' in Article 3(1).⁷⁸

⁷³ Ibid.

⁷⁴ Philip Alston 'Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1, 13.

⁷⁵ See, eg, *Mil Mohamud v Minister of Immigration* [1997] NZAR 223, 228; *Kumar v Minister of Immigration* (Auckland High Court, Randerson J, 25 March 1999, M184/99) 7-8.

⁷⁶ The cases are discussed below. For exceptional invocations of the presumption of consistency, see *Lomu v Chief Executive, Department of Labour* (Wellington High Court, Ronald Young J, 23 May 2002, AP 209/01) 3 and *Schier v Removal Review Authority* [1998] NZAR 230, 238.

⁷⁷ See, eg, *Panthongkum v Chief Executive, Department of Labour* (Wellington High Court, Gallen J, 23 March 1998, AP 158/97); *Numia v Chief Executive, Department of Labour* (Wellington High Court, Gallen J, 3 June 1999, CP 380/98) 8-9.

⁷⁸ See, eg, *Raju v Chief Executive, Department of Labour* (Wellington High Court, McGechan J, 8 December 1996, AP 307/95) 3; *Mil Mohamud v Minister of Immigration* [1997] NZAR 223, 228; *M v Minister of Immigration* (Wellington High Court, Goddard J, 17 August 2000, AP 84/99) 11-12. See, also, Gendall J in *Vaigafa v Chief Executive, Department of Labour* (Wellington High Court, 27 April 1999, AP 234/98) 9,

On an equally significant number of occasions, however, High Court justices have relied on orthodox *Wednesbury* principles to expressly disclaim any ability to scrutinise the weight placed on internationally protected interests by decision-makers.⁷⁹

Thus, the apparent ambiguity in *Puli 'uvea* as to whether decision-makers are required to treat the best interests of the child as a 'primary' consideration (as mandated by the presumption of consistency) or merely to 'have regard' to the interests protected by Article 3(1) (as required by orthodox *Wednesbury* principles) is carried over into the High Court jurisprudence. There is a lack of consistency in the High Court jurisprudence as to the extent to which justices have assumed control over the weight attached to international obligations in the decision-making process, and a degree of confusion as to the jurisprudential basis upon which questions of weight might or might not be addressed. This confusion is, perhaps, epitomised by the decision of Randerson J in *P v Minister of Immigration* (1999), in which his Honour disclaimed any ability to review decisions on the basis of the 'weight' attached to particular considerations and then went on to require the Minister to take the best interests of the child as a 'primary consideration,' without any apparent recognition of the inherent contradiction between the two statements.⁸⁰

The High Court jurisprudence is also characterised by variations in the extent to which High Court justices have required decision-makers to articulate a clear and compelling basis for overriding internationally protected interests. Again, there are occasions on which the justifications advanced by decision-makers to override the best interests of the child have been subject to intense judicial scrutiny.⁸¹ On other occasions, however, decisions have been upheld in the absence of any articulation at all of the reasons for overriding the child's interest. In *Elika v Minister of Immigration*, for example, Williams J was satisfied from the existence of an interview process in which information was gathered as to the effect of removal on the family, together with a formulaic recitation by the decision-maker of the relevant international obligations and a bare assertion that those obligations had been 'balanced' against the interests of the state in policing its borders, that substantial weight had been accorded to the family's interests, as required by the relevant Immigration Service guidelines.⁸² Thus, the language of 'substantial weight' has not always translated into close judicial oversight of the justificatory process.

To summarise, then, in the absence of a clear exposition by the Court of Appeal of the framework within which international obligations can be legitimately deployed as a constraint on administrative action, the High Court jurisprudence is characterised by considerable variation as to the extent of scrutiny High Court justices have considered appropriate and confusion as to the jurisprudential basis for this scrutiny. A number of High Court justices have exhibited unease at the proposition that mere 'consideration' of the relevant interests is sufficient to ensure compliance with international law. However, a coherent basis for enhanced scrutiny of such decisions has not been articulated. In particular, any articulation of the existence of a presumption of consistency with international obligations is strikingly absent from the High Court jurisprudence in this context.

Conclusion

In this paper I have attempted to expose a degree of confusion in the New Zealand jurisprudence as to the relationship between the two dominant models invoked, to explain the relevance of unincorporated

reverting to the discredited language of 'starting points' in order to try to encapsulate the spirit of Article 3(1).

⁷⁹ See, eg, *Valle v Minister of Immigration* (Wellington High Court, Wild J, 18 September 1998, AP 246/97) p 6 (doubting but not deciding the point); *Kuldip Singh v Minister of Immigration* (Auckland High Court, Robertson J, 18 July 1996, M1321/95) 7; *Faavae v Minister of Immigration* (Auckland High Court, Fisher J, 9 May 1997, M1434/96; HC122/97) 12.

⁸⁰ (1999) 18 FRNZ 69, 76 and 81.

⁸¹ See, eg, *Kumar v Minister of Immigration* (Auckland High Court, Randerson J, 25 March 1999, M184/99); *M v Minister of Immigration* (Wellington High Court, Goddard J, 17 August 2000, AP84/99) 11; *A, B & C v Chief Executive, Department of Labour* [2001] NZAR 981. In all three of these cases, the decision-making process was considered flawed because of inadequacies in the reasons advanced to override internationally protected interests.

⁸² *Elika v Minister of Immigration* [1996] 1 NZLR 741, 746-748.

treaties to administrative decision-making, and to cast some light on the analytical relationship between them.

This analysis raises as many questions as it answers. What, for example, is the analytical relationship between these two models and other emerging heads of judicial review, for example, the principle of legality and the doctrine of proportionality?⁸³ And how are the normative issues surrounding the legitimacy of the two models to be resolved?

I do not attempt to tackle these questions in this paper except to note, briefly, that although the presumption of consistency has the potential to act as a more potent constraint on administrative power than the *Wednesbury* model, its utilisation in administrative law cases does not necessarily herald a dramatic abandonment of the sovereignty of Parliament to the dictates of international law. The presumption of consistency is a technique of statutory construction and as such, can be overridden by clear Parliamentary language or by an inconsistent statutory scheme. In my own view, for example, the *Puli'uvea* court may have reached the right decision for the wrong reasons in that at least one of the powers at issue in *Puli'uvea* may well have been incapable, as a matter of construction, of an interpretation consistent with Article 3(1) of the CRC.⁸⁴

The limited purpose of this paper, however, is simply to stress the need for a more careful exploration of the relationship between the two models in the New Zealand courts' emerging jurisprudence on the role of international law in constraining administrative action.

⁸³ For a summary of recent developments in relation to both these heads of review, see Taggart, above n 42.

⁸⁴ Section 63B of the Immigration Act 1987 predicated the relevant decision-maker's power to cancel a removal order on the existence of 'exceptional' circumstances of a humanitarian nature. This notion of 'exceptionality', which places emphasis on the rarity of the humanitarian circumstances at issue rather than their cogency, may well be inconsistent with the direction in Article 3(1) to treat the best interests of children as a primary consideration in all decisions concerning them.

Domestic Procedures for International Treaty Actions: The Courts and Unincorporated Treaties in New Zealand

Allan Bracegirdle*

This article is a companion paper to a recently published article that provides a detailed description of the international treaty examination procedures that New Zealand has put in place to increase the role of Parliament with respect to international treaty actions.¹ That article noted that a separate article would be addressing a further important (but largely unrecognised) background issue to the new procedures. That issue concerns the relevant case law, particularly with respect to unincorporated treaties.

It is suggested that the question of unincorporated treaties is of special importance to the relationship between international law and domestic law in countries like New Zealand, and to the relationship between all three branches of government. The treaty examination procedures point to possible developments in those relationships. On a broader front, the procedures may be pointing towards an emerging convergence in different international approaches to the domestic legal status and application of treaties and to international law generally. But if so, it is important that any recourse by the courts (and the Executive) to unincorporated treaties is managed with sensitivity to concerns over certain aspects of globalisation and over democratic accountability.

Court of Appeal decisions

As is well known, in countries (such as many in the Commonwealth) that follow a “dualist” approach to the relationship between international treaties and domestic law, treaties form part of domestic law only if they are incorporated into it through legislation passed by or under the authority of Parliament, and the act of becoming party to a treaty has consequences only at international law and not also at domestic law. In the case of countries that follow the “monist” approach, the argument for treaties applying directly in domestic law on a self-executing basis can be made on the ground that Parliament (or one House of Parliament) will have given its consent to them; in the case of the dualists, the only point at which it may be possible to talk of parliamentary “approval” of a treaty is when legislation is put before Parliament and passed to implement the treaty in domestic law, in circumstances where it is clear that that is the purpose of the legislation.

For the dualists, it therefore follows that, unless the treaty has been incorporated into domestic law, it ought not be applied (or otherwise recognised, other than to a limited extent) by the domestic courts. If that principle is not respected, international treaties would be brought into domestic law, and be binding on ordinary citizens, without any parliamentary involvement. Concern about a “democratic deficit” and suspicion about international treaties (and perhaps international law more generally) could be expected to follow.

There are signs of such concern in several countries.² In New Zealand’s case, standard dualist principles were reasonably well settled³ (and international treaties received little attention in the New Zealand courts)

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¹ See Bracegirdle A, “Domestic Procedures for International Treaty Actions: Description of New Zealand Procedures” (2003) 14 *PLR* 28.

² Particularly in Australia. Ironically, in the most controversial case there in recent times, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, where the Australian High Court decided that ratification of a treaty created a legitimate expectation that a decision maker will act in accordance with the treaty, it was the

until the mid 1990s, when unincorporated treaties were relied on against the Crown in two Court of Appeal decisions in the human rights area. One of those cases, known as *Baigent's Case*,⁴ can be explained, at least in part, on the ground of an anomalous fact situation, and did not in any event involve direct application of the treaty, the International Covenant on Civil and Political Rights, that was drawn on in the judgment. It is also perhaps worth noting that the international obligation that was drawn on in that case was Article 2(3) of the Covenant which requires an effective remedy for the violation of rights or freedoms "as herein recognised". The substantive right at issue in the case, section 21 (concerning unreasonable search) of the New Zealand Bill of Rights Act 1990 (a statute which affirms New Zealand's commitment to the Covenant but was not necessary for New Zealand's implementation of, or compliance with, that international instrument which New Zealand had ratified over a decade earlier), is in quite different terms to the "corresponding" right in the Covenant, Article 17 concerning arbitrary or unlawful interference with privacy, home, etc.

Too much has been made of the other case, *Tavita v Minister of Immigration*,⁵ in which the Court considered as "unattractive" and as pointing to "window dressing", comments by the Crown to the effect that Ministers and Departments are entitled to ignore international instruments in the exercise of their discretion under legislation. In that case, the treaties at issue included the Convention on the Rights of the Child, which New Zealand had ratified earlier in the same year, but which had not required separate implementation in New Zealand law. The Court commented that legitimate criticism could extend to the Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the Executive is necessarily free to ignore them.

But several aspects of the case should not be overlooked, notwithstanding the reference that has been made to it in other New Zealand cases and the influence that it seems to have had on the subsequent controversial decision of the Australian High Court in *Teoh's Case*.⁶ It was only an interim judgment of the Court of Appeal, and the appeal was adjourned *sine die* (although a stay on the plaintiff's removal from New Zealand under immigration legislation remained in force). The point about the domestic legal status of international instruments was not fully argued, and the Court considered that a final decision on the argument was neither necessary nor desirable. If the Court was intending to enhance the status of international law, and human rights treaties in particular, it is not clear how it could achieve that in the absence of recognition that governments are contracting at international law with the other states parties in becoming party to treaties and that it is under that law that governments are accountable for alleged non-compliance with treaties. The precise purport of the case is also obscure. It did not decide that international treaty obligations founded mandatory relevant considerations (such that failure by decision makers to take the obligations into account would render the decisions reviewable in the courts) on the facts before it. Rather, it appears simply to have been leaving that open as a possibility for further development by the courts in future.

In New Zealand's case, what is perhaps most significant is that no further conclusive development, in respect either of treaty obligations as mandatory relevant considerations, or of the application of

Australian government that was on the receiving end of the "democratic deficit". A Joint Statement was made by Australian Ministers in response to the decision at the time, and successive Australian governments have responded to it by introducing legislation, the Administrative Decisions (Effect of International Instruments) Bill, that remains before the Australian Senate. Such legislation has been enacted however in South Australia, and the case has generated a substantial literature.

³ The leading case was probably *Ashby v Minister of Immigration* [1981] 1 NZLR 222. For an excellent summary of the principles more generally on the relationship between international law and municipal law, see Jennings R and Watts A (eds), *Oppenheim's International Law*, 1992 (9th ed.), Vol 1, paras 18-21. See also Aust A, *Modern Treaty Law and Practice* (2000), especially Ch 10, "Treaties and Domestic Law".

⁴ *Simpson v Attorney-General* [1994] 3 NZLR 667.

⁵ [1994] 2 NZLR 257. The relevant Ministerial decision at issue in this case was taken before the child was born and before New Zealand became party to the main treaty at issue.

⁶ See above, n 2.

unincorporated treaties more generally, has yet taken place. This is despite the fact that treaties have come before the Court of Appeal frequently since *Tavita case*. The Court of Appeal set out relevant considerations in *Puli'uvea case*⁷ and *Rajan case*⁸ (and also examined the relevant statutory provisions), but again did not need to take final decisions. In *New Zealand Air Line Pilots' Association case*,⁹ it reiterated the long-standing orthodox point that the stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law, and it went on to note that the giving of full effect to treaty provisions in New Zealand law is required in some cases and not in others and that, if national legal effect is needed, the effect might be given indirectly as well as directly. In *Tangiara case*,¹⁰ upheld on appeal to the Privy Council, it decided that international treaty provisions, when used to assist in the interpretation of domestic statutes, must be relevant and applicable to the construction of the statute concerned. In *Butler's case*,¹¹ another case of judicial review in the immigration (refugee) area, it noted that if the courts could consider applications for review in such cases, the basic principle that the Executive cannot change the law by entering into treaties in the absence of securing any necessary legislative change would appear to be avoided. In *Nicholls and Tikitiki case*,¹² it stated that international considerations are relevant only in the process of bona fide interpretation of domestic legislation, not to create ambiguity or uncertainty that is not there, and it specifically agreed with the Solicitor-General's submission that international law is available to clarify Parliament's intention, but not to reshape it.

Extensive reference was made to relevant treaties by the Court of Appeal in a case that was concerned with whether "same sex" marriages must be permitted under anti-discrimination law.¹³ In that case, the Court decided against further development of the law. The law was further developed by the Court in a defamation case involving qualified privilege and political comment, but in that case the international material provided only limited support and, on appeal, the Privy Council referred the decision back for reconsideration to the Court of Appeal where a different balance was struck.¹⁴ Unincorporated treaties, including the United Nations Convention on the Law of the Sea, were extensively relied upon by the Court in a maritime case.¹⁵ But that was done on the back of a determination by the Court that a principle set out in that Convention to the effect that the state of nationality of a ship has exclusive jurisdiction over the ship on the high seas, is declaratory of customary international law (and thus part of domestic law in any event), even though the only recent application of customary international law in the New Zealand courts had been in cases involving sovereign immunity.¹⁶ In other words, customary international law operated as a hook (or Trojan horse) to make a number of unincorporated treaties accessible to the Court.

⁷ *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 and [1996] 3 NZLR 538 (application for leave to appeal to the Privy Council only).

⁸ *Rajan v Minister of Immigration* [1996] 3 NZLR 543.

⁹ *New Zealand Air Line Pilots' Association Inc. v Attorney-General and Others* [1997] 3 NZLR 269.

¹⁰ *Wellington District Legal Services Committee v Tangiara* [1998] 1 NZLR 129.

¹¹ *Butler v Attorney-General and Refugee Status Appeal Authority* [1999] NZAR 205. At the suggestion of the Court, the Refugee Convention (and Protocol) was subsequently enacted into NZ law, but unhappily the Immigration Amendment Act 1999 achieved a lack of clarity on the issue of incorporation.

¹² *Nicholls and Tikitiki v The Registrar of the Court of Appeal and Attorney-General* [1998] 2 NZLR 385.

¹³ *Quilter v Attorney-General* [1998] 1 NZLR 523.

¹⁴ *Lange v Atkinson and Australian Consolidated Press Ltd* [1998] 3 NZLR 424; see also at [2000] 1 NZLR 257 (Privy Council), and [2000] 3 NZLR 385 (Court of Appeal – second decision).

¹⁵ *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44. For a recent criticism of this case, on statutory interpretation grounds, for using international law to create an exception to a statute in a manner that undermines a stable legal system, see Evans J, "Questioning the Dogmas of Realism", in Bigwood R (ed.), *Legal Method in New Zealand: Essays and Commentaries* (2001), at 293-5.

¹⁶ See *Marine Steel Ltd v Government of Marshall Islands* [1981] 2 NZLR 1; *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738; *Reef Shipping Co Ltd v The ship "Fua Kavenga"* [1987] 1 NZLR 550; *Governor of Picairn and Associated Islands v Sutton* [1995] 1 NZLR 426; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278; and *Air New Zealand Ltd v Director of Civil Aviation & Attorney-General* [2002] 3 NZLR 796 (also act of state).

Unincorporated international human rights instruments have informed, but have not actually been applied in, decisions of the Court in other recent cases where the Court has rejected the appeals of the plaintiffs.¹⁷ One recent case, involving the application of a provision in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), concluded under the auspices of GATT/WTO as part of the Uruguay Round agreements in 1994, is less easy to square away with principle, but the context of that case is complex and difficult and it is not easily construed.¹⁸ Two other recent cases have also extensively referred to, but without appearing to be decisively determined by, GATT/WTO customs valuation codes that have been implemented in, but not incorporated into, New Zealand law.¹⁹

In the lower courts in New Zealand, it is probable that the Court of Appeal decision in *Tavita case* has had a significant influence on the balance of the case law. But both pre- and post-*Tavita*, statements of orthodox principle by the High Court can be found.²⁰ In the pre-*Tavita* case, the judge put it forcefully:²¹

I can accept that, as a matter of proper conduct, Ministers of the Crown should, in principle, seek to uphold New Zealand's international obligations. They are the executive of the country, and we do not wish to become an international pariah. However, it is a further and long step to hold that there is some consequential generalised duty, enforceable at law, to that effect. Is it for the Courts to direct Ministers to obey the UN Charter? International conventions of various descriptions?... What is certain is that an order by way of mandamus to a Minister to (indirectly) procure compliance with New Zealand's international obligations in a way which will benefit the applicant, is in substance the enforcement of an international treaty – not itself part of domestic law – for the benefit of that private citizen applicant. I will not do indirectly something which the Court is forbidden – and for good public policy reasons – to do directly.

One author, after citing that case, went on to note the increasing influence of international law in judicial interpretation of domestic law, but concluded: "...the Courts will need to avoid overemphasis of international law which has not been enacted in the domestic law. Otherwise, the legislature may decide to intervene in order to maintain basic principles of parliamentary democracy."²²

The foregoing examples of cases from New Zealand's experience make it difficult to avoid the conclusion that the floodgates have now opened, or perhaps that the goalposts have now shifted, in terms of the

¹⁷ *Tranz Rail Ltd v Rail & Maritime Transport Union* [1999] 1 ERNZ 460; *Mendelsohn v Attorney-General* [1999] 2 NZLR 268; *R v N* [1999] 1 NZLR 713; and *R v Harlen* (1999-2001) 18 CRNZ 582. But see *R v Poumako* [2000] 2 NZLR 695 and *R v Pora* [2001] 2 NZLR 37, as to the International Covenant on Civil and Political Rights supporting the New Zealand Bill of Rights Act 1990 with reference to criticisms by the Court of criminal sentencing legislation having retrospective effect; cf *R v D* [2003] 1 NZLR 41, as to the Sentencing Act 2002 (in relation to the sentence of preventive detention) only being subject to interpretation consistently with the Covenant if the words of the statute allow it.

¹⁸ *Pharmaceutical Management Agency Ltd v Commissioner of Patents* [2000] 2 NZLR 529.

¹⁹ *Elitunnel Merchanting Ltd v Regional Collector of Customs* (2000) 1 NZCC 61, 151; *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand Customs Service* (2001) 1 NZCC 61, 198. See, similarly, *Chief Executive of the New Zealand Customs Service v Rakaia Engineering & Contracting Ltd* (2002) 1 NZCC 61, 217, concerning the 1983 International Convention on the Harmonized Commodity Description and Coding System adopted under the auspices of the then Customs Cooperation Council (now the World Customs Organisation). On the implementation/incorporation distinction, see below n 37.

²⁰ See, eg, *Federated Farmers of New Zealand Inc v New Zealand Post* [1990-92] 3 NZBORR 339; *Lawson v Housing New Zealand* [1997] 2 NZLR 474.

²¹ *Ibid* 390. However, in a more recent case, the same judge seems virtually to have accepted that the Deportation Review Tribunal was bound to consider an unincorporated treaty obligation, Article 11 of the International Covenant on Economic, Social and Cultural Rights: *Rahman v Deportation Review Tribunal & Minister of Immigration*, HC CP49/99, 26 September 2000 (unreported).

²² Williams D, *Environmental and Resource Management Law*, 2nd ed (1997), para 2.24.

influence of unincorporated international treaties in domestic law.²³ That is a development which probably made a response by Parliament in terms of the international treaty examination procedures inevitable.

Calls for further development by the courts

In New Zealand, there has probably been more concern with the Crown's implementation of and accountability for compliance with treaties to which it is party, than with the courts giving effect to unincorporated treaty obligations. There have been articles of a descriptive kind by one author commenting on the question of a more broadly receptive approach to international human rights instruments, and treaties in general, in New Zealand law.²⁴ But the judicial developments have also inspired calls in New Zealand for the courts to go further in this area. There have been calls for international treaties to be used in judicial review, specifically for international obligations to found mandatory relevant considerations on the part of decision makers and to give rise to contents-based substantive review.²⁵ There has been a dense, and to some extent challenging, call for unincorporated treaties (particularly, it seems, international human rights instruments) to be of broad interpretative application in relation to the exercise of statutory discretionary powers.²⁶ There has been a claim that Parliament's concern that court recognition of unincorporated obligations somehow usurps parliamentary sovereignty is misguided.²⁷ There has also been a suggestion that the parliamentary examination procedures ought to legitimise the application of international treaties by the courts.²⁸

This last suggestion has, in effect, already been commented upon in the earlier article.²⁹ The other calls raise many issues, the proper consideration of which is beyond the scope of this article. Some comments can however be made. So far as the calls for expanded use of unincorporated treaties in administrative law are concerned, those calls are made with particular reference to cases before the courts involving international human rights treaties. It may be that in common law dualist jurisdictions, unincorporated human rights treaties are taking on a *sui generis* character and becoming an exception to the general rule that international treaties cannot be applied in the absence of incorporation by the legislature into domestic

²³ One recent study which analysed all reported Court of Appeal decisions in the 3 years 1976, 1986 and 1996 reported that international treaties were relied on in 13% of cases involving statutory interpretation by the Court in 1996, compared to none in 1976 and 1986: Allan J, "Statutory Interpretation and the Courts" (1999) 18 *NZULR* 439. However, for a criticism of the limitations of that list, see Keith K, "Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness", in Bigwood, above n. 15, at 89-90; and for a different list, which nevertheless shows substantial growth in citations of international legal texts, periodicals and law reform materials, see Richardson I, "Trends in Judgment Writing in the New Zealand Court of Appeal", *ibid* charts at 269-78.

²⁴ Keith K, "The Application of International Human Rights Law in New Zealand" (1997) 32 *Texas Intl LJ* 401; Keith K, "The Impact of International Law on New Zealand Law" (1998) 6 *Waikato Law Rev.* 1; Keith K, "Roles of the Courts in New Zealand in Giving Effect to International Human Rights – With Some History" (1999) 29 *VUWLR* 27; Keith K, above n 23, at 89-92; Keith K, "Law made Elsewhere: Do We Need a New Way of Thinking?", paper to NZ Law Conference, 2001 (see Internet site; <http://www.nz-lawsoc.org.nz/conference/papers2.html>).

²⁵ See Joseph P, "Constitutional Review Now" [1998] *NZ Law Rev.* 85, at 109-119; Joseph P, *Constitutional and Administrative Law in New Zealand* (2001), at 782-4; Taggart M, "Introduction to JR in New Zealand" [1997] *JR* 236, at 239; Taggart M, "Administrative Law" [2003] *NZ Law Rev* 99, at 107-9.

²⁶ Dyzenhaus D, Hunt M & Taggart M, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *Oxford University Commonwealth LJ* 5 (presented by Taggart to NZ Law Conference 2001, see Internet site, above n 24).

²⁷ Chen M, "A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making" (2001) 19 *NZULR* 448, at 452 (n. 4).

²⁸ Poole M, "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 *VUWLR* 91, at 107-110; Palmer G, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 *VUWLR* 57, at 62; Taylor P, "The New Zealand Treaty Making Process" (June 1999) 133 *Planning Quarterly* 3, at 4.

²⁹ See above, n 1, at 34-35.

law. At least one book, written prior to the passage of the Human Rights Act 1998 in the United Kingdom, is devoted to sometimes ingenious arguments in support of a broad development of that kind.³⁰

Yet, from the point of view of international law on treaties, human rights treaties are not in a special position (some do not provide for withdrawal, but that is not a unique feature, and nor is the fact that they may embody rules of customary international law and that obligations with respect to human rights are specifically mentioned in the United Nations Charter). It is not possible to generalise about treaties or international law from a human rights sample (any more than from an environmental or trade and economic sample). Many treaties require states parties to impose prohibitions or burdens of one sort or the other on individuals, and some of the cases noted earlier have already sought to go beyond human rights treaties. As this concern has recently been put: “Would the argument apply to duties imposed on individuals as well as rights? And, as a result, could an individual complain if a duty were imposed on him or her by treaty without legislative sanction (remembering the rule of law doctrine that one should not be punished except where in breach of the law)? From a wider perspective, should the Crown enjoy a de facto legislative power?”³¹

New Zealand’s treaty links are voluminous and concern virtually every area of government activity, with a huge range of on-going negotiations.³² Looking across them, it could be concluded that the international community has had an excessive preoccupation in the past with promoting the positive side of “globalisation”. If so, it might be observed that redressing the balance in the future through greater attention to the “negative” aspects of “globalisation” could be expected to entail comparative growth in treaties establishing international crimes and other controls, and providing for co-operation between enforcement and regulatory authorities (The experience of the 1990s might also suggest that the subject of compliance with treaties generally, and enforcement of compliance, is bound to become an even more crucial matter in future. The international rule of law, and the international legal order, will not prosper from an uneven approach of picking and choosing which treaties to support, and when). International criminal and related treaties are unlikely to be received enthusiastically as candidates for direct application in domestic law. Looked at from this point of view, dualism (properly understood) can and does serve to protect people from the impact of treaties that have not been through the democratic process of incorporation into domestic law.

In the case of treaties in the “good” category (although some treaties such as extradition treaties may be both good and bad for individuals), and particularly in the case of treaties in the human rights area, part of the problem seems to be an assumption that if the treaty is not contained in domestic law in terms, then the government is not giving proper effect to it, and the courts ought to make up for that omission by having recourse to it directly. It may not be generally understood that international law, while very much concerned that states do comply with their treaty obligations, does not address or regulate how countries give effect to treaties - that being a matter for national constitutional systems. This is not the place to go

³⁰ Hunt M, *Using Human Rights Law in the United Kingdom Courts* (1997). The dilemma that the author faces, however, in reconciling such a development with parliamentary sovereignty is emphasised when he resorts to taking a shot at the worth of Parliament as an institution (ibid 24). This has echoes of the debate over the ultra vires basis for judicial review: see, in particular, the strident criticisms of Parliament and representative democracy in Joseph P, “The Demise of Ultra Vires – A Reply to Christopher Forsyth and Linda Whittle” (2002) 8 *Canterbury Law Rev* 463, at 470-473.

³¹ Conte A, “From Treaty to Translation: The Use of International Human Rights Instruments in the Application and Enforcement of Civil and Political Rights in New Zealand” (2001) 8 *Canterbury Law Rev*. 54, at 57. See also the very forthright statement of such concern by the House of Lords in *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 2 All ER 523, at 526 and 544, which also in effect makes the point that non-application of unincorporated treaties is not a legislated principle but something that the courts have elaborated as a principle of the common law.

³² The list of New Zealand treaties alone runs to 2 volumes: see *New Zealand Consolidated Treaty List* (Part 1, Multilateral Treaties, and Part 2, Bilateral Treaties), Ministry of Foreign Affairs and Trade (1997), published as New Zealand Treaty Series 1997, No. 1 and No. 2 (although that very comprehensive list also includes inherited treaties and terminated treaties).

into the intricacies of domestic implementation of international treaties,³³ even though this issue, on analysis, often lies at the heart of debates over treaties. Suffice to say that it is a difficult and complex art, for the monists as well as for the dualists, with many choices.

In New Zealand, it is rare for treaty texts to be included in legislation, and rarer still for them to be given the force of law in any respect. Although this practice may have increased in recent years, it is to be resorted to with caution, since it can create confusion about the status of treaties as instruments, and accountability for them, on the international legal plane, and blur the distinction between interpretation of treaties directly and interpretation of statutory provisions giving effect to them.³⁴ Because the law will only be changed when it is necessary to do so to give effect to the terms of a treaty, legislation can be expected when the treaty entails the imposition of new prohibitions or other obligations on people, and not necessarily when it is providing for rights. Most dualist states will have a mass of statute law (and common law) that is already consistent with, and can be relied upon for the implementation of, major human rights treaties such as the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Rights of the Child. The tradition in such jurisdictions of detailed and precise legislation also makes these treaties, which include broad, even vague, provisions (overlapping with existing statutes at many points, but at a level of generality), difficult to incorporate in terms while maintaining reasonable certainty. There may also be an argument as to whether direct application of general, sometimes minimum, international standards might operate to reduce the protection of a detailed, comprehensive approach under existing law. As a starting point, domestic litigants ought generally be required to base their arguments on legislation or the common law, and not to seek refuge in treaties that are in principle to be left to the international legal system.

Countervailing considerations

None of this is to suggest that unincorporated treaties can be of no assistance in domestic law. There are recognised situations where assistance can be obtained. But those cases are limited,³⁵ and any expansion ought to be a matter of caution. Assistance that extends to application, whether directly or (beyond a certain point) indirectly, of unincorporated treaties, as if they are little different from domestic statutes, and especially involving their enforceability at private suit, is particularly problematic. As has been noted: “There are few, if any, exceptions to the principle that legislation is required to make a treaty part of domestic law. This principle is the necessary counterweight to the Executive’s treaty-making power, for without it the Executive would be able to circumvent the legislature and change the law of the land by adoption.”³⁶ It would be inadequate to reply that the courts could be relied upon to enforce treaties only

³³ See, eg, Thornton G, *Legislative Drafting* (1996), at 308-14; Burrows J, *Statute Law in New Zealand* 3rd ed (2003), at 335-343; Law Commission (of New Zealand) Report 34, *A New Zealand Guide to International Law and its Sources* (May 1996), at 14-22; Law Commission (of New Zealand) Report 45, *The Treaty Making Process: Reform and the Role of Parliament* (December 1997), at 51-57; Legislation Advisory Committee (LAC), *Guidelines on Process and Content of Legislation* (2001), Ch 6, “International Obligations and Standards”, and Appendix 3, “Treaties” (see Internet site; <http://www.justice.govt.nz/lac/index.html>), a publication which contains a general injunction against legislating unnecessarily; Gobbi M, “Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand’s Constitutional Response” (1998) 6 *Tulane J. of Int’l & Comp. Law* 57; Gobbi M, “Drafting Techniques for Implementing Treaties in New Zealand” (2000) 21 *Statute Law Rev.* 71; Gobbi M, “Making Sense of Ambiguity: Some Reflections on the Use of Treaties to Interpret Legislation in New Zealand” (2002) 23 *Statute Law Rev.* 47.

³⁴ See Jennings & Watts, above n 3, para. 631 (n 2), at 1270.

³⁵ It can be argued that they are more limited than is suggested, for example, in Law Commission Report 34, above n. 33, at 23-26.

³⁶ Hastings W, “New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi” (1989) 38 *ICLQ* 668. He has also written: “Individuals cannot enforce a treaty against the government. Courts have considered that the entering into, performance, and breach of treaties by the executive is not contestable by private individuals. Individuals may, however, enforce legislation implementing a treaty, against the government if the legislation specifically states that it binds the Crown.”: see Chap. 16, “International Environmental Treaties”, in Milne C (ed.), *Handbook of Environmental Law* (1992), at 277.

against the Crown and not individuals, because cases readily suggest themselves where enforcement at the behest of one individual would be to the detriment of other individuals.

Of course, the boundaries are unlikely ever to be sharply determined. As one perceptive comment puts it:³⁷

No-one doubts the proposition that, under current principles which apply in both New Zealand and Australia, treaties do not have full effect in domestic law unless implemented by a relevant Parliament. I choose this formulation deliberately, not to excite controversy by pushing the acceptable boundaries of the influence of international law, but to make the point that the precise rule is not entirely clear. It has been formulated in various ways: treaties ‘do not form part’ of domestic law, do not ‘alter’ domestic law, have ‘no direct legal effect’, do not alter rights, modify law or impose financial obligations. Whether or not there is a difference between any of these formulations, or others, may not have been a significant question in the past. It is becoming more significant now, as the influence of treaties is more keenly felt.

The same commentator went on to draw attention to the need to reconsider treaty implementation, as the other side of that coin: “unless there is a sea-change in the detail and regularity of incorporation, uncertainty about the effect of treaties before courts will continue as well.”³⁸ She concluded: “Ultimately it may be necessary formally to accept that at least some international instruments have direct effect subject to appropriate democratic safeguards. But we are still a long way from that.”³⁹

There is also the alternative route for the “application” of unincorporated treaty obligations that reflect rules of customary international law and, for that reason, apply automatically as part of the common law. The lack of rigour by the courts in their preoccupation with non-incorporation at the expense of that option has been criticised,⁴⁰ although evidence of state practice, on which such rules are based, has been described as “scattered and unsystematic”⁴¹ and may mean that the relevant rules are not easy to identify with reasonable certainty in particular cases. It may be, for example, that the landmark House of Lords decision in *Pinochet case*⁴² is to be properly understood in terms of the application of customary international law, and not as a case of the application of unincorporated treaty obligations.

The limits on the assistance that unincorporated treaties can provide to litigants has nothing to do with the fact that treaties (at least the multilateral kind) look something like domestic legislation. The point has been made that treaties are, properly speaking, not a source of law but a source of obligation between the parties.⁴³ Looked at from this point of view, they are more analogous to contracts (or bargains) than to legislation on the domestic plane. This point has been partly recognised from very early times, but perhaps

³⁷ Saunders C, “A Prerogative Under Pressure”, (unpublished) paper to Third Annual Administrative Law Conference (in New Zealand), 1998, at 13. Much certainly depends on how a treaty is implemented and the precise terms of the relevant statutory provisions, i.e. a treaty is only incorporated into domestic law if, and to the extent that, the statutory provisions give it the force of law or other direct application or effect. Otherwise, it is, properly, only the statutory provisions that apply. A treaty that has undergone transformation into statutory provisions is not thereby “incorporated” into domestic law. Mere references in a statute to a treaty are also not incorporation.

³⁸ Ibid 20.

³⁹ Ibid

⁴⁰ Higgins R, “The Relationship Between International and Regional Human Rights Norms and Domestic Law” (1992) 18 *Commonwealth Law Bulletin* 1268; Cunningham A, “The European Convention on Human Rights, Customary International Law and the Constitution” (1994) 43 *ICLQ* 537. See also Higgins, *Problems and Process: International Law and How We Use it* (1994), especially Ch 12, “The Role of National Courts in the International Legal Process”.

⁴¹ Law Commission Report 34, above n 33, at 31.

⁴² *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening)* (No. 3) [1999] 2 All ER 97.

⁴³ See Jennings R, “Recent Developments in the International Law Commission: Its Relation to Sources of International Law” (1964) 13 *ICLQ* 385, at 388-90; also see Jennings & Watts, above n 3, para. 11.

less so recently, in calls for parliamentary approval of treaties.⁴⁴ The point also occasionally arises in court decisions bearing on the interpretation of treaties.⁴⁵ Treaties in their origins are not “legislated”, and it is not by chance that they commonly refer to the parties as the contracting states. While the domestic courts can, within bounds, obtain some assistance from unincorporated treaties, which may be relevant (like other material sources of evidence⁴⁶) to issues before them, it is to be expected that the application and enforcement of treaties is a matter between the parties to the contracts at international law. As the Court of Appeal put it in one recent (habeas corpus) case: “The claim for a direct Covenant remedy in a New Zealand court also appears to be flatly contrary to principle.”⁴⁷

The need for parliamentary involvement arises rather for a different reason (apart of course from the constitutional considerations). That is the huge, sometimes called driving, influence that treaties are perceived to be having on government policy and on the statute book. They are not like regulations or other delegated legislation or (domestic) Crown contracts, but can be more general and intrusive in their purpose and substance. It has been estimated that as much as one-quarter of all New Zealand public Acts, in whole or in part, may be implementing international treaties,⁴⁸ but often without any indication of that fact in the statutes concerned. It has been pointed out, with reference to the presumption that statutes are not intended to contravene international law serving as a general qualifying doctrine: “Since New Zealand is a party to around 1,000 multilateral treaties and 1,400 bilateral treaties, that would effect a massive change to the legal system.”⁴⁹ The problem that past treaties pose in the event of any change to arrangements relating to the present status of treaties in domestic law is plainly a substantial one. With reference to the binding nature of treaty actions at international law, it needs also to be mentioned that, particularly in the case of multilateral treaties, it can be more difficult and take longer to amend or withdraw from treaties than is the case with either domestic legislation or contracts.⁵⁰

Furthermore, there is the practical point that has been put in the following terms: ⁵¹

In a unitary state, there is rarely any difficulty in performing a treaty obligation which necessitates a change in the internal law of the state. In the United Kingdom and New Zealand, for example, once the government has entered into a treaty, it can easily secure the passage of any legislation which is necessary to perform the treaty obligations. There is only one Parliament for the whole country and that Parliament has power to make laws upon all subject matters. Moreover, in a system of responsible government, the government is usually able to control the Parliament. The result is that the government which has the power to form treaty obligations also has the power to see that the obligations are performed through legislative action.

⁴⁴ For example, see *The Federalist* (1787), particularly No. 75 (Hamilton A, “The Treaty-Making Power of the Executive”); Bagehot W, *The English Constitution* (1872, in Introduction to 2nd ed.); cf Blackburn R, “Parliament and Human Rights”, Chap. XI in Oliver D & Drewry G, *The Law and Parliament* (1998), at 183 and 189-90.

⁴⁵ A recent New Zealand Court of Appeal decision in point is *Edwards v United States of America* [2002] 3 NZLR 222, at 229 (concerning an extradition treaty), a case which does, however, also reinforce the point that the courts may have been making increasing reference to unincorporated treaties because they may have been regarding them more like legislation than contracts.

⁴⁶ The Evidence Act 1908 (N.Z.) provides, in sections 37 and 38, for international treaties to be proved and received in evidence.

⁴⁷ *McVeagh v Attorney-General* [2002] 1 NZLR 808, at 819.

⁴⁸ *LAC Guidelines* (1991 ed.), para 44 (p 15) & Appendix E (pp 71-82), now revised with somewhat different comments and lists (2001 ed, above n 33), Ch 6 & Appendix 3; see also Law Commission Report 34, above n 33, Appendix C (at 116-9).

⁴⁹ Evans, above n 15, at 294.

⁵⁰ Perhaps with that in mind, one recent commentary, with reference to treaties in the economic area, has drawn attention to the possible (mis)use of treaty-making by the Executive with the intention of constraining Parliament (and others) by closing off options: Waelde T & Kolo A, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law” (2001) 50 *ICLQ* 811, at 822 and 847. See also Taylor P, above n 28.

⁵¹ Hogg P, *Constitutional Law of Canada*, 1997 (4th ed.), at 295.

The implications of this comment, including in terms of separation of powers, and whether it is more or less true for New Zealand under its Mixed Member Proportional (MMP) voting system and makes a parliamentary treaty examination process more or less necessary, may be a matter for debate. The same commentator has also pointed to the proliferation of international treaties being accompanied by their increasing domestic intrusiveness.⁵²

There is no indication that the influence of treaties on statute law is slowing down,⁵³ or likely to do so in future with the addition of significant new legislative requirements arising particularly out of the Kyoto Protocol to the United Nations Framework Convention on Climate Change.⁵⁴ The content of treaty implementing legislation may be largely determined by the terms of the treaty, leaving little opportunity or flexibility for Parliament to influence the content of the statutory provisions. Parliament may be presented with a *fait accompli*, an all or nothing choice between passing the legislation in its entirety, to enable the Executive to become party to the treaty, or rejecting the legislation. Similarly, treaties come before Parliament under the treaty examination procedures on the basis of texts that have been adopted by the parties. Unless it is possible to lodge reservations, Parliament may, again, be reduced to an all or nothing, yes or no, response. In a sense, once a treaty has been adopted, it is too late.

There is no easy answer to these conundrums, short of involving Parliament in some manner at the formative stage when the text of the treaty is under negotiation. Suggestions to that effect have been made in New Zealand.⁵⁵ Two of the authors of those suggestions have also drawn particular attention to treaties that might affect future policy choices but do not require legislative change and would therefore not have involved Parliament at all prior to the treaty examination procedures.⁵⁶ This highlights a further issue, which is the importance, at an officials level, of not claiming more for treaties than is appropriate, especially with respect to suggestions of people being obliged to comply with treaties because the Executive has become party to them. In short, if that is the intention, the agreement of Parliament must first be obtained to incorporate the obligations into domestic law. Even where a treaty is intended to affect the actions only of the Crown, it may be appropriate to seek prior legislation where the treaty may be imposing constraints of any significance on future policy choices (It may also be the case that the processes of corporatisation and privatisation in the state sector in recent times make it less easy to rely on non-legislative options, such as administrative practice and directions, to give effect to many treaties). The treaty examination procedures are no substitute for proper processes in that regard.

Mutual forbearance, and give and take, will nevertheless continue to be important. It has been noted that treaties “are not the only way in which activities at the national level are in effect governed internationally.”⁵⁷ Treaties are sometimes regarded as but one option on the menu for the conduct of foreign policy. They may be becoming of ever broader purport and, perhaps partly for that reason, certain significant drawbacks in treaties are being highlighted and may be bringing treaty making under increasing pressure. Outcomes that might drive foreign policy or the international legal system in less transparent, “non-legal” directions are in principle to be avoided.⁵⁸ It may sometimes be the broader foreign policy that is of interest or concern, rather than the treaty manifestation of it.

⁵² Ibid 303.

⁵³ See statistics in Gobbi M, “Drafting Techniques for Implementing Treaties in New Zealand” (2000) 21 *Statute Law Rev*, 71, at 72-5; Keith K, paper to NZ Law Conference 2001, above n 24, at 13-15.

⁵⁴ See, eg, Chen M, “Ratifying Kyoto” [2001] *NZLJ* 443.

⁵⁵ Law Commission Report 34, above n. 33, at 14 (n 7), and Report 45, above n 33, at 44, 46 & 58-60; Mansfield W, “The Constraints of Treaties and International Law”, in James C (ed), *Building the Constitution* (2000), at 105-111; Taylor P, “The Global Perspective: Convergence of International and Municipal Law”, Ch 7 in Bosselmann K & Grinlinton D (eds), *Environmental Law for a Sustainable Society* (2002), at 125-6.

⁵⁶ Mansfield, at 108; Taylor, at 125.

⁵⁷ Mansfield, above n 55, at 106.

⁵⁸ See the interesting comments on Memoranda of Understanding in Aust, above n 3, at 17-18 and Ch 3.

In the case of New Zealand, two additional factors may have helped to give rise to the new interest in treaties. One is the New Zealand Bill of Rights Act 1990, on the back of which the courts have introduced, or made reference to, international material in a number of cases. While the Act affirms and draws on the International Covenant on Civil and Political Rights, it does not incorporate that instrument into New Zealand law. But it may have generated some confusion about the relationship between domestic law and that treaty. Moreover, while of constitutional significance, the Act was enacted as an ordinary statute and is of neither entrenched nor overriding status.

The second factor is the Treaty of Waitangi concluded in 1840 between the Crown and Maori Tribes of New Zealand. The Treaty has given rise to substantial jurisprudence and writings in recent times,⁵⁹ and its resurgence has likely played a part in increasing the courts' familiarity with treaties generally. The Treaty is to be regarded as a founding document of New Zealand, but its status may be a matter more of constitutional law than international law. One writer who has commented on its status under international law⁶⁰ cited McNair⁶¹ in support of the orthodox view that such treaties are not to be regarded as treaties in the international law sense of the term, but purported to trump McNair by citing another noted international lawyer, Brownlie, in support of a contrary view. However, Brownlie, in the course of a set of lectures on the Treaty, also made the following comment: "It is not an international agreement presently in force, since it could not survive the disappearance of one Party [that is, at international law] as a result of its execution. Even if it were a valid international agreement, it would be subject to certain modifications, on the basis that particular obligations had been terminated as a result either of a fundamental change of circumstances or as a consequence of the emergence of new peremptory norms of general international law."⁶² Nothing said in this article would limit, or apply to, the Treaty in any way.

Summary of legal position

It is worth recording the careful conclusions of one noted writer of long-standing here, by way of summary of the legal position on unincorporated treaties and judicial review (there have of course been developments in this area since he was writing, for example with respect to the ambiguity limitation, but his comments overall are significant):⁶³

- (1) Where the treaty has been implemented by domestic legislation, it can, for the purpose of judicial review, never be considered to a greater extent than to overcome a doubt or an ambiguity of the statute.
 - (2) Where the treaty has not been implemented by domestic legislation, it must never be used so as to introduce into domestic law or practice a rule which Parliament has failed to adopt, for if this were not so the treaty would, through a back door, acquire legal force in the absence of parliamentary sanction. This paramount principle, therefore, requires the utmost care on the part of the Executive as well as the courts.
 - (3) It follows that if in exercising its discretion the Executive fails to take account of the unincorporated treaty it cannot be criticised by the court in proceedings for judicial review.
 - (4) On the other hand if in exercising its discretion the Executive takes account of the unincorporated treaty this is unobjectionable, provided the Executive does not in fact allow itself to be bound by the treaty, but sees in it only one of several elements leading to the decision.
- In short, while the unincorporated treaty cannot be the sole or decisive basis for the Executive's decision, it should be allowed to reinforce a decision founded on other grounds. To put it negatively, arguments derived from the treaty should not be excluded on the ground of absence of incorporation, for the treaty imposes an international obligation which, within the limits of prevailing

⁵⁹ See, eg, Joseph P, *Constitutional and Administrative Law in New Zealand* (2001), Ch 3.

⁶⁰ Ibid 49-52.

⁶¹ McNair A, *The Law of Treaties* (1961).

⁶² Brookfield F (ed), *Treaties and Indigenous Peoples – the Robb Lectures 1991* (given by Brownlie I in Auckland, New Zealand) (1992), at 82.

⁶³ Mann F, *Foreign Affairs in English Courts* (1986), at 96. See also de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (1995), Ch 28, "Treaties and Foreign Affairs" (especially at 998); and Taylor G, *Judicial Review: A New Zealand Perspective*, Supplement (1997), at 109-113.

English law, should be fulfilled. This may be a difficult path to follow, but the difficulty is created, not by the law, but by the Executive's failure to adopt the route prescribed by a basic principle of constitutional law.

As noted earlier, in New Zealand's case the judicial flirtation with unincorporated treaties has not yet (quite) become a consummation. At the very time that New Zealand has introduced a new electoral system directed, in part, at reducing Executive domination of Parliament, it would be odd for the courts to be transferring powers in the other direction, from Parliament to the Executive. Constitutionally, the New Zealand system is marked by its comparative lack of checks and balances. The spreading influence of unincorporated treaties is not a check on the Executive; rather, it will have the opposite effect.

In case that comment may be considered to overstate the position, it is appropriate to conclude this summary by referring to several recent Privy Council decisions, including Lord Hoffmann's memorable reference in one dissenting judgment to the majority having found "in the ancient concept of due process of law a philosopher's stone, undetected by generations of judges, which can convert the base metal of Executive action into legislative gold. It does not however explain how the trick is done".⁶⁴ These decisions concern some of the so-called "death penalty" cases in which the Privy Council has considered appeals from Caribbean jurisdictions. The cases have mainly turned on particular constitutional provisions in force in the relevant jurisdictions. But in several of the cases, the Privy Council has had to confront directly issues arising out of reliance by the appellants on unincorporated human rights treaties. Despite the serious nature of the appeals before it, the Privy Council has reiterated "the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation.... When so enacted, the Courts give effect to the domestic legislation, not to the terms of the treaty".⁶⁵ It considered this trite law, going on to say that the "many authoritative statements to this effect are too well known to need citation".⁶⁶

But the Privy Council has not stopped there. The minority judgment in that same case went on to say that this general conclusion:⁶⁷

will disappoint those who contend for the application of unincorporated international human rights conventions in municipal legal proceedings so that such rights will be *directly* enforced in national courts as if they were rights existing in municipal law. The widest possible adoption of humane standards is undoubtedly to be aspired to. But it is not properly to be achieved by subverting the constitutions of states nor by a clear misuse of legal concepts and terminology; indeed, the furthering of human rights depends upon confirming and upholding the rule of law. Suppose that an international treaty declares certain conduct to be criminal wherever committed (and such examples exist), unless and until the Legislature of a state party to the treaty has passed a law making such conduct criminal under its municipal law, it would be contrary to due process.... for the Executive of the state to deprive any individual of his life, liberty or property on the basis of the international treaty. It would be a clear breach of that individual's constitutional rights. An unincorporated treaty cannot make something due process: nor can such a treaty make something not due process unless some separate principle of municipal law makes it so.

Shortly after that judgment, the majority of the Privy Council put it even more strongly: "The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot

⁶⁴ *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50, at 88. See also Collins L, "Foreign Relations and the Judiciary" (2002) 51 *ICLQ* 485, especially at 495-6.

⁶⁵ *Thomas v Baptiste* [2000] 2 AC 1, at 23.

⁶⁶ *Ibid*

⁶⁷ *Ibid* 33.

change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the seventeenth century.”⁶⁸

The relevant judgments of the Privy Council may not be a model of clarity and consistency as it has grappled to find other reasons based on constitutional provisions and the common law for some of its decisions. It has also made some (obiter) expressions of support for the legitimate expectations approach to unincorporated treaties set out in *Teoh's Case*.⁶⁹ But it is perhaps surprising that none of the judgments of the Court of Appeal have resulted in the question of unincorporated treaties in domestic law ending up before the Privy Council for an authoritative finding. On the point that such treaties are not applicable in domestic law, the Privy Council comments probably represent the law in New Zealand.

Future developments

It may be that the time is coming when human rights treaties ought to be separated off from consideration of international treaties generally, and dealt with in a different way from the past in dualist jurisdictions. Importation of such standards may become inevitable if there is to be acceptance of the increased submission to international supervisory jurisdiction in the human rights area (which includes 3 further Optional Protocols in New Zealand's case in the past 3 years). Perhaps international human rights treaties will come to exercise a similar underlying influence on statutes and their interpretation as fundamental common law principles may increasingly be doing.⁷⁰ Regardless of other principles, international standards in this area may also be required to have a more direct role to play in countries where there are deficits in respect for human rights and good governance.⁷¹

In New Zealand, a great deal of attention has nevertheless been given to the virtues of international human rights obligations in the domestic legal system.⁷² This attention is of course understandable, but it does threaten to skew understanding of the huge range of other international treaties to which states are party, and distort consideration of the role (and limits on that role) that treaties ought to play in domestic law. In the absence of a separation between human rights treaties and other treaties, discussion in this area may also degenerate into a contest between a Diceyan parliamentary supremacy/ Hart positivism paradigm on the one hand and some sort of limited sovereignty/ Dworkian rights-based paradigm on the other hand. These can be “straw man” arguments. In the treaties area, and more generally for that matter,⁷³

⁶⁸ *Higgs v Minister of National Security* [2000] 2 AC 228, at 241.

⁶⁹ See above, n 2.

⁷⁰ See the 18 principles listed in the LAC Guidelines, above n 33, at 45-8.

⁷¹ But note the perceptive view expressed in Bull H, *The Anarchical Society: A Study of Order in World Politics*, 2002 (3rd ed.), Ch 6, “International Law and International Order”, at 154, to the effect that the growing influence of international human rights and duties reflects a contraction rather than an expansion of international consensus.

⁷² See Keith articles, above n 24. See also, for example, Hunt P & Bedggood M, “The International Law Dimension of Human Rights in New Zealand”, Chap. 2 in Huscroft G & Rishworth P (eds), *Rights and Freedoms* (1995); Richardson I, “Rights Jurisprudence – Justice for All”, in Joseph P (ed), *Essays on the Constitution* (1995), at 65-9 (although 2 other chapters of that book are concerned with trans-Tasman trade and economic treaties); Palmer article, above n 28; Butler A & P, “The Judicial Use of International Human Rights Law in New Zealand” (1999) 29 *VUWLR* 173; Rishworth P, “The Rule of International Law?”, and Evatt E, “The Impact of International Human Rights on Domestic Law”, Chs 14 & 15 in Huscroft G & Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002). This attention is also notable for largely ignoring the constitutional protection of property rights (see, eg, the criticisms by Palmer G, “*Westco Lagan v A-G*” [2001] *NZLJ* 163), and for largely ignoring economic, social and cultural rights more generally for that matter.

⁷³ See, eg, the interesting articles by Waldron J, “A Question of Judgment”, *TLS*, 28 September 2001, and McLean J, “Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act” (2001) *NZ Law Rev.* 421, to the effect that the power to strike down legislation in the U.S. may be more apparent than real and may be substituted for in countries like N.Z. with an “ingenious and aggressive” approach by the courts to statutory interpretation. The House of Lords has also commented about the protection of fundamental rights through statutory interpretation: “In this way the courts of the United Kingdom, although acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries

comparative analysis may well reveal that, at the detailed operational level, there is a much closer similarity between national jurisdictions than appears at first sight. It may be more helpful to focus on the similarities rather than on notions of sovereignty which, across most jurisdictions, is in practical terms shared. The question, rather, is to ensure how the interests of all branches of government are properly kept in view. In the case of treaties, this means for the dualist that the more that the courts take account of unincorporated treaties and the more that they treat such treaties like statutes, the more consideration will need to be given to upgrading the involvement of Parliament, vis-à-vis the Executive, in treaty actions before they take place. In short, the constitutional relationships are bound not to remain unaffected. Further developments ought, however, to be a matter for conscious decision by Parliament.

One Australian commentator, in a perceptive comment, has recently mentioned the possibility that treaty examination procedures may increase (not decrease) the openness of countries to international law and treaties⁷⁴ (how controlled that process is may depend on the extent to which the House and select committees can do justice to the new system). Senior Australian legal figures have also pressed for domestic law to be more receptive to international law,⁷⁵ with one commenting that the “reconciliation of municipal and international law represents a great challenge to the legal system” and that growing economic integration, coupled with international problems and world concern about fundamental human rights, “makes the gradual process of establishing an effective relationship between municipal and international law both inevitable and desirable.”⁷⁶ It is likely that the treaty examination procedures will bring about greater select committee familiarity with treaties over time, and a constructive engagement by the government with committees in this area, including in terms of on-going reporting on, and involvement in, important negotiations.

An international common law may be most likely to emerge under pressure of growing global problems. It may be that we are now moving into such an era,⁷⁷ and that Parliament might need accordingly to give consideration to incorporation (in a suitably managed way) of treaties that are developed in response. The coalescing of monist and dualist systems has probably been regarded as something of a Holy Grail on the part of some international lawyers.⁷⁸ While the authorities point to a complexity and diversity in national

where the power of the legislature is expressly limited by a constitutional document.” (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131).

⁷⁴ Opeskin B, “Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries – Part II” (2001) *P.L.* 97, at 100 (although the article incorrectly characterises the N.Z. procedures in certain respects).

⁷⁵ Mason A, “The Influence of International and Transnational Law on Australian Municipal Law” (1996) 7 *PLR* 20; Brennan G, “The Role and Rule of Domestic Law in International Relations” (1999) 10 *PLR* 185.

⁷⁶ Kirby M, “Lord Cooke and Fundamental Rights”, in Rishworth P (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997), at 348. It has also been suggested that the role of the courts may need to increase in response to the decline in the standing of other institutions: see, eg, Mulgan R, “The Westminster System and the Erosion of Democratic Legitimacy”, Ch 8 in Gray B & McClintock R (eds), *Courts and Policy: Checking the Balance* (1995). Of course, it is not unknown for decisions of the courts to make matters more difficult for Parliament: for recent examples, see Bracegirdle A, “Members of Parliament and Defamation: the courts raise the bar” (Spring 2002) 17(2) *Australasian Parliamentary Review* 141 (forthcoming).

⁷⁷ There is no shortage of pessimistic material about the effects of globalisation, or aspects of it, coming from sources that might, on the face of it, be regarded as respectable. See, eg, the books by the Professor of European Thought at LSE, Gray J, *False Dawn* (1998); a Professor of Law at Yale University, Chua A, *World on Fire* (2002); and a former FCO official, Harvey R, *Global Disorder*, 2003 (2nd ed). For a recent article expressing concern over secessionist developments (including the international community’s failings, and the accommodations reached, in the former Yugoslavia) that is critical of the ability of international law to play a constructive role due both to its dependence on states many of which are authoritarian and to its limited historical commitment to democratic governance, see Horowitz D, “The Cracked Foundations of the Right to Secede” (2003) 14(2) *Journal of Democracy* 5, especially at 13-14.

⁷⁸ See, eg, Alston P (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999), at 13 and 476-7; Brownlie I, *Principles of Public International Law*, 1998 (5th ed.), at 31-4; Higgins, *Problems and Process*, above n 40, at 216, where she hopes for a changing legal culture more receptive to international law; Taylor, above n 55, at 124-5.

systems applying to treaties,⁷⁹ it is, as noted, also possible to see important similarities. This is particularly so if the detail of what actually happens in different systems in practice is examined. It has been noted that “even the written constitutions of other countries do not necessarily tell the full story; they may be varied by constitutional conventions and practices which are not apparent from the black-letter law”⁸⁰ (such as the development of executive agreements, which comprise the very great majority of all United States treaties but are also to be found in other countries such as Switzerland, and other agreements in simple form that may reduce the “rigour” of domestic constitutional requirements). The recent development of treaty examination procedures has probably increased the similarities.

But it is probably also going too far to say, as one commentator has done, that the monism argument is likely to become considerably stronger in New Zealand now that the processes for Parliament’s consideration of international treaties that the government is intending to enter have altered.⁸¹ It is always open to Parliament to take further, deliberate steps in that direction. For example, both the Australian and United Kingdom Parliaments have in the past considered (private) Members’ Bills providing for Parliamentary approval of treaties. In both cases, it was decided not to proceed with the bills. A Member’s Bill to similar effect, the International Treaties Bill, has been before the New Zealand Parliament but has also been subject to a very recent decision by the House that it not proceed.⁸² Such legislation raises in stark manner the relationship between the branches of government and whether treaties should take on a self-executing character that would entail a significant move in the direction of monism, possibly reducing the legislative burden, and away from the present “stand-off” attitude by domestic law to international treaties. In any such event however, Parliament would have to put a similar effort into treaties as it now puts into legislation.

⁷⁹ Jacobs F & Roberts S (eds), *The Effect of Treaties in Domestic Law* (1987), which argues however (at xxiv) that the antithesis between monism and dualism is an oversimplification to be viewed with caution; Reisenfeld S & Abbott F (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (1994); Leigh M & Blakeslee M (eds), *National Treaty Law and Practice*, ASIL (1995).

⁸⁰ MacKay D, “Treaties – A Greater Role for Parliament?” (1997) 20(1) *Public Sector* 6, at 7. See also Aust, above n 3, especially at 145.

⁸¹ Palmer, above n 28, at 61; see also Palmer G & M, *Bridled Power: New Zealand Government Under MMP* (1997), Ch 17, “International Law”, where the authors refer to an old quotation from Jenks that international law “represents the common law of mankind at an early stage of development”. See, further, Lord Cooke, “The Dream of an International Common Law” (but approaching the matter more from the perspective of a general common law, than a common international law or a common approach to international law), and Walker K, “Treaties and the Internationalisation of Australian Law” (calling for a “philosophy of harmonisation” in terms of domestic compliance with international law), both in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996).

⁸² See above, n 1, at 35 (and n 22 thereof).

The Utility of International Human Rights Law and Treaty Bodies to Resolve Tensions between Women's Rights and Indigenous Custom: a Preliminary Assessment

Claire Charters*

Introduction

Indigenous peoples the world over must, albeit to varying degrees, address conflict between their customs and human rights, including the right to freedom from discrimination. One means to do this is to have recourse to international human rights law and institutions, especially where indigenous individuals can bring individual communications to an international human rights treaty body.

In this paper, I make a preliminary argument against the utility of international human rights law and treaty bodies to resolve the particular issues that arise where indigenous custom discriminates against Indigenous women. These arguments include:

- international human rights treaty bodies cannot provide a balanced answer;
- international human rights law is internally problematic;
- theoretical debate between cultural relativism and universalism can be unhelpful where it influences international treaty body decision-making;
- in the light of indigenous peoples' experience with colonisation, the imposition of norms by an outside body is inappropriate and can be counterproductive; and
- there are significant practical difficulties in an international body applying human rights to indigenous custom.

I do not address arguments based on the well-trodden ground of group versus individual rights, or the application of rights in the private sphere. Those issues will be the subject of more comprehensive scholarship.

An example of alleged discrimination against indigenous women under indigenous custom

As Charlesworth, Chinkin and Wright have pointed out '[w]omen can find themselves dominated by foreign rule, economic exploitation and aggression, as well as by local entrenched patriarchies, religious structures and traditional rulers.'¹

There are many examples of alleged discrimination against indigenous women under indigenous custom. One, both close to home and contentious, is that of speaking rights on the marae atea. Some iwi and hapu tikanga (tribal custom) dictates that women do not whaikorero (make speeches) on the marae atea (the area in front of the meeting house), although they do karanga (call - often in the context of welcoming visitors onto the marae).

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¹ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *AJIL* 613, 619.

Notably, the prohibition on women speaking on the marae atea has been transferred into other domains, outside the marae atea. In 1995, Cathy Dewes was elected to the Te Arawa Maori Trust Board (the Trust Board) as the Ngati Rangitahi representative on the Trust Board. Once elected, the existing trustees, all men, protested Cathy's appointment by resigning en masse. They argued that under Te Arawa tikanga, women could not act as a spokesperson for the tribe.

It goes without saying that discrimination against indigenous women under indigenous custom raises extremely complex and often divisive issues. However, these issues are most perplexing for indigenous women who often do not want to undermine the plight of their peoples by drawing attention to internal discord in environments that are hostile to indigenous peoples' rights.

Domestic human rights and institutions

A quick word on domestic human rights and the institutions that decide cases involving conflict between indigenous custom and women's rights to freedom from discrimination. The applicable laws and institutions vested with the duty to apply them differ. For example, in the United States, Indian tribal courts have the jurisdiction to apply the Indian Civil Rights Act 1968.² The Ugandan Constitution explicitly prohibits 'laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status',³ while the Constitution of Zimbabwe exempts African customary law from its anti-discrimination provisions. In New Zealand there is no clear legal framework for resolving tensions between indigenous custom and women's rights. The Bill of Rights Act 1990 and the Human Rights Act 1993 do not explicitly address discrimination against women under custom.

Whether a legal system should prioritise indigenous custom or women's rights has caused controversy in a number of countries. In drafting the South African Constitution, tribal leaders (mainly male) argued that constitutional protections of the right to equality should not be applied to tribal customary laws. In response, tribal women formed powerful lobby groups contesting the tribal leaders' claims that they represented the views of the tribe as a whole.⁴ A similar phenomenon occurred in Canada in dialogue about First Nations' self-government.⁵

Applicable international human rights law and relevant treaty bodies

International human rights laws

A number of international human rights laws are applicable to discriminatory indigenous custom. General anti-discrimination and rights to equality provisions abound in international legal instruments, including the United Nations Charter,⁶ the International Covenant on Civil and Political Rights (ICCPR),⁷ the International Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention),⁸ the International Covenant on Economic, Social and Cultural

² 25 USCA (1968).

³ Constitution of Uganda, Article 33(6).

⁴ Tom W Bennett, 'The Equality Clause and Customary Law' (1994) 10 *South African Journal of Human Rights* 122.

⁵ See generally *Native Women's Association of Canada v Canada* (1994) 119 DLR (4th) 224 (SCC).

⁶ Charter of the United Nations, opened for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945) ('United Nations Charter').

⁷ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) ('ICCPR').

⁸ Convention for the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('The Women's Convention').

Rights (ICESCR),⁹ and International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries 169.¹⁰

Some international legal instruments deal specifically with women's right to freedom from discrimination in the context of culture. Article 18 of the Vienna Declaration and Program of Action states 'the full and equal participation of women in political, civil, economic, social and cultural life [...] and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community [...]'.¹¹ Article 38 emphasises the importance of eradication of conflicts that may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices or religious extremism.¹²

Article 27 of the ICCPR has been the subject of many indigenous peoples' communications to the Human Rights Committee, including one by an indigenous woman claiming that Canadian legislation discriminated against her by withdrawing her status as an Indian when she married a non-Indian. An Indian man did not lose his status as an Indian when he married a non-Indian woman.¹³ Article 27 states:¹⁴

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It is conceivable that an indigenous woman who is discriminated against under custom by, for example, being banished from her village on the grounds that she has contravened a custom that only applies to women, could argue that she is denied the right to enjoy her own culture under Article 27. Notably, however, only states are subject to Article 27, not indigenous peoples, which might impede her chances of success.

One international human rights treaty clearly addresses custom that discriminates against women: the Women's Convention.¹⁵ The preamble states: 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women.'¹⁶ Under Article 2(f) states parties undertake to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'¹⁷ Article 5(a) requires states parties to:¹⁸

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men or women.

⁹ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

¹⁰ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), opened for signature 27 June 1989, 72 ILO Official Bull 59, (entered into force 5 September 1991).

¹¹ Vienna Declaration and Programme of Action, opened for signature 25 June 1993, UN Doc A/CONF 157/23 (entered into force 12 July 1993). This Declaration and Action Plan was adopted by the World Conference on Human Rights.

¹² Ibid.

¹³ *Lovelace v Canada* (30 July 1981) Com No 24/1997, CCPR/C/13/D/24/1997 (UNHRC).

¹⁴ ICCPR, above n 7.

¹⁵ The Beijing Declaration of Indigenous Women states 'Indigenous laws, customs, and traditions which are discriminatory to women [are] to be eradicated.' However, this must be viewed in the context of calls for greater recognition of indigenous peoples' rights generally in the same Declaration. NGO Forum, UN Fourth World Conference on Women, Beijing, Peoples Republic of China, *Beijing Declaration of Indigenous Women* (1995) Indigenous Peoples Council on Biocolonialism <http://www.ipcb.org/resolutions/htmls/dec_beijing.html> at 28 August 2003.

¹⁶ The Women's Convention, above n 8.

¹⁷ Ibid.

¹⁸ Ibid.

Again, the duty to comply with the rights set out in the Women's Convention rests with states as opposed to indigenous peoples. What distinguishes the Women's Convention from Article 27 of the ICCPR is that it explicitly requires the state to modify or abolish discriminatory indigenous custom where Articles 2(f) and 5(a) are abrogated.

Some states have entered reservations to Articles 2(f) and 5(a) of the Women's Convention. For example, the government of the Cook Islands reserved 'the right not to apply [...] article 5(a) [of the Women's Convention] to the extent that the customs governing the inheritance of certain Cook Island chief titles may be inconsistent with those provisions.'¹⁹

For obvious reasons, international human rights instruments that guarantee the right to culture (e.g. Article 15 of the ICESCR) are also relevant. The practice of indigenous custom is usually integral to an indigenous culture. An indigenous peoples' right to self-determination, as guaranteed in the draft Declaration on the Rights of Indigenous Peoples and,²⁰ arguably, the UN Charter, the ICCPR and the ICESCR, is also significant. Surely the right to self-determination extends to protecting indigenous peoples' freedom to determine the content of customary law without interference from the state.

International human rights treaty bodies

There are a number of international human rights institutions where alleged conflict between indigenous custom and women's rights could be raised. The Working Group on Indigenous Populations, a United Nations body with the mandate to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, could provide a forum for indigenous women to raise concerns about discriminatory indigenous custom.

However, my focus here is on international human rights treaty bodies. As indicated above, an indigenous woman could seek a view from an international human rights treaty body on the grounds that a state has not modified or abolished discriminatory indigenous custom when the following criteria are met:

- a treaty includes the right to freedom from discrimination on the grounds of sex;
- the relevant state has ratified that treaty;
- the corresponding treaty body has jurisdiction to hear individuals' communications from that state; and
- the indigenous woman can meet the admissibility criteria for communications.

Given the above, the two treaty bodies that are most likely to have jurisdiction to hear a communication from an indigenous woman are the Human Rights Committee, which applies the ICCPR, or the Committee on the Elimination of Discrimination Against Women (CEDAW), which applies the Women's Convention.

¹⁹ 1249 UNTS 13. Similarly, the Niger government entered a reservation that Article 5(a) could not be applied immediately in relation to family relations 'as [it is] contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority' 1249 UNTS 13.

²⁰ Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994).

The utility of international human rights law and treaty bodies to resolve disputes involving discriminatory indigenous custom

The approach

The perspective from which the utility of international human rights law and treaty bodies is assessed is from that of indigenous women. With that in mind, the best resolution to tensions between indigenous custom and the right to freedom from discrimination is one that reaffirms indigenous custom and, also, protects women from discrimination. Such an approach recognises that indigenous women are just as involved in the broader struggle for greater recognition of indigenous peoples' custom as they are in eliminating discrimination against them as women. Moreover, indigenous women must not be made to prioritise their sex over their culture or vice versa. As Rayna Green, a Cherokee woman, has said: 'for Indian feminists every women's issue is framed in the larger context of Native American people.'²¹ This view is also evident in the voices of indigenous women as expressed in the Beijing Declaration of Indigenous Women 1995.²² While it demands the eradication of discriminatory customary laws it also calls for recognition of an indigenous peoples' right to self-determination.

International human rights treaty bodies cannot provide a balanced answer

As illustrated above, there are a number of international human rights instruments that are applicable to discriminatory indigenous custom. On the one hand, some prioritise women's right to freedom from discrimination and, on the other, some protect indigenous peoples' right to culture and self-determination. As a result, a conflict of rights is likely to arise when discriminatory indigenous custom is evaluated under international human rights law. The conflict would be aggravated were it argued that the discriminatory custom also constitutes a denial of a woman's right to access her culture (e.g. under the banishment example). Here, the individual's right to culture may conflict with the group's right to culture. All of this suggests that international human rights law is uncertain and incoherent on the issue of discriminatory indigenous custom. But that is not unusual. Conflict between rights is common. It is possible to balance rights.

However, the conflict of rights is fatal where an indigenous woman has brought a communication to a human rights treaty body on the grounds that custom discriminates against her. The reason is this: sensitive and nuanced balancing is not possible because there is no one international human rights treaty body that has the mandate to consider all the applicable rights together. In the context of a hypothetical communication to CEDAW, CEDAW would be required to apply both Articles 2(f) and 5(a). It simply does not have the mandate under the Women's Convention to balance the state's duty to eliminate discrimination against women under custom with arguments based on an indigenous peoples' right to culture and self-determination.

The Human Rights Committee would not be in any better position to take a broader more "all rights – inclusive" approach, despite the fact that the ICCPR guarantees all peoples the right to self-determination; the right for persons belonging to minorities to enjoy their culture; and freedom from discrimination on the grounds of sex.²³ Without explicit jurisdiction under the ICCPR to assess the practices of non-state actors, it is unlikely that the Human Rights Committee would be willing to impose a duty on a state to modify indigenous peoples' customs. As noted above, the Women's Convention is extraordinary in imposing an obligation on the state to modify or abolish customs, which means, in effect, that CEDAW has the jurisdiction to compel non-state actors to comply with duties set out in the Women's Convention. Secondly, the Human Rights Committee is of the view that it cannot review arguments based on the right to self-determination. Its reasoning is as follows: only individuals can bring communications, individuals cannot claim a group right, which the right to self-determination undeniably is, and, hence, it does not have the jurisdiction to hear arguments based on self-determination.²⁴ From the perspective of indigenous peoples, including women, that the Human Rights

²¹ Rayna Green, 'Native American Women' (1980) 6 *Signs: Journal of Women in Culture and Society* 248.

²² Beijing Declaration of Indigenous Women, above n 15.

²³ ICCPR Articles 1, 27 and 26 respectively, above n 7.

²⁴ *Ominayak, Chief of Lubicon Lake Band v Canada*, Comm No 167/1984, Report of the Human Rights Committee, UN GAOR, 45th Sess, Supp No 40, vol 2, at 1, UN Doc A/45/40 Annex 9(A) (1990) (views adopted 26 March 1990).

Committee cannot consider their right to self-determination when assessing the legality of custom seriously undermines the Human Rights Committee's ability to make a legitimate evaluation of the issues at stake. Finally, given that the Human Rights Committee cannot consider group rights, it is also unlikely to accept arguments based on an indigenous peoples' right to determine custom as a function of its group right to culture.

International human rights law is internally problematic

The utility of international human rights law to resolve tensions between indigenous custom and indigenous women's rights is cast into further doubt by other problems internal to the international human rights framework. They include concerns about the nature of human rights, tensions between women's rights and human rights and claims that women's advocates, as they advance their cause in international fora, are hypocritical. The complex nature of these problems suggests that the wholesale application of human rights to customary law is not prudent unless and until indigenous peoples and, in particular, indigenous women have the opportunity to assess how they might be best resolved in a manner most constructive to them. Do indigenous peoples and women want to buy into a human rights system that is less than ideal? There is the additional risk that if international human rights are applied to customary laws, the conflicts internal to international law would aggravate, divert attention from and possibly delay the resolution of the tension between culture and discrimination against indigenous women on the ground.

International law has been criticised by women for entrenching patriarchal concepts. Charlesworth and Chinkin, for example, claim '[i]n the major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees.'²⁵ Some feminists have argued that the separation of women's rights in the Women's Convention and human rights in the ICCPR and the ICESCR has the effect of marginalising women's rights from the main body of human rights law, noting also the Human Rights Committee's failure to address discrimination against women in a comprehensive or consistent fashion.²⁶

Profound tensions also exist between human rights and women's rights and, in particular, in relation to the requirement under the Women's Convention that rights be enforced in the private sphere.²⁷ Meron states '[t]here is a danger [...] that state regulation of interpersonal conduct may violate the privacy and associational rights of the individual and conflict with the principles of freedom of opinion, expression, and belief.'²⁸

Women's rights have also come under significant attack, aggravating concerns about their utility to provide indigenous women with the protection required to prevent discrimination sourced in custom. The cultural relativist attack on women's rights is complex because it accuses feminists of hypocrisy, charging them with 'imposing Western standards on non-Western cultures in much the same way that feminists have criticised states for imposing male-defined norms on women.'²⁹ Arguments that women's rights are universal and applicable regardless of culturally specific factors are unsound, given that the women's rights are premised on respect for difference.

²⁵ Charlesworth and Chinkin, 'The Gender of Jus Cogens' (1993) 15 *Human Rights Quarterly* 63, 65.

²⁶ Laura Reanda notes that reports from the Committee to the ICCPR rarely deal with the situation of women. See 'Human Rights and Women's Rights: The United Nations Approach' (1981) 3 *Human Rights Quarterly* 11.

²⁷ The dilemma is heightened by the fact that women have the greatest need for rights protections in the private sphere. Charlesworth, Chinkin and Wright claim that the public-private distinction might not exist if violence against women was considered as serious as violence against people for their political ideas. Hilary Charlesworth, Christine Chinkin and Shelley Wright, above n 1, 628.

²⁸ Theodor Meron, *Human Rights Law Making in the United Nations: A Critique of Instruments and Process* (1986) 60.

²⁹ Tracey Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89, 96.

The women's rights movement must also answer to criticisms relating to their failure to include indigenous women in the process of determining the content of women's rights. Ironically, women's rights advocates have criticised international policy makers for excluding women's voices.³⁰

The cultural relativist/universalist debate is unhelpful

Treaty bodies' ability to sensitively address a communication involving discriminatory indigenous custom may be weakened where they take theoretical debate about the nature of human rights, such as that between universalists and cultural relativists, into account.³¹

The universalist argument originates in the claim that rights are inherent in, and fundamental to, human beings. Accordingly, they apply to all individuals regardless of each person's cultural heritage. Further, the assumption of a universal, objective and true knowledge underlies the universalist position. Cultural relativists maintain that the content of rights enjoyed by a community is determined by culture. They dismiss the concept of universal rights on the grounds that they reflect the Western ideal, are (Western) culturally specific and are allied to dominant regimes. Accordingly, it is inappropriate to apply them to non-Western cultures.³²

At first brush, dialogue between cultural relativists and the universalists would seem helpful to indigenous peoples and indigenous women in addressing conflict between culture and the freedom from discrimination. The cultural relativist view accords, at least to some extent, with the need to recognise that indigenous peoples must balance the right to freedom from discrimination against other culturally significant factors, such as the preservation of their culture. On the other hand, the universalist position is aligned with the view that freedom from discrimination must be applied irrespective of cultural factors.

However, the utility of this debate as a means to constructively address the tension between custom and freedom from discrimination has been seriously compromised. First, it has been, to a large extent, captured by political forces, which have subverted it to their political advantage. Otto states:³³

[t]he debate reflects the contest over universal truth between the liberal capitalism of the "North" (Europe, the West) and the new economic systems emerging from the non-liberal context of some "Asian" (Southern) states. Consequently, neither side of the argument represents a transformative commitment to global multiplicity and antidiscipline.

Second, again on the political level, the cultural relativist and universalist debate has been polarised into two diametrically opposed arguments, such that there is little middle ground between the two, which is hardly a source of inspiration when attempting to find commonality between two ostensibly competing interests.

While academic discussion of the cultural relativist and universalist debate is more advanced, it is in many respects too abstract and far removed from the indigenous peoples and women who seek to benefit from it. This is a problem recognised by some human rights activists who work in communities. They do not, for strategic reasons, approach their task using the 'human rights dialogue' reverberating in academic writing on the cultural relativist/universalist debate. As Chidi Anselm

³⁰ See generally Higgins, *ibid.*

³¹ See generally Claire Charters 'Universalism and Cultural Relativism in the Context of Indigenous Women's Rights' (pending publication 2003 in *Human Rights Research - Victoria University of Wellington*).

³² Dianne Otto states that '[a]dvocates of the position that rights are universal must concede that many basic rights (such as the right to a fair criminal trial) allow for culturally influenced forms of implementation or realisation' in 'Rethinking the Universality of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review* 1.

³³ *Ibid* 4.

Odinkalu states: '[i]n Africa, the real life struggles for social justice are waged by people who feel their realities and aspirations are not adequately captured by human rights organisations or their language.'³⁴

Colonisation

The history of indigenous peoples' experience of colonisation is highly relevant to an assessment of whether international human rights and treaty bodies are appropriate tools to address issues that arise where indigenous custom discriminates.

Colonisation has in some cases exacerbated discrimination against women under custom. The example of Cathy Dewes' appointment to the Trust Board illustrates the point. It is contestable whether custom that prohibits women from speaking on the marae atea is discriminatory. It is arguable that it is a case of women and men fulfilling different but equal roles. Women have the exclusive right to karanga, a role that is at least as important as the man's whaikorero. In contrast, where indigenous peoples have had to organise themselves into structures cognisable to government, such as a trust board, customary rules like that prohibiting women from speaking on the marae atea, when transposed to those new structures, clearly discriminate. Hence, the coloniser's requirement that Maori conform to new governing structures aggravated discrimination against Maori women under Te Arawa custom. Cathy Dewes ascribes the behaviour of male members of the Te Arawa Maori Trust Board to chauvinistic, missionary attitudes developed by Maori men following colonisation.³⁵ Similarly, Annie Mikaere argues that colonisers had a detrimental effect on the relationship between men and women in Maori societies by, for example, introducing the concept that women were chattels and dealing with men only.³⁶

In some countries, codification of customary law has lent legislative or constitutional force to discriminatory customs. For example, Kenyan legislation recognises customary polygamous marriages for men (only).³⁷ Notably, also, Western discriminatory biases had an impact on the customary laws that are now codified and those that were not. Often government officials in colonial governments chose to consult exclusively with indigenous men on the subject of indigenous customary law. Kaganas and Murray comment that:³⁸

[i]t has been pointed out that the translation of constantly evolving customary practices into a more rigid body of rules implemented by the colonial authorities was marked by the influence of African men seeking to secure their dominant position.

In the light of the above, indigenous women, for whom discrimination may have become more entrenched as a result of outside interference in custom, may be understandably weary of the utility of international human rights laws and treaty bodies to address discrimination against them under custom.

³⁴ *Human Rights Dialogue* (2000) Carnegie Council on Ethics and International Affairs <<http://www.cceia.org/pdf/rightsbox.pdf>> at May 7 2001.

³⁵ Interview with Barbara Charters (Rotorua, 3 May 2001).

³⁶ Annie Mikaere, 'Maori Women: Caught in the Contradictions of a Colonised Reality' (1994) 2 *Waikato Law Review* 125.

³⁷ Section 3(5) Law of Succession Cap 160, 1981. See also, Alice M Wahome, *Gender Equality Under Customary Law* (2001) The Information Service of the Canadian Bar Association http://www.cba.org/cba/idp/InterDev_PDF/WAHOME_Speech.pdf at 1 September 2003. Additionally, under s23(3) of the Constitution of Zimbabwe anti-discriminatory provisions do not apply to African customary law. In 1999 the Zimbabwe Supreme Court, in reliance on that provision, held that discriminatory customary law on the administration of an estate was not contrary to the Constitution. *Magaya v Magaya* 1999 (1) ZLR 100 (S).

³⁸ Felicity Kaganas and Christina Murray, 'The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution' (1994) 21 *Journal of Law and Society* 409, 411. See also, Celestine I Nyamu's comment that 'the institutionally recognised customary law rules merely reflect the versions of custom endorsed by colonial structures of authority' in 'How Should Human Rights and Development Respond to Legitimation of Gender Equality in Developing Countries' (2000) 41 *Harvard International Law Journal* 381, 402.

On the other hand, it might be argued that the application of international human rights to indigenous custom, such as those contained in the Women's Convention, is significantly different from the application of colonial norms to indigenous societies. Their purpose is to eliminate discrimination against women.

However, given indigenous peoples' sensitivity to outside interference, a successful communication by an indigenous woman to CEDAW may only fuel indigenous peoples' desire to entrench remaining cultural practices in their discriminatory form, creating an environment in which it is more, rather than less, difficult to resolve the tension between culture and discrimination against indigenous women. It may also be that indigenous men, feeling the loss of power resulting from colonisation, become more inclined to assert their position over indigenous women, when they feel their power could be further threatened by, for example, CEDAW. In turn, this could have a negative impact on discrimination against indigenous women. The highly acclaimed movie *Whalerider* makes a similar point. It depicts an old Koro's stubborn attempts to reinvigorate and reassert traditional custom in an inflexible and discriminatory fashion because outside influences threaten the custom's very existence. One can only imagine what might have happened had his granddaughter successfully brought a communication to CEDAW, resulting in the New Zealand government legislating for the abolition of traditional hapu customs.

Practical difficulties

There are significant practical difficulties associated with international human rights treaty bodies applying human rights to indigenous customary practices, thereby undermining their utility in addressing problems of discriminatory indigenous custom.

There is a very real risk that human rights treaty bodies will apply human rights in a culturally insensitive manner without regard to the context in which the customary practice takes place. This may impact on a treaty body's ability to determine whether a practice is in fact discriminatory. It is sufficiently difficult for New Zealanders to understand the perspective that some iwis' and hapus' prohibition against women speaking on the marae atea might not be discrimination against women, but a case of men and women performing equal but different roles. It would be even more difficult for members of CEDAW to appreciate the nuances of this cultural practice. The Human Rights Committee in the *Mahuika* communication, challenging the Treaty of Waitangi (Fisheries Claim) Settlement, illustrates this.³⁹ The Human Rights Committee was satisfied that slim majority Maori consent to the fisheries settlement was sufficient to reject *Mahuika's* argument that the settlement breached Article 27 of the ICCPR. It did not seem to appreciate that in many Maori iwi and hapu a greater level of consensus is required before a decision can be taken.

Were CEDAW or the Human Rights Committee to recommend the abolition of an indigenous custom that is only discriminatory when viewed through a Western lens, for example, the custom would be attacked not only by the very fact of the application of human rights to a non-Western culture but, also, by the way in which the human rights are applied.

Are international human rights law and treaty bodies a waste of time?

Despite the argument that the application of human rights law by treaty bodies is less than ideal to resolve conflict between custom and freedom from discrimination, it is far from redundant. One of the best means to achieve freedom from discrimination for indigenous women, and affirmation of indigenous custom, is an evolution of indigenous custom. International human rights law and treaty bodies can play a meaningful role on the periphery of the development of indigenous peoples' customary laws. They can provide a catalyst for customary law to adapt to provide for the protection of indigenous women from discrimination.

³⁹ *Mahuika v New Zealand* (15 November 2000) Comm No 547/1993, CCPR/C/70/D/547/1993 (UNHRC).

Conclusion

In the 1930s, the name of the Owhata Whareniui (meeting house) was changed from Hinemoa, a famous Te Arawa female ancestor, to Tutanekai, her lover's name. The result was an affront to Hinemoa's mana wahine. Nevertheless, international human rights law is an inappropriate tool and human rights treaty bodies inappropriate fora to ensure the restoration and future protection of Hinemoa's mana wahine. They do, however, play a worthwhile role in invigorating custom to adapt to provide for the protection of indigenous women from discrimination.

International Law, Indigenous Peoples and the Struggle for Human Rights: An Analysis of the Utility of United Nations' Bodies and International Human Rights Law in the Protection of Indigenous Peoples' Rights

Kerensa Johnston*

Introduction

This paper explores the range of opportunities available in international law for indigenous peoples who wish to protect and advance indigenous issues, in the international arena. In part one of this paper, I review the three bodies which the United Nations has established to focus on indigenous peoples' rights – the Working Group on Indigenous Populations, the Commission on Human Rights Intercessional Working Group and the Permanent Forum on Indigenous Issues. I discuss the viability of all three bodies, and whether the Working Group on Indigenous Populations will survive the establishment of the Permanent Forum on Indigenous Issues. I argue that all three bodies should be retained within the United Nations system. The Working Group provides a valuable forum for states and indigenous peoples to meet to discuss regional and international matters of concern. It is one of the few places on the international stage where indigenous peoples can call states to account for human rights abuses. Furthermore, the Permanent Forum is in its infancy – it is too early to tell how effective it will be at fulfilling its mandate. With this in mind, I suggest it would be imprudent to abolish the Working Group, particularly when there is so much work to be done to remedy the discrimination indigenous peoples continue to experience throughout the world.

Part two discusses some of the specific legal protections in place to protect indigenous peoples' rights (such as the International Labour Convention 169) and explores the general international human rights protections and procedures in place, such as the Optional Protocol to the International Covenant on Civil and Political Rights, and state party reporting obligations under the international treaties.

In part two, I also consider whether the international human rights protections in place, and the rules and practices which have evolved from them with respect to indigenous peoples, constitute an international consensus on minimum legal standards which apply in the area of indigenous peoples' rights. I conclude, that although there is a growing range of declarations, treaties, jurisprudence and international bodies, such as the Permanent Forum, which are helping to achieve the "...slow but steady achievement of indigenous goals"¹, the application of customary international law in the area of indigenous human rights is problematic. Perhaps the most pressing problem is the refusal of many states to accept that the right of self-determination applies to indigenous peoples, and the resistance of states to the adoption of the Draft Declaration on the Rights of Indigenous Peoples.

In part three, I discuss the failure of states to adopt the Draft Declaration on the Rights of Indigenous Peoples and argue that the failure to adopt the Declaration poses a serious threat to the slow, but steady, achievement of indigenous goals.² In particular, I argue that the adoption of the Declaration is an essential

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¹ Torres Wick, R, "The Rights of Indigenous Populations: The Emerging International Norm" (1991) 16 *Yale J Int'l L* 127, 165.

² *Ibid.*

step towards strengthening the role of United Nations bodies which focus on indigenous issues, such as the Permanent Forum, and towards advancing indigenous goals within the international community generally.

I conclude that although progress has been made in the area of international human rights law and the protection of indigenous peoples' rights generally, there is still a great deal of work to do, both at home and in the international environment. In the area of international law, the range of declarations, treaties, jurisprudence and international bodies (such as the Working Group and Permanent Forum) in place to protect indigenous interests, should continue to be utilised by indigenous peoples, ultimately, to ensure our survival as distinct and vibrant cultures, with our many and varied aspirations for the future of our peoples.

United Nations' bodies which specifically address indigenous issues

Introduction

Despite the diversity of our cultures and languages, there are some common experiences that help to unite indigenous peoples. We share a history of colonial expansion into our territories, either by force, treaty or a combination of both. In many areas, including New Zealand, colonisation imposed a new and dominant culture on indigenous peoples, which has irreversibly changed our way of life. For many indigenous peoples throughout the world, colonisation has led to extreme poverty, disease and despair.³

Despite the profound impact of colonisation, indigenous peoples are unique on the international stage and within states, because we continue to actively maintain and assert our distinctive cultures and ways of doing things and to strive towards rediscovering and implementing our own indigenous social, political and economic structures – whatever shape they may take in the new millennium.

Indigenous peoples throughout the world have worked for many years to seek recognition of indigenous peoples' fundamental human rights. As early as the 1920s, a Maori delegation traveled to the League of Nations in Geneva to protest about human rights abuses and breaches of the Treaty of Waitangi.⁴ In that same decade, a Native American delegation traveled to Geneva to protest about the human rights breaches they had suffered in the United States. Both parties were refused an audience because they were not states and therefore had no status before the League.

Thankfully, attitudes towards indigenous peoples have changed in the international community. Since the 1970s, the United Nations has directed more attention to the position of indigenous people throughout the world.⁵ In the 1970s and 1980s, the United Nations commissioned studies to explore the human rights position of indigenous peoples.⁶ These studies revealed the extent of discrimination indigenous peoples

³ See Wiessner, S, "Rights and Status of Indigenous Peoples: A Global and International Legal Analysis", (1999) 12 *Harv. Hum. Rts. J.* 59 - 93, 98 where numerous examples of the impact of colonisation on indigenous peoples throughout the world are provided.

⁴ The Treaty of Waitangi was signed by Maori and the British Crown in New Zealand in 1840. The Maori text of the Treaty authorises the Crown to fulfil the functions of governorship, preserve law and order between Maori and the settler population and affirm and protect Maori authority and control of land, resources and taonga katoa (all things precious). The English text vests absolute sovereignty in the Crown; for further discussion see Orange, C, *The Treaty of Waitangi*, (1987); See Jackson, M, *Presentation to the New Zealand Human Rights Commission*, "Maori Awareness of UN Forums", 8 August 2002, Wellington, New Zealand (personal notes on file with the author) for comments on the Maori delegation to the League of Nations.

⁵ Anaya, J, *Indigenous Peoples in International Law*, (1996), 50, 54; see, also, Iorns-Magallanes, C, "International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand", in Havemann (ed), *Indigenous Peoples Rights in Australia, Canada and New Zealand*, (1999) 238.

⁶ In 1971, the United Nations appointed Jose Martinez-Cobo, as Special Rapporteur, to undertake a study on the level of discrimination towards indigenous peoples. The study included a definition of indigenous peoples, examined the role of intergovernmental and non-governmental organisations, and the extent of discrimination against indigenous peoples in areas such as health, employment, land, and political rights, the study also

experienced, and led to the establishment of the United Nations Working Group on Indigenous Populations (“the Working Group”) in 1982.⁷

The Working Group on Indigenous Populations

The Working Group is a subsidiary group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (“the Sub-Commission”), which reports to the United Nations Commission on Human Rights, then through the Economic and Social Council (“ECOSOC”) to the General Assembly.⁸

The Working Group’s mandate is to review and examine indigenous peoples’ human rights and to develop international standards for the enhancement and protection of indigenous peoples’ human rights. Since its establishment, the Working Group has been instrumental in promoting the 1993 Year of the World’s Indigenous People and the 1995-2004 International Decade of the World’s Indigenous People⁹ (“the International Decade”), establishing the Voluntary Fund for Indigenous Populations and the United Nations Indigenous Fellowship Programme.¹⁰

Although the Working Group does not have a mandate to consider specific complaints of human rights violations, or to make decisions on such complaints, its role is extensive.¹¹ The Working Group provides a valuable forum for states and indigenous peoples to meet to discuss regional and international issues of concern.¹² It is one of the few places on the international stage where indigenous peoples can call states to account for treaty and other human rights breaches. The Working Group sessions are well attended by indigenous peoples, states, and others from civil society.¹³ The number of indigenous peoples attending Working Group sessions is growing - between 1982 and 1994, the number of indigenous organisations attending the Working Group meetings increased from 14 to 162.¹⁴

The Working Group consists of five expert members, drawn from the Sub-Commission, and they are selected on a regional basis. The Working Group members are considered to be experts on indigenous peoples and international law, although none of the members are indigenous. Indigenous peoples do of course participate in the Working Group meetings as observers and in this way, can influence the

considered measures to eliminate discrimination: see Cobo, M, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7.

⁷ See <http://www.unhcr.ch> (Fact Sheet No 9, *The Rights of Indigenous Peoples*), (last visited 12 June 2003).

⁸ The Sub-Commission consists of twenty-six experts whose role is to assist the Commission on Human Rights with matters relating to discrimination and minorities. The Commission on Human Rights, (comprising 53 state representatives) makes studies, prepares recommendations for submission to ECOSOC, undertakes drafting of legal instruments and investigates human rights violations and complaints; see Pritchard, S, “Working Group on Indigenous Populations, Mandate, Standard Setting Activities and Future Perspectives” in Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998) 42.

⁹ The United Nations designated 1995-2004 the International Decade of the World’s Indigenous People in its resolution 48/163, GA Res 48/163 (1993) (proclaiming the “International Decade of the World’s Indigenous People” commencing 10 December, 1994).

¹⁰ Morgan, R, “The Future of the Working Group on Indigenous Populations in the Balance – Concerns and Consequences” 5 (20) *Indigenous Law Bulletin* 1; she notes “...the Working Group has also generated studies, reports and working papers of particular importance to Indigenous peoples...[i]ts other activities include expert seminars on the environment and self-government. These and other initiatives have succeeded in raising the profile of indigenous peoples internationally, and in bringing indigenous issues to the forefront of the UN human rights agenda.”

¹¹ Dodson, M, “Comment” in Pritchard (ed), above 8, 63; referred to by Morgan, above n 10, 11.

¹² The group aims to improve dialogue between governments and indigenous peoples and review national developments in the protection of the human rights of indigenous peoples. In reviewing national developments the Working Group receives and analyses information submitted by Governments, United Nations agencies, intergovernmental and non-government organisations and indigenous peoples. The Chairperson-Rapporteur may also visit countries to gain information.

¹³ Above n 10, 12.

¹⁴ See Iorns-Magallanes, above n 5, 240.

proceedings.¹⁵ The role of indigenous delegates attending Working Group sessions is vital – they challenge state reports on the domestic situation of indigenous peoples and provide the Working Group members with an indigenous view, which balances the comments government representatives make during the sessions.¹⁶

The Draft Declaration on the Rights of Indigenous Peoples

The Working Group's main achievement, to date, is the formulation of the Draft Declaration on the Rights of Indigenous Peoples' ("the Declaration").¹⁷ The need for a broad-based international human rights document such as the Declaration was based on the view that existing international instruments fail to address indigenous peoples' common experiences and aspirations, and in particular, the importance of indigenous lands and communities.¹⁸

The United Nations Charter and the International Bill of Rights (consisting of the Universal Declaration of Human Rights ("UDHR"), International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social and Cultural Rights ("ICESCR")) contain provisions which have been utilised to address specific abuses of indigenous peoples' rights. These provisions include the right to equality and the right to enjoy one's culture in association with others.¹⁹

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("the Women's Convention") provides an avenue for indigenous women who wish to address discriminatory practices (and who live in states which are a party to the Convention).²⁰ There are other international instruments indigenous peoples can turn to, when seeking to address human rights abuses in international fora, which are not discussed here, including, the Convention on the Elimination of All Forms of Racial Discrimination ("CERD").²¹

The rights contained in the aforementioned instruments do not encapsulate the fundamental interests and concerns of indigenous peoples, particularly with respect to our spiritual and cultural ties to our

¹⁵ Above n 10, 11-12.

¹⁶ See, also, infra note 128 and accompanying text.

¹⁷ Draft United Nations Declaration on the Rights of Indigenous Peoples, United Nations Working Group on Indigenous Populations, 12th Session, UN Doc E/CN.4.Sub.2/AC.4/1994/4/Add.1.

¹⁸ See Hunt, P "Reflections on International Human Rights Land and Cultural Rights" in Wilson and Hunt (ed), *Culture, Rights and Culture Rights* (1998) 25 for a review of existing rights (such as Article 27 of the Universal Declaration of Human Rights and Article 27 of the International Covenant on Civil and Political Rights) and a discussion of how existing rights fail to recognise indigenous peoples rights; see Watson, I, "One Indigenous Perspective", in Garkawe (ed) *Indigenous Human Rights* (2000) 30 for a discussion of how Western philosophy and rights are separated from indigenous peoples' understandings of the natural world; see, also, Trask, H, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (1993) 112-113 who sees 'rights' talk as meaningless when it is controlled, contained and defined by the coloniser or dominant party.

¹⁹ The International Covenant on Civil and Political Rights, entered into force on March 23, 1976, 999 UNTS 171, reprinted in 6 ILM 368; The International Covenant on Economic, Social and Cultural Rights entered into force on January 3 1976, 999 UNTS 3, reprinted in 6 ILM 360 (the cases where indigenous peoples have relied on these treaties are discussed in part two).

¹⁹ See infra note 87 and accompanying text.

²⁰ The Women's Convention was adopted by the United Nations in 1979 and entered into force in 1981. It has the most ratifications and of all the international treaties. By October 2002, 170 countries (almost ninety percent of the United Nations) had ratified the Women's Convention; See <http://www.un.org/womenwatch/daw/states.htm> (last visited 24 October 2002).

²¹ See infra note 123 and accompanying text.

territories.²² To even talk using the language of universal rights is the antithesis to some indigenous peoples of what it means to be indigenous. As Haunani-Kay Trask explains:²³

Ideologically, ‘rights’ talk is part of the larger, greatly obscured historical reality of American colonialism...by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonisation. Once [I]ndigenous peoples begin to use terms like language ‘rights’ and burial ‘rights’, they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. These [I]ndigenous, Native practices are not ‘rights’ which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel... When Hawaiians begin to think otherwise, that is, to think in terms of ‘rights’, the identification as ‘Americans’ is not far off.

Indigenous peoples are naturally wary of turning to a ‘universal’ language of rights that is foreign to them.²⁴ Apart from the Declaration, indigenous peoples have not played a part in drafting and developing international human rights instruments.²⁵

A cursory examination of human rights declarations indigenous peoples have drafted shows how differently we think about and express our rights. Rights are often expressed in relation to land, as the following quote from the Kimberley Declaration, which was drafted by indigenous peoples attending the Johannesburg Earth Summit in August 2002, illustrates: “We are the original peoples tied to the land by our umbilical cords and the dust of our ancestors.”²⁶

Indigenous peoples tend to emphasise the obligations we have to each other and to our land, recognising that rights and responsibilities co-exist together. The Kari-Oca Declaration (which was drafted by indigenous people at the 1992 Earth Summit in Brazil) expresses rights and obligations in the following way:²⁷

We the Indigenous peoples walk to the future in the footprints of our ancestors...the footprints of our ancestors are permanently etched upon the lands of our peoples...we maintain our inalienable rights to our lands and territories, to all of our resources, above and below – and to our waters, we assert our ongoing responsibility to pass these on to future generations...

²² Above n 3, 99.

²³ Trask, H, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (1993) 23; Moana Jackson makes a similar point reminding us that the debate about self-determination (in the context of the Draft Declaration on the Rights of Indigenous Peoples) has been “[C]aptured by lawyers, reworked by political scientists, and sloganised by new age colonizers”; see Jackson, M, “Self-Determination: The Principle and the Process”, (2000) 1.

²⁴ Tomas, N, “Locating Human Rights in the South Pacific”, in Garkawe (ed), *Indigenous Human Rights* (2001) 132, 118.

²⁵ Charters, C, “Protecting Hinemoa’s Mana Wahine: An Assessment of the Utility of International and Constitutional Law in Resolving Tensions Between Culture and Discrimination Against Indigenous Women” (2001) (Unpublished LLM Paper, New York University) 48.

²⁶ The Kimberley Declaration, International Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa, 20-23 August 2002; Other examples of Declarations drafted by Indigenous People include the Charter of the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests; the Mataatua Declaration; the Santa Cruz Declaration on Intellectual Property; the Leticia Declaration of Indigenous Peoples and Other Forest Dependent Peoples on the Sustainable Use and Management of All Types of Forests; the Charter of Indigenous peoples of the Arctic and the Far East Siberia; the Bali Indigenous Peoples Political Declaration; and the Declaration of the Indigenous Peoples of Eastern Africa in the Regional WSSD Preparatory Meeting.

²⁷ Kari-Oca Declaration, signed at Brazil, 30 May 1992.

This language contrasts sharply with the language of existing human rights instruments such as Article 17 of the UDHR, which recognizes “the right to own property alone as well as in association with others.”²⁸

As well as questioning the language of human rights, indigenous peoples question the value of turning to international law for protection when international law has traditionally been used against indigenous peoples to justify colonial expansion and the removal of indigenous peoples from their land.²⁹ As Irene Watson says:³⁰

How do we negotiate rights with the unequal power of thieves? How do we engage with their law when we have never consented to their stolen title of our lands? When is it our turn to de-colonise in a universal world order, which nurtures the myth and language of post-colonialism?

The Declaration was formulated in response to these criticisms, bearing in mind indigenous peoples’ views and ideals. It represents an attempt to provide a comprehensive set of rights for indigenous peoples and to establish minimum standards for the protection and enhancement of indigenous rights, which are recognised by international law.

The Working Group, states and indigenous delegates, began work on the Declaration in 1985. The Declaration contains forty-five articles, covering for example, the recognition of the right to self-determination (Article 3, which provides “indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); the protection of culture, language and religion (Articles 12 and 13); protection against genocide and ethnocide (Article 7) and the right to maintain and strengthen the spiritual relationship with land (Article 25). Article 42 of the Draft Declaration affirms that the rights recognised therein are the minimum standards for the survival, dignity and well being of indigenous peoples.

Described as a “triumph of indigenous solidarity” over 400 different indigenous peoples’ delegations contributed to the Declaration.³¹ As has been noted, “...probably no other international human rights instrument has attracted such lengthy and intensive consultations with the immediate beneficiaries of the text”.³² It should also be remembered that state representatives actively participated in the drafting sessions.³³

Although the Declaration will have considerable moral force once it is adopted by the General Assembly, it has no legal force in and of itself.³⁴ The Declaration’s success will ultimately depend on how many states ratify the Declaration and commit to its implementation in domestic law and policy.³⁵

²⁸ Universal Declaration of Human Rights 1948, UN Doc A/810 at 71.

²⁹ Watson, I, “One Indigenous Perspective”, in Garkawe (ed), *Indigenous Human Rights* (2001) 29-30.

³⁰ Ibid.

³¹ Williams, J “A Summing Up” in Quentin-Baxter (ed), *Recognising the Rights of Indigenous Peoples* (1998) 189; see, also, Holder, C and Cornassel, J, “Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights” 24 *HRQ* 126,140.

³² Above n 18, 38.

³³ See Iorns-Magallanes, above n 5, 240; The Working Group’s decision to relax procedural rules contributed to the collaborative nature of the drafting process between states, indigenous peoples and the Working Group members and allowed Indigenous representatives to maximise their involvement.

³⁴ In New Zealand, international instruments, such as treaties and declarations, have no legal status in and of themselves until incorporated into the domestic law by Parliament; see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 233; see, also, Blay, Ryszard, Piotrowicz & Tsamenyi (eds), *Public International Law: An Australian Perspective* (1997) 88-89.

³⁵ It is not my intention to cover every aspect of international law and how it has developed, with respect to indigenous peoples’ rights. I do not discuss, for example, the complex issues surrounding the enforcement of

The Intercessional Working Group

The Working Group's role in drafting the Declaration ended in 1993. On 26 August 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted the Declaration (with no amendments) and submitted it to the Commission on Human Rights for consideration. Consistent with the aims of the International Decade, the General Assembly requested that the Declaration be adopted before the end of the Decade in 2004.³⁶

In 1995, the Commission on Human Rights established the Commission on Human Rights Intercessional Working Group ("the Intercessional Working Group"). The Intercessional Working Group's mandate is to consider all aspects of the Declaration, including its scope and application.³⁷

Since 1995, the Intercessional Working Group sessions have focused on detailed reviews of the text. Over time, states have become more resistant to the Declaration in its current form and in particular, some states refuse to accept that indigenous peoples have the right to self-determination as it is set out in Article 3 of the Declaration.³⁸ By 1996, state opposition to the collective right of self-determination had increased and negotiations were becoming increasingly difficult.³⁹ Matters came to a head between some indigenous delegates and states at the 1996 Intercessional Working Group's second session in Geneva, where indigenous participants, (including the Maori delegation) left the meeting in protest at states' persistent refusal to recognise indigenous peoples' right of self-determination.⁴⁰

Australia, Canada, the United States and New Zealand continue to seek amendments to the Declaration and have begun work on a new draft declaration.⁴¹ New Zealand delegates continue to argue that New Zealand is unable to accept an unqualified right of self-determination because it could be interpreted as giving Maori a right to secede from the New Zealand state.⁴² On this basis, the New Zealand government will not agree to the inclusion of the Article 3 right of self-determination, as it is presently drafted.

New Zealand has rejected other articles in the Declaration on the basis of a perceived conflict with Treaty of Waitangi rights. Article 29 of the Declaration, for example, recognises indigenous peoples' full ownership, control and protection of our cultural and intellectual property and the indigenous right to control, develop and protect our cultural and scientific property, including genetic material and medicinal knowledge. New Zealand's refusal to accept Article 29 is partly based on the perception that the draft article cuts across the Maori flora and fauna claim to the Waitangi Tribunal.⁴³ The New Zealand

international human rights law; for a discussion of this nature see Blay, Ryszard, Piotrowicz & Tsamenyi (eds) *ibid* 1-21.

³⁶ Burger, J, "The United Nations Draft Declaration on the Rights of Indigenous Peoples" (1996) 9 *St Thomas L Rev* 209, 211 referred to in above n 3, 104.

³⁷ Commission of Human Rights Resolution 1995/32 of 3 March 1995.

³⁸ Above n 5, 241, 242; where Iorns-Magallanes notes, that Canada, New Zealand and Australia have all opposed the inclusion of the right to self-determination and the implication that it includes a right to secession. Norway has in the past supported its inclusion, Canada does not support the inclusion of the right. It is important to note that not all states have resisted Article 3 in its current form: Finland has indicated its support and Denmark has said that the exercise of the right of self-determination is a precondition for the full realisation of human rights for indigenous peoples; see Daes, E, "The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflection on the Making of the United Nations Draft Declaration" in Aikio & Schenin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000) 68.

³⁹ Above n 3, 104 referring to Burger, J, "The United Nations Draft Declaration on the Rights of Indigenous Peoples" (1996) 9 *St Thomas L Rev* 209, 210.

⁴⁰ Statement on Behalf of the Maori Delegation, 24 October 1996 – United Nations Intercessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples, referred to in, Tomas (ed) *Collective Human Rights of Pacific People* (1999) 82.

⁴¹ Trask, M, Permanent Forum Member Statement, Second Session of the Permanent Forum on Indigenous Issues, United Nations Headquarters, New York, 23 May 2003.

⁴² *Draft Declaration on the Rights of Indigenous Peoples, New Zealand Negotiating Brief* (1999) 105-106.

⁴³ WAI 262, *Indigenous Flora and Fauna Claim to the Waitangi Tribunal*.

government opposes other articles in the Declaration, such as Article 36, which would give Maori the right to submit disputes concerning the Treaty to international bodies. Giving its reasons for rejecting Article 36, New Zealand has said that “the Treaty is not recognised as an international treaty in law” and “discussion of domestic claims at an international level would not assist in their early resolution and could contribute to their inflammation”.⁴⁴

The government’s position, which is taken from its negotiating brief on the Draft Declaration, is currently under review, however, it appears that the government is intending to table a new draft of the Declaration at the next Intercessional Working Group meeting.⁴⁵ This new draft has been prepared with no input from Maori or any consultation about, firstly, whether changes to the Declaration are necessary, and second, the substance of the changes proposed. In my view, New Zealand is in a position to take a lead on the Declaration negotiations – New Zealand is already complying with some of the Declaration’s articles, and if the government has the political will to do so, it could agree to the inclusion of many of the other articles in their current form.⁴⁶

The Declaration is still before the Intercessional Working Group of the Commission and no substantive progress has been made since 1994.⁴⁷ As Madame Erica-Irene Daes (previously the Chairperson of the Working Group), has said, “this constitutes a source of disappointment and even bitterness for myself along with members of the Working Group...and in particular for all indigenous peoples of the world community as well as for certain governments which sincerely seek the adoption and proclamation by the General Assembly of this historic instrument”.⁴⁸

The reasons why the international community’s recognition of the unqualified Article 3 right of indigenous self-determination, as it is presently drafted in the Declaration, is essential, and why changes to the Declaration in its current form must be very carefully considered (if not resisted) by indigenous peoples, are discussed in part two and three.

The United Nations Permanent Forum on Indigenous Issues

Genesis of the Permanent Forum

The idea for the establishment of the Permanent Forum was first raised at the Vienna World Conference on Human Rights in 1993. This led to a review of all existing mechanisms, procedures and programmes within the United Nations concerning indigenous peoples. The review highlighted the lack of internationally accepted guidelines on the rights of indigenous peoples, concluding that there was no mechanism within the United Nations system which gave indigenous peoples an opportunity to provide expert advice or to take part in decision-making.⁴⁹ This is a problem within the United Nations system generally, where indigenous peoples are poorly represented in all areas of the United Nations’ work.

The review identified several other problems within the United Nations’ system, such as the poor coordination and exchange of information within United Nations’ agencies and between the United Nations

⁴⁴ Above n 42.

⁴⁵ Personal Conversation with New Zealand Government delegates during the Second Session of the Permanent Forum on Indigenous Issues, United Nations Headquarters, New York, 12-23 May 2003 (notes on file with the author).

⁴⁶ For example, Article 14 which provides that states shall take effective measures to ensure “Indigenous Peoples have the right to revitalise and use their language”; the New Zealand Government could point to the Maori Language Act 1987 and its support of Kohanga Reo initiatives, as examples of steps taken to fulfil Article 14 obligations.

⁴⁷ Daes, E, “The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the Draft Declaration”, in Aikio & Scheinin (eds), above n 38, 73.

⁴⁸ Ibid.

⁴⁹ Report of the Secretary General, *Review of the Existing Mechanisms, Procedures and Programmes within the United Nations Concerning Indigenous Peoples*, 14 October 1996, UN Doc. A/51/493.

and indigenous peoples. This has led to work duplication and the inefficient use of resources. The establishment of a forum for indigenous peoples to express our views and knowledge within the United Nations system and to assist the full and effective involvement of indigenous people in the planning, implementation and evaluation of projects and policies affecting us, was recommended in order to overcome some of these problems.

In April 2000, the United Nations Commission on Human Rights adopted a resolution to establish the Permanent Forum on Indigenous Issues (“the Permanent Forum”) (to act as an advisory body to ECOSOC) before the end of the International Decade of the World’s Indigenous Peoples.⁵⁰

The Permanent Forum held its inaugural session at the United Nations Headquarters in New York on 13-24 May 2002. Over 1000 people attended the Permanent Forum’s first session. The Permanent Forum’s second session was held in New York in May 2003. Over 1200 indigenous peoples and their organisations registered to attend, making it the largest United Nations meeting of indigenous peoples in history.⁵¹

The Permanent Forum’s mandate

The Permanent Forum, which meets once a year for 10 days, has the task of raising awareness, promoting and coordinating activities relating to indigenous issues within the United Nations system, and preparing and disseminating information on indigenous issues. States, United Nations bodies, intergovernmental and non-governmental organisations, and organisations of indigenous people may take part as observers.

The Permanent Forum serves as an advisory body to ECOSOC with a broad mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights.⁵² In particular the Permanent Forum’s role is to:

- (a) Provide expert advice and recommendations on indigenous issues to ECOSOC, as well as to programmes, funds and agencies of the United Nations (through ECOSOC);
- (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system;
- (a) Prepare and disseminate information on indigenous issues.

The Permanent Forum aims to become a global focal point for promoting cooperation between states and indigenous peoples on the implementation of international policies and action plans, for example, by devising codes of conduct to monitor multinational activities and their impact on indigenous peoples and ensuring consistent guidelines are applied to work which impacts on indigenous peoples.

As Mary Robinson has said, the Permanent Forum “...is potentially a mechanism for combining all the diverse issues dealt with by the United Nations System in one common place so that they can be viewed in their totality – as a whole rather than in distinct parts. I believe the Forum offers us an opportunity to work

⁵⁰ See “Press Release: Commission on Human Rights Concludes Fifty-Fourth Session”, UN Doc HR/CN/875 (1998) 2.

⁵¹ Ole Henrik, Permanent Forum Member Statement, Second Session of the Permanent Forum on Indigenous Issues, United Nations Headquarters, New York, 23 May 2003.

⁵² As a subsidiary of ECOSOC it sits at the same level as the Commission on Human Rights. The Working Group, in comparison, has a specific mandate to undertake case studies and assist with standard setting and drafting international instruments, and sits at a lower level within the United Nations hierarchy where it reports to the Commission on Human Rights. Indigenous peoples have recently affirmed continuing support for the Working Group based on its mandate to set international standards on the rights of Indigenous peoples; see The Kimberley Declaration, International Peoples Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa, 20-23 August 2002.

as one with a very clear test at the end: have our concerted efforts made a difference for indigenous peoples?”⁵³

The Permanent Forum members

The Permanent Forum has sixteen independent members serving three-year terms in their personal capacities, of whom eight are nominated by indigenous people and eight by governments.⁵⁴ The Permanent Forum is unique because it is the first official United Nations body where indigenous voices, nominated by indigenous peoples, can be heard as members with the same status as state representatives.⁵⁵ This is unprecedented within the usually state-centred United Nations system and it poses some challenges for states and indigenous groups.

The Permanent Forum members are appointed by the President of the Council (ECOSOC) after consultation with governments, indigenous peoples and other relevant groups, such as nongovernmental organisations.⁵⁶ The indigenous members act as independent experts, rather than representatives of specific regions, although the eight indigenous members reflect roughly the regional distribution of indigenous peoples throughout the world.⁵⁷

Although the indigenous members act in their personal capacities as independent experts on indigenous issues with the specific objective of fulfilling the Permanent Forum’s mandate, they are chosen by indigenous peoples, not states.⁵⁸ In the Pacific region, for example, criteria for the nomination of the indigenous candidate was developed by Pacific indigenous peoples, which required the nominee to: (a) be indigenous; (b) reside in the Pacific and have strong ties to his or her indigenous country; (c) have a strong background in the United Nations system and its work on indigenous issues; (d) be familiar with other Pacific peoples and finally, (e) not be a government employee or elected official.⁵⁹

Mililani Trask (Hawaii) was eventually nominated (and subsequently appointed to the Permanent Forum) after a process of meetings, telephone and email consultations between indigenous Pacific peoples.⁶⁰

This unique nomination process creates the expectation that members will represent and promote regional indigenous interests and that they are accountable and responsible to indigenous peoples in their region, even though the members sit in their personal capacity as independent experts. This expectation was

⁵³ Robinson, M, (ex) United Nations Commissioner for Human Rights, “Bridging the Gap between Human Rights and Development: From Normative Principles to Operational Relevance”, 3 December 2001, at <http://www.worldbank.org/wbi/B-SPAN/submaryrobinson.htm> (last visited 28 May 2003).

⁵⁴ Indigenous-nominated members for the 2003 session were: Antonio Jacanamijoy (Colombia); Ayitegau Kouevi (Togo); Willie Littlechild (Canada) who is also Rapporteur for the session; Ole Henrik Magga (Norway); Zinaida Strogalschikova (Russian Federation); Parshuram Tamang (Nepal); Mililani Trask (Hawaii); and Fortunato Turpo Choquehuanca (Peru). Government-nominated members were: Yuri Boitchenko (Russian Federation); Njuma Ekundanayo (Democratic Republic of the Congo); Yuji Iwasawa (Japan); Wayne Lord (Canada); Otilia Lux de Coti (Guatemala); Marcos Matias Alonso (Mexico); Ida Nicolaisen (Denmark); and Qin Xiaomei (China).

⁵⁵ As Willie Littlechild (Cree Nation) and Permanent Forum explained at the opening of the Forum’s first session, “The Forum on Indigenous Issues means today the recognition of self-determination, as full actors in our own histories, will begin its process”; see Eulynda Toledo-Benalli, “The United Nations Permanent Forum – First Meeting”, 4 October 2002, at Indigenous Media Network, <http://www.indigenousmedia.org> (last visited 17 April 2003).

⁵⁶ Press Release Note No 5741, “Briefing on Permanent Forum on Indigenous Issues”, 27 July 2002, 1.

⁵⁷ There is one seat each for Africa, the Asian States, Eastern European States; Latin America and Caribbean States, and Western European and other states; the other seats rotate between the regional groups.

⁵⁸ All members serve for three years with the possibility of re-election for one another three years.

⁵⁹ Email Correspondence (notes on file with the author).

⁶⁰ The Pacific Region Selection Committee members are Dr Takiora Ingram (Pacific Islands), Frank E Guivarra (Australia), Tracey Whare (Aotearoa), Michael Makasiale (Fiji) and Kekula Bray-Crawford, (Hawaii).

apparent at the second session of the Permanent Forum, where indigenous Permanent Forum members were expected to meet with indigenous delegates to lobby for interests specific to the different regions.⁶¹

Extreme time and work pressure can make it difficult for the members to meet during the Permanent Forum sessions, although members such as Mililani Trask did meet with the Pacific Caucus during the second session and she clearly saw her role as one of promoting and advocating for the interests of the Pacific Caucus.⁶² Outside of the Permanent Forum sessions, Mililani Trask visited Pacific areas (including New Zealand) in 2002, in an attempt to meet with indigenous peoples and to familiarise herself with regional issues. However, because the Permanent Forum members are unpaid and do not receive a budget to visit indigenous peoples' regions, these trips are likely to be relatively infrequent.

The procedure of the Permanent Forum

Like the Working Group, the Permanent Forum meetings are open to states, indigenous peoples, and non-governmental organisations. Indigenous peoples can participate in the meetings, by way of making statements about human rights abuses at home, or by questioning governments and United Nations' agencies about general and specific issues relating to breaches of indigenous human rights.

The procedure of the Permanent Forum is designed to promote dialogue between states, indigenous delegates and United Nations agencies. During the first and second sessions, international institutions and agencies, such as the World Bank and the United Nations Development Fund, presented a review of their activities. During these presentations, questions and interventions were allowed, so members could closely question states and United Nations agencies on specific issues (rather than listen to a monologue).⁶³

This is potentially the area where the Permanent Forum can achieve a great deal, directing the United Nations agencies and international institutions, such as the World Bank, to develop standards and policies relating to indigenous peoples and generally, to seek a higher prioritisation of indigenous issues within these institutions.

The open and flexible nature of the proceedings has proved effective at directing the attention of states to serious and urgent human rights abuses. During the Permanent Forum's second session, indigenous delegates from the Democratic Republic of Congo called attention to the dire human rights situation of the indigenous pygmy peoples, and the mass murder and cannibalism being committed by military groups against the indigenous pygmy peoples, while the Permanent Forum was in session.⁶⁴ This led to the Permanent Forum members convening a meeting with ECOSOC President Gert Rosenthal (Guatemala), to discuss what could be done to resolve the problem as a matter of urgency.⁶⁵

Why the Working Group should be retained

The Working Group on Indigenous Populations and the Intercessional Working Group are United Nations bodies, like the Permanent Forum, that were created to focus on indigenous issues. The Working Group's

⁶¹ Personal Conversation with indigenous delegates, Second Session, Permanent Forum on Indigenous Issues, United Nations Headquarters, New York, 12-23 May 2003, (notes on file with the author).

⁶² Personal Observations, Second Session, Permanent Forum on Indigenous Issues, 13 May 2002, (notes on file with the author).

⁶³ The Forum has warned that United Nations agencies and bodies should be "very specific in any statements they make about indigenous issues, and any replies submitted should be equally specific so that the members of the Forum can obtain information."; see Permanent Forum on Indigenous Issues, Final Report on the First Session, (13-24 May 2002), 7, E/2002/43/Rev.1., 7.

⁶⁴ "Press Release: Delegates at UN Forum tell of alleged Cannibalism in DR of Congo", UN News Centre, 23 May 2003, 1.

⁶⁵ Ibid.

⁶⁵ Ibid.

mandate is limited to a consideration of human rights related issues (which includes standard-setting and the authorisation to review developments relating to the promotion and protection of indigenous human rights), whereas the Intercessional Working Group focuses almost exclusively on issues surrounding the adoption of the Declaration. In contrast, and as is clear from the Permanent Forum's mandate, the Permanent Forum considers a wider range of issues including education, culture, the environment and health.

The United Nations is currently reviewing all existing mechanisms and bodies in place to address indigenous issues, within the United Nations system.⁶⁶ Whether the Working Group will survive in the face of pressure from states to abolish it remains to be seen; Australia and the United States are advocating its abolition, arguing that resource and funding constraints within the United Nations make the maintenance of all three bodies focusing on indigenous issues, unsustainable.⁶⁷

Australia has political motivations driving its proposals to abolish the Working Group. During the second session of the Permanent Forum, Australian representatives, replying to statements made by aboriginal delegates about nuclear contamination of aboriginal lands, admonished one of the delegates for raising these issues at the Permanent Forum, reminding him that the Permanent Forum is primarily concerned with inter-agency cooperation, not state behaviour.⁶⁸ This comment illustrates the importance of retaining the Working Group as an international forum where indigenous peoples can call states to account for their behaviour at home. Retaining the Working Group, for this reason, is particularly important for those indigenous groups who cannot address human rights abuses at home, for fear of retribution.⁶⁹

The New Zealand government supported the establishment of the Permanent Forum because, it says, it provides a model for confidence building and consultation between states and indigenous peoples. The New Zealand government states that although the Working Group plays an important role in bringing indigenous issues to the international arena and promoting respect for indigenous people, "...the debate in the Working Group had become stale in recent years and it was not convinced that the Group's Work had resulted in improvements in the conditions of the indigenous".⁷⁰ New Zealand anticipates that a decision on the Working Group will need to be taken soon by Governments, "...taking into account the views of

⁶⁶ This review is to be completed in 2003; see *Comments by Julian Burger, Office of the United Nations High Commissioner for Human Rights*, Second Session, Permanent Forum on Indigenous Issues, United Nations Headquarters, New York, 21 May 2003, (notes on file with the author).

⁶⁷ It should also be noted that from the outset, several states opposed the establishment of the Permanent Forum. The government of India argued that there were already adequate mechanisms within the United Nations system to protect indigenous peoples' rights and The United States objected on the basis of a lack of financial resources within the United Nations. Other states, such as Australia, supported the establishment of the Permanent Forum but on the condition that the Working Group be abolished; see *Indigenous Peoples' Millennium Conference, Final Report* (2001) 9; furthermore, Australia has noted that the "mandate of the Working Group has been fulfilled and it is time for it to be wound up"; see Report of the Secretary General, *Social and Human Rights Questions – Permanent Forum on Indigenous Issues: Information Concerning Indigenous Issues Requested by the Economic and Social Council*, 23 June 2003, E/2003/72, para 7.

⁶⁸ Personal Observations, Second Session, Permanent Forum on Indigenous Issues, 13 May 2002, (notes on file with the author); see, also, "Information Received From Governments: Australia", Second Session, Permanent Forum on Indigenous Issues, UN Doc E/C.19/2003/20, para 3 where the Australian Government notes: "While Australia appreciates the fact that there are many issues related to the situation of indigenous people – all of which deserve attention – Australia envisages the primary role of the Forum being to assess the work undertaken by other United Nations agencies and to focus on strategies to enhance the coordination and streamlining of that work."

⁶⁹ Above n 10, 11; see, also, Press Release HR/4600, "Problems of Indigenous Peoples Living in Cities Should be Addressed", 21 May 2003, at <http://www.un.org> (last visited on 23 April 2003) at 2, which discusses Ken Saro-Wira, Ogoni environmentalist and writer, who was hung (along with others) for demanding the recognition and protection of indigenous rights.

⁷⁰ Report of the Secretary General, *Social and Human Rights Questions – Permanent Forum on Indigenous Issues: Information Concerning Indigenous Issues Requested by the Economic and Social Council*, 23 June 2003, E/2003/72, para 13.

indigenous experts and the outcome of the [United Nations] review”.⁷¹ The question for Maori, therefore, is what role (if any) we will play in this decision-making process? To what extent will the Government be prepared to consult with Maori and take our view into account, before making a decision about the Working Group?

A further point the government makes with respect to the Working Group relates to the demands being made on indigenous delegations of multiple meetings, suggesting that “...a rationalisation of agendas would boost attendance and encourage wider representation”.⁷² Certainly, Maori attendance at the Working Group (and Permanent Forum) meetings has been poor.

There are other reasons for retaining the Working Group. There is still more standard-setting work to do in the area of indigenous peoples’ rights, particularly in the area of setting guidelines for the activities of the private sector and multinational companies.⁷³ The Working Group is the only body within the United Nations which has the mandate to undertake standard-setting work – the Permanent Forum is not mandated to develop new standards in the area of indigenous human rights, nor is it mandated to review state activities in relation to indigenous peoples.⁷⁴

Furthermore, the Permanent Forum, as an organisation, is in its infancy. It is too early to tell how effective it will be at influencing other agencies within the United Nations to give higher priority to indigenous issues, or to determine the level of state and indigenous support it will enjoy.⁷⁵ It would be imprudent to abolish the Working Group, which has over twenty years of experience of indigenous issues, when there is so much work to be done to remedy the position of indigenous peoples throughout the world.⁷⁶

International law protections and indigenous peoples’ rights

Introduction

As well as United Nations bodies, such as the Permanent Forum and Working Group, which focus solely on indigenous issues, there are numerous international declarations, treaties, and complaint and review mechanisms that indigenous peoples may be able to utilise in order to prevent and call attention to human rights abuses at home.

In spite of its draft status, the Declaration has had some of its rights and principles incorporated into international environmental instruments such as the Convention on Biological Diversity, the Rio Declaration and Agenda 21.⁷⁷ The International Labour Organisation (“ILO”), one of the first specialised

⁷¹ Ibid.

⁷² Ibid; not all states oppose the Working Group. Cuba considers the Working Group to be important for a better understanding of the problems faced by indigenous peoples and argues that the establishment of the Permanent Forum and other mechanisms for indigenous peoples does not necessarily exclude other mechanisms like the Working Group. In Cuba’s view, the mechanisms are complementary and do not overlap. Similarly, Norway supports the continuation of the Working Group, noting that the Permanent Forum needs time and resources to meet expectations; see Report of the Secretary General, *Social and Human Rights Questions – Permanent Forum on Indigenous Issues: Information Concerning Indigenous Issues Requested by the Economic and Social Council*, 23 June 2003, E/2003/72, para 8,14.

⁷³ Above n 10, 11.

⁷⁴ Ibid.

⁷⁵ Although the number of indigenous peoples attending the Permanent Forum’s last two sessions indicates that there is considerable indigenous support for the Permanent Forum.

⁷⁶ Above n 10, 12.

⁷⁷ New Zealand (along with 141 countries) has signed The Convention on Biological Diversity which came out of the 1992 United Nations Conference on Environment and Development (“the 1992 Earth Summit”). Article 8(j) of the Convention requires governments to “respect, preserve and maintain knowledge, innovations and practices of indigenous communities...” The implementation of Article 8(j) requires support for indigenous sustainable

United Nations agencies to address indigenous issues, has revised its policies concerning indigenous peoples as a result of the evolving standards, policies and practices in the area of indigenous peoples' rights.⁷⁸ This led to the redrafting of the International Labour Convention Concerning Indigenous and Tribal People's in Independent Countries 169 (1989) ("The ILO Convention"). The ILO Convention is the only international legally binding instrument to address indigenous peoples' rights.⁷⁹

Specific legal recognition of indigenous peoples' rights

The ILO Convention 169

The ILO Convention provides for (among other things) indigenous and tribal groups to maintain their way of life without forced assimilation, and protects them from discrimination, and cultural and religious oppression. The ILO Convention does not include a right to self-determination and in Article 1(3) denies that any international law implications flow from the use of the term 'peoples'.⁸⁰ The Convention's preamble recognises "...the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the [s]tates in which they live."⁸¹ Importantly, the ILO Convention recognises indigenous peoples' collective rights to live as distinct communities with control over their legal status, lands, internal development and environment. This focus on group, rather than individual rights, challenges state sovereignty and established forms of social and political organisation.⁸²

Most states, including New Zealand, Canada, and the United States, have not ratified the Convention.⁸³ The Australian government refuses to ratify the ILO Convention because, it says, the Convention's "...emphasis on integration does not ... accord with the government's policy of recognising the fundamental right of Aborigines to retain their identity and traditional life style where desired."⁸⁴

Although criticised by indigenous peoples because of the limited recognition of the right to self-determination,⁸⁵ the ILO Convention represents an absolute minimum standard for the protection of indigenous human rights. Anaya, and others, argue that the Convention is useful for "...confirming the international legal commitment to indigenous cultural self-determination, indigenous peoples' participation

development initiatives. This could include support for and the strengthening of indigenous organisations (at regional, national and international levels); see *Ministry for the Environment (New Zealand), Maori Environmental Monitoring* (Technical paper No 26) (1998) 29; Chapter 26 of Agenda 21 was the non-binding work programme adopted at the 1992 Earth Summit in order to achieve the principles set out in the Rio Declaration. It contains protections for indigenous peoples rights and sets out specifications for empowering indigenous peoples and their communities.

⁷⁸ Mackay, F, "Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples" [2002] 17 *Am U Int'l L Rev* 525, 536; also above n 3, 100.

⁷⁹ ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, reprinted in 28 ILM 1382 (1989). Convention No 169 entered into force 5 September, 1991. The ILO Convention is a revision of the ILO Convention No 107 (adopted in 1957). The 1957 Convention focused on the goal of integration, rather than on protection of indigenous cultures and way of life; see above n 3, 100.

⁸⁰ Whether a group of persons is a 'people' for the purposes of self-determination has been said to depend on the extent to which the group making the claim shares ethnic, religious, linguistic or cultural bonds – although the absence of one of these criteria need not invalidate the claim. The main question to answer is whether the group perceive their identity as distinct from the identities of other groups; see Daes, E, above n 38, 77.

⁸¹ Fifth preambular paragraph.

⁸² Anaya, above n 5, 50.

⁸³ As at 1 April 2003, the Convention had been ratified by 14 countries. Argentina, Bolivia, Columbia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay and Peru; see Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, 7, UN Doc. E/CN.4/2002/97.

⁸⁴ Brownlie, I, *Treaties and Indigenous Peoples* (1992) at 64.

⁸⁵ Although see Anaya, above n 5, 49 where he notes that indigenous peoples from Central and South America have been active in pressing for ratification and indigenous peoples from other regions (such as the Sami, Inuit and National Indian Youth Council) have expressed support for the Convention.

in the making of national decisions affecting them, and indigenous peoples' rights to their traditional lands and territories".⁸⁶

General international human rights protections

While not specifically created to focus on indigenous peoples, there are numerous international human rights treaties which indigenous peoples can rely on in order to call attention to human rights abuses. Indigenous peoples residing in states which are a party to treaties (and the individual complaint procedures which accompany them) such as ICCPR, ICESCR, and the Women's Convention, can submit a complaint based on a breach of the rights contained in the relevant treaty. Furthermore, state parties to these treaties are required to submit periodic reports on measures taken to implement the human rights obligations contained in the treaties.⁸⁷ This reporting process can be useful at directing states attention to specific indigenous issues and, as is discussed below, provides opportunities for indigenous peoples seeking to advance indigenous human rights issues in the international arena.

The Optional Protocol procedure (Human Rights Committee)

The First Optional Protocol to the ICCPR allows individuals who claim their rights under the ICCPR have been violated (and who reside in a state which is a party to the ICCPR and the Optional Protocol) to submit written communications to the Human Rights Committee. The ICCPR entered into force in New Zealand in March 1979, and the Optional Protocol in August 1989.⁸⁸

Indigenous individuals and groups have taken the opportunity to submit complaints to the Human Rights Committee for consideration, although these claims have not always been successful, particularly when they involve a clash between the exercise of rights among members of an indigenous group, such as in the recent case, *Mahuika et al v New Zealand*.⁸⁹

Mahuika concerned a complaint made to the Human Rights Committee by Maori about the Treaty of Waitangi (Fisheries Claims) Act 1992 ("the Settlement Act") and the process that led to its enactment. The Human Rights Committee rejected the complaint, acknowledging that although the Settlement Act and its mechanisms limited the right in Article 27 to enjoy one's culture, "... the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures."⁹⁰

In *Mahuika*, the Human Rights Committee considered that wide-ranging and effective consultation had taken place and the settlement legislation was enacted only after following the Maori representatives' report that substantial Maori support for the settlement deal existed. In making this finding, the Human Rights Committee relied on the report, rather than the evidence to the contrary – that is, that substantial Maori support for the proposal did not exist.⁹¹ The Human Rights Committee accepted New Zealand's argument that there should be no inquiry into the (Maori) internal decision making process.⁹²

⁸⁶ See Iorns-Magallanes, above n 5, 241 and Anaya, above n 5, 50.

⁸⁷ Article 40 of ICCPR; Article 17 of ICESCR and Article 18 of the Women's Convention.

⁸⁸ *Mahuika v New Zealand* Communication No 547/1993, Views adopted on 27 October 2000, CCPR/C/70/D/547/1993, 2.

⁸⁹ Ibid.

⁹⁰ Ibid 13.

⁹¹ See infra note 105 and accompanying text.

⁹² The New Zealand Government relied on the case of *Grand Chief Donald Marshall et al v Canada* Communication No 205/1986, Views adopted on 4 November 1991, CCPR/C/43/D/205/1986, in which the Human Rights Committee rejected a claim that all tribal groups should have a right to participate in consultations

The Human Rights Committee did not agree that the author's minority rights had been interfered with and, applying the rule from *Lovelace v Canada*⁹³, stated, "...where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected".⁹⁴

The authors claimed that the right to self-determination, under Article 1 of the ICCPR, had been infringed because access to fishing resources was denied along with the right to freely pursue their economic, social and cultural development with respect to fisheries. The authors argued that the right to self-determination under the ICCPR is only effective when people have access to and control over resources.⁹⁵

Consistent with its earlier jurisprudence, the Human Rights Committee found the case admissible under Articles 27 and 14(1) – effectively denying that rights under Article 1 were justiciable under the Optional Protocol because these rights are conferred on "peoples" not individuals.⁹⁶ The provisions of Article 1 may, however, be relevant in the interpretation of other rights protected by the Covenant, in particular Article 27.⁹⁷

In *Kitok v Sweden*, a Sami challenged Swedish legislation that sought to restrict reindeer breeding to certain Sami members. In this case, Kitok had lost his reindeer breeding rights, and although the Sami community could have restored these rights, it refused to do so. Kitok argued that the refusal to recognise his breeding rights was a breach of Article 27.⁹⁸

Acknowledging the importance of reindeer herding to Sami culture, the Human Rights Committee recognised that economic activities are within the scope of the ICCPR when they are an essential aspect of the culture of the indigenous community. In *Kitok's* case, the Human Rights Committee concluded that the restriction on reindeer breeders was reasonable for economic and ecological reasons and for the well being of Sami people as a whole. On this basis, the Human Rights Committee concluded there was no violation of Article 27.⁹⁹

In *Ominayak v Canada*, the Human Rights Committee refused to consider whether the Lubicon Lake Band constituted "peoples" for the purposes of Article 1 of the ICCPR, preferring instead to find a violation of Article 27 on the basis that leases for forestry, oil and gas exploration interfered with the right to engage in economic and social activities related to the culture of the Lubicon Lake Band.¹⁰⁰ So, although the ICCPR does not recognise land rights, the Human Rights Committee's interpretation of Article 27 illustrates its

on aboriginal matters. (However, this case did not require a minority group's consent to extinguish its property rights or deny access to the courts to enforce those rights).

⁹³ In this case, Sandra Lovelace, a Maliseet Indian, argued that Canadian legislation which provided that an Indian woman lost her legal status as an Indian upon marriage to a non-Indian male, breached her right to enjoy culture in Article 27 of the ICCPR. Although the Human Rights Committee concluded that in this case, Lovelace's right of access to her culture and language in community with other members of her group had been interfered with, the case established the rule that a restriction upon the right of an individual member of an indigenous group must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the indigenous group as a whole; see *Lovelace v Canada* (1977) Communication No R/24, UN GAOR, 36th Session, Supp, No 40; UN Doc A/36/40; see, also, *Kitok v Sweden* (1988) Communication No 197/1985, UN GAOR 43rd Session, Supp No 40; UN Doc A/43/40.

⁹⁴ Above n 88, 13.

⁹⁵ Ibid 6.

⁹⁶ See General Comment No 23.

⁹⁷ Above n 88, 12.

⁹⁸ *Kitok v Sweden*, above n 93 at paras 9.2, 9.3, 9.8; see, also, above n 8, 487.

⁹⁹ Ibid.

¹⁰⁰ *Ominayak, Chief of the Lubicon Lake Band v Canada* Communication No 167/1984, UN GAOR, 45th Sess. Supp No 40, vol 2, at 1 UN Doc A/45/40 (1990).

willingness to recognise the social and economic importance of land to indigenous peoples and indigenous cultures, particularly where there has been a failure to assure a group a land base, combined with the exploitation of indigenous peoples' resources by others.¹⁰¹

Lansmann v Finland concerned an attempt, again by Sami, to prevent the Central Forestry Board of Finland awarding a stone quarrying contract on the flanks of a sacred Sami mountain. The proposed quarrying would also interfere with reindeer breeding and herding.¹⁰² Although the Human Rights Committee did not accept that the quarrying would interfere with the reindeer and the Sami right to enjoy their culture in the area (and on that basis the Human Rights Committee dismissed the complaint), the Committee rejected Finland's argument that Article 27 only protects traditional activities, finding that modern adaptation to new methods of reindeer herding did not prevent them enjoying the application of Article 27.

In *Hopu and Bessert v France*, indigenous peoples complained that the construction of a hotel on a burial ground site breached Article 17 (protection against interference with privacy) and Article 23(1) (protection of the family group), because the hotel development would destroy important ancestral burial grounds and lead to the desecration of a lagoon used by 30 families for fishing.¹⁰³ The Human Rights Committee, taking into account a broad indigenous view of family which include relationships with ancestors and the land, and the significance this has in present day circumstances, held that there had been a breach of Article 17 and Article 23 rights.

The Human Rights Committee approach in the *Hopu* and *Ominayak* cases illustrates the Committee's understanding of indigenous peoples' unique relationship with lands and territories and the link to the exercise of the right of self-determination. Recognition of this relationship is important in international law terms, because it helps to "[confirm] the legitimacy of systems of special rights to ensure the survival of indigenous groups."¹⁰⁴

The approach in *Mahuika* and *Kitok*, however, demonstrates that the Human Rights Committee is unwilling to inquire into disputes between members of an indigenous group, even in cases where those disputes arise as a result of discriminatory state practices, policies and legislation. In *Mahuika*, for example, the Human Rights Committee accepted the Maori Negotiators report which asserted that there was Maori agreement for the controversial fisheries settlement package, when clearly (as the subsequent litigation and Waitangi Tribunal claims illustrate) there was no substantial support, particularly from some large iwi and hapu groups.¹⁰⁵

It may be that international law, and law generally, is not equipped to deal with disputes between members of indigenous groups, which involve a consideration of issues which are highly specific to a particular cultural group and arise in particular cultural contexts. It would be highly undesirable and inappropriate for the state or international law to intervene in Maori complaints involving, for instance, allegedly discriminatory practices on the marae (such as Maori women's speaking rights).¹⁰⁶ But cases which involve

¹⁰¹ Above n 3, 99.

¹⁰² *Lansmann v Finland* Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992, para 2.1, 3.1, 9.3, 9.7; see, also, above n 38, 488.

¹⁰³ *Frances Hopu and Tepoaitu Bessert v France* Communication no 549/1993, UN Doc CCPR/C/60/D/549/1993 (29 July 1997).

¹⁰⁴ Above n 38, 487.

¹⁰⁵ See *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17; see, also, Dame Mira Szaszy and Others Claim to the Waitangi Tribunal, WAI 381, 1993 ("the Mana Wahine claim").

¹⁰⁶ A discussion of these issues is outside the scope of this paper; see Mikaere, A, "Maori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 *WLR* 125 and Te Kawehau Hoskins, C, "In the Interests of Maori Women?" (1997) 13:2 *Women's Studies Journal* 25 for a full discussion of why the best way of addressing discriminatory cultural practices within Maori society is according to tikanga Maori (Maori ways of knowing and doing things); see, also, Charters, C, "Protecting Hinemoa's Mana Wahine: An Assessment of the Utility of International and Constitutional Law in Resolving Tensions Between Culture and Discrimination Against

state legislation (as in *Kitok*) or state practice which has contributed to discrimination within the group (as in *Mahuika*) should attract the rigorous consideration of the Human Rights Committee.

The Optional Protocol procedure (Women's Convention)

The Women's Convention is the most comprehensive legally binding international treaty on women's rights. New Zealand ratified the Women's Convention in January 1985.¹⁰⁷ The Optional Protocol to the Convention on the Elimination of Discrimination Against Women came into force in New Zealand in December 2000.

As yet, the Women's Committee has not received a complaint from an indigenous woman or group of indigenous women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. However, a complaint from indigenous women is possible, at least in New Zealand, on several grounds.

In New Zealand in 1993, a group of prominent Maori women submitted a claim to the Waitangi Tribunal based on Article 2 breaches of the Treaty of Waitangi.¹⁰⁸ The impetus for the claim was, once again, the Maori fisheries settlement process, and in particular the low level of Maori women representation and involvement in that process. The claimants alleged breaches of the Treaty based on the Crown's policies and practices, which the statement of claim alleges have systematically discriminated against Maori women and deprived them of their tino rangatiratanga (self-determination), effectively since the signing of the Treaty.¹⁰⁹

Evidence to support this claim can be found as far back as the signing of the Treaty itself, when some Crown agents refused to allow Maori women to sign the Treaty.¹¹⁰ Maori land legislation and Native Land Court practices and policies of the past provide further evidence of the negative and discriminatory impact of the Crown's policies and practices on Maori women.¹¹¹ Today, Maori women are poorly represented in public decision-making positions. Maori women hold only 2.1% of senior management positions and have the highest rate of unemployment.¹¹² The health of Maori women and their families is very poor. About a third of all Maori women and their families are in the lowest income group and cannot afford to eat properly all of the time, and basic food runs out for a third of Maori families in the low income bracket.¹¹³

Maori women in New Zealand could submit a complaint under the Optional Protocol to the Women's Convention, based for example, on a breach of Article 2 of the Convention, which requires the state to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against

Indigenous Women", (2001), Unpublished LLM Thesis, New York University), for a discussion about cultural relativism and international human rights law in the context of discrimination against indigenous women.

¹⁰⁷ See above n 20.

¹⁰⁸ *Mana Wahine Claim*, above n 105, *Statement of Claim to the Waitangi Tribunal*, 27 July 1993.

¹⁰⁹ *Ibid.*

¹¹⁰ Orange, C, *The Treaty of Waitangi* (1987) 90.

¹¹¹ In 1873, for example, the Native Land Act was amended to require husbands to be a party to any deed executed by a married Maori women, although Maori men were free to dispose of the land interests of their wives without their consent; see New Zealand Law Commission, *Justice: The Experiences of Maori Women* (1999) NZLC R53, 20.

¹¹² *Aotearoa/New Zealand Non-Governmental Organisations Non-Maori Report, Status of Women, Comments to the UN CEDAW Monitoring Committee on New Zealand's Progress in Implementing the Convention on the Elimination of All Forms of Discrimination Against Women*, (September 2002), 17.

¹¹³ Maori women are the highest proportion of New Zealand's population to have an income below \$20,000; the median personal income for Maori women is \$278.00 per week (compared to \$479 for non-Maori men); see Ministry of Women's Affairs, *Maori Women in Focus: Titiro Hangai, Ka Marama* (1992) 2.

women.¹¹⁴ The application of Article 2 is potentially very wide, requiring states to take steps to eliminate or modify laws, practices and customs which discriminate against women.¹¹⁵

Article 7 of the Women's Convention, relates to the political and public life of women and requires states to ensure equality with respect to voting rights and, importantly, women's participation in the formulation of government policy. So, it is here that the Mana Wahine claimants, provided they can get around any admissibility hurdles, may be able to argue that the New Zealand government has breached its obligations under the Women's Convention by failing to ensure adequate representation and involvement of Maori women in the settlement process.

If the Women's Committee finds in the Maori claimants favour, it could direct New Zealand to take immediate action to remedy the complaint, which could include for example, a recommendation to implement temporary measures such as affirmative action systems or quota systems to ensure the equal or effective participation of Maori women in public bodies, such as the Treaty of Waitangi Fisheries Commission, the body responsible for the management and allocation of Maori fisheries assets resulting from the fisheries settlement.

State reporting to the treaty-based committees

Although the Human Rights Committee will not determine the nature and extent of indigenous claims to self-determination under the Optional Protocol procedure, the Committee's comments and observations on state reports indicate its acceptance that the Article 1 right of self-determination contained in the ICCPR, applies to indigenous peoples, and that the right of self-determination applies to peoples within independent states as well as those territories awaiting decolonisation.¹¹⁶

The Human Rights Committee has recently affirmed that self-determination includes indigenous peoples' right to freely dispose of their natural wealth and resources and not to be deprived of their own means of subsistence.¹¹⁷ Considering Canada's fourth periodic report to the Human Rights Committee in 1999, the Committee criticised Canada's practice of including a clause extinguishing aboriginal title claims in agreements between indigenous groups and the Canadian government and asked Canada to "...report adequately on implementation of Article 1 in its next report".¹¹⁸ Norway has also been asked to provide information about the Sami right to self-determination under Article 1 and paragraph 2.¹¹⁹ These comments establish an important legal precedent by including indigenous self-determination within the framework of international human rights law.¹²⁰

In May 2002, the New Zealand delegation appeared before the United Nations Committee on Economic, Social and Cultural Rights to present its report on measures taken to uphold economic and cultural rights in New Zealand.¹²¹ Those rights, as set out in the Covenant, include, for example, the state's obligation to

¹¹⁴ The Women's Convention was adopted in 1979 and came into force in 1981; New Zealand ratified the Women's Convention in January 1985; The Optional Protocol to the Convention came into force in New Zealand in December 2000; see <http://www.un.org/womenwatch/daw/cedaw> (last visited 24 April 2003).

¹¹⁵ Article 2(d) requires the state to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions conform with this obligation.

¹¹⁶ See Official Records of the General Assembly, Fifty-fifth Session, Supplement No 40 (A/55/40, vol 1, paras 498-528).

¹¹⁷ See Aikio & Schenin (eds), above n 38, 135.

¹¹⁸ The Committee noted its regret that "...no explanation was given by the delegation concerning the elements that make up [the concept of self-determination]"; see UN Doc. CCPR/C/79/Add.105, para 7; see, also, Kingsbury, B, "Restructuring Self-Determination", Aikio & Schenin (eds), above n 38, 31-32.

¹¹⁹ UN Doc CCPR/C/79/Add.112, para 17.

¹²⁰ See Aikio & Schenin (eds), above n 38, 136.

¹²¹ E/1990/6/Add.33.

recognise the right to take part in cultural life and the right of everyone to attain the highest standard of physical and mental health.¹²²

The Committee on Economic, Social and Cultural Rights released its comments on New Zealand's report in May 2003 and noted with concern, the poor health situation of Maori (in particular the Committee noted that Maori life expectancy is significantly lower than the national average) and the high drop out rates from the education system of Maori children and youth.¹²³ The Committee directed the New Zealand government to adopt effective measures to improve the health situation of Maori and to take remedial action to ensure Maori have equal access to education – the Committee asked New Zealand to provide, in its next report, comparative data on the enrolment and drop out rates of Maori and other groups.¹²⁴

In November 2002, the Committee on the Elimination of Racial Discrimination released its conclusions and findings based on the New Zealand government's report to the Committee in August 2002.¹²⁵ The Convention on the Elimination of Racial Discrimination condemns racial discrimination in all forms and aims to promote the equal enjoyment of human rights and freedoms.

Although the Committee congratulated the New Zealand government for (among other things) its apparent abandonment of the fiscal envelope policy for the settlement of claims, in favour of fair and equitable settlements, the Committee was critical of the disparities that Maori continue to face in the area of employment, housing, social welfare and health.¹²⁶

Maori delegations (or individuals), independent of the New Zealand government, did not attend these recent reporting sessions in Geneva, or take the opportunity to submit a shadow report to either contradict the government's statements or to raise issues of particular concern. The various committees mentioned have limited resources and rely heavily on the information they receive from governments and others. The Committee members are very keen to receive information from as many sources as possible – so Maori groups, organisations and other nongovernmental organisations are encouraged to either attend Committee meetings or, if that is not possible, to submit written statements, reports and questions which can then be put to governments.

This approach has worked well with respect to New Zealand's latest report to the Women's Committee on the Elimination of All Forms of Discrimination Against Women.¹²⁷ In that forum, the New Zealand government report, prepared by the Ministry of Women's Affairs, was accompanied by a report prepared by the New Zealand National Council of Women which highlighted some inaccuracies in the government reporting. The government report claimed, for instance, that the new MMP system had increased the numbers of women in Parliament, when in fact the number of women in Parliament has fallen since 1999 - from 26.6% in 2002 compared with 32.9% in 1999.¹²⁸

The identification of indigenous human rights norms and customary international law

¹²² Article 12 and Article 15.

¹²³ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, (23 May 2003) E/C.12/1/Add.88, 2-3.

¹²⁴ *Ibid.*

¹²⁵ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand* (1 November 2002) A/57/18, para 412-434, 2-3.

¹²⁶ *Ibid.*

¹²⁷ *Ministry of Women's Affairs, Status of Women in New Zealand 2003, Report to CEDAW*; available at <http://www.mwa.govt.nz> (last visited 12 June 2003).

¹²⁸ *Aotearoa/New Zealand Non-Governmental Organisations Non-Maori Report, Status of Women, Comments to the UN CEDAW Monitoring Committee on New Zealand's Progress in Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (September 2002) 20.

The range of declarations, treaties, jurisprudence and international and domestic bodies (such as the Working Group and Permanent Forum) in place to protect indigenous peoples' interests, as well as statements made by governments to international bodies such as the Working Group, have led some writers to argue that states and other relevant actors (such as indigenous peoples' organisations and nongovernmental organisations) agree on minimum standards that should govern behaviour towards indigenous peoples, that these standards are already guiding behaviour, and these standards therefore constitute customary international law.¹²⁹

James Anaya, argues that since the 1970s an international consensus on indigenous peoples' rights has developed in international law and there is evidence that customary international law has accepted the right of cultural self-determination for indigenous peoples and the consequent autonomous control necessary to achieve that.¹³⁰ Furthermore, he argues, indigenous rights (such as the rights contained in the ILO Convention) have reached the status of customary international law and they therefore bind states regardless of whether they have ratified the relevant human rights treaties.¹³¹ So, as well as the existing international mechanisms and protections already discussed, indigenous peoples may be able to rely on emerging rules of customary international law when, for example, taking cases to the Human Rights Committee, or participating in Permanent Forum sessions.

The precise content of the customary law rules indigenous peoples may be able to rely on, is explained by Siegfried Wiessner who argues that there is widespread agreement and practice, both in international and domestic law, that (a) indigenous peoples are vulnerable groups worthy of legal consideration; that (b) indigenous peoples' cultures are entitled to specific protection; that (c) they are entitled to the control and use of indigenous lands; that (d) they have the right to self-government and that (e) governments must act in good faith towards indigenous peoples and honour treaty commitments.¹³² Throughout the negotiations on the Declaration, Wiessner argues, none of the governments participating have opposed these issues – on this basis “a consensus has emerged and has been translated, with whatever imperfections, into widespread, virtually uniform state practice.”¹³³

Additionally, Torres Wick argues, many states have modified their behaviour towards indigenous peoples in response to the emerging norm.¹³⁴ Using New Zealand and Australia as examples, she says that many states are considering and granting indigenous claims to land.¹³⁵ The Nicaraguan Constitution, which seeks to protect indigenous traditions and the Panamanian Constitution, which commits the state to “establish an institution for the study and preservation of [indigenous communities] and their languages and for the promotion of the comprehensive development of Indian groups” are provided as further examples to support the emerging norm.¹³⁶ Furthermore, the Draft Declaration is relied on and referred to in top level international institutions and the United Nations has made the adoption of the Draft a priority of the International Decade of the World's Indigenous Populations (the failure to finalise the Draft Declaration,

¹²⁹ See Anaya, above n 5, 50, 56 where he argues: “[t]he claim here is not that each of the authoritative documents referred to can be taken in its entirety as articulating customary international law, but that the documents represent core precepts that are widely accepted and, to that extent, are indicative of customary law.”; see also Wiessner, above n 3, 109 and Foster, C, “Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples” (2001) 12 (1) *EJIL* 141, 157.

¹³⁰ See Anaya, above n 5, 49-58.

¹³¹ See Anaya, above n 13, 49-58; see, also, Mackay, F, “Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous peoples” [2002] 17 *Am U Int'l L Rev* 527, 536; see Wiessner, above n 3; Torres Wick, above n 1, 127; and Iorns-Magallanes, above n 5, 238.

¹³² Above n 3, 109.

¹³³ *Ibid.*

¹³⁴ Above n 1, 127, 137 145, 158-63; and see Torres Wick, R, “The Rights of Indigenous Populations: The Emerging International Norm – Revisiting the Emerging International Norm on Indigenous Rights: Autonomy as an Option” (2000) 25 *Yale J Int'l L* 291, 296, 299.

¹³⁵ Although see above n 1, 139, 291, 296; where Torres acknowledges that indigenous groups may be dissatisfied with the land set aside for them by the state.

¹³⁶ Above n 1, 127, 159.

should not, Torres Wick argues, obscure the progress made towards codifying a norm on indigenous rights).¹³⁷

The establishment of the Permanent Forum (at a higher level in the United Nations hierarchy than the Working Group) is another example of the growing importance of indigenous issues within the United Nations system and the international community's recognition that indigenous peoples must participate in making decisions about the standards designed to apply to them.¹³⁸ Similarly, written and oral statements made by governments during Working Group sessions and Permanent Forum sessions are provided as examples of customary norms.¹³⁹

Customary international law: A brief overview and criticism

Customary international law consists of state practice and *opinio juris sive necessitatis* (the belief by states that it is an international obligation).¹⁴⁰ Historically, it was the main source of law to guide international relations and despite its longevity, its content, scope, meaning and operation is not settled.¹⁴¹

As explained by the International Court of Justice, for a practice or custom to become customary international law "...not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."¹⁴²

There are a number of difficulties with the concept of customary international law, particularly with respect to states' beliefs and practices in the area of indigenous human rights. For a rule (or norm) to be customary law, then firstly, enough states must believe that it is the law and then put that belief into practice. Even if it is accepted that there is widespread agreement and practice, both in international and domestic law, in the main areas identified by Wiessner and Torres, (the specific protection of indigenous cultural rights; indigenous land rights; economic and social welfare; self-government and honouring treaties),¹⁴³ to what extent does widespread agreement and practice amount to a "settled practice" as defined by the International Court of Justice?¹⁴⁴

What happens, for instance, when states, as is so often the case, do and say different things? The statements governments make in Working Group and Permanent Forum sessions (and before the various Treaty-based committees) often contradict the reality for indigenous peoples at home – they are not good examples of actual state practice. As one indigenous delegate commenting on Canada's recent report to the Human Rights Committee, points out, "...the government reports are very self-serving...and in my

¹³⁷ Above n 134, 291, 294.

¹³⁸ See Iorns-Magallanes, above n 5, 239.

¹³⁹ See Anaya, above n 5, 56.

¹⁴⁰ Dunworth, T, "The Role of Customary International Law in New Zealand", (Draft Paper), Faculty of Law, University of Auckland, 12 June 2003, 3.

¹⁴¹ Ibid 2; see, also, Jennings & Watts (eds), *Oppenheim's International Law* (9th ed 1996), 25 and Anaya, above n 5, 50, where he quotes Professors McDougal, Laswell, and Chen who explain customary law is "...generally observed to include two key elements: a 'material' element in certain past uniformities in behaviour and a 'psychological' element, or *opinio juris*, in certain subjectivities of "oughtness" attending such uniformities in behaviour"; see, also, Brownlie who says "...the material sources of custom..." include "diplomatic correspondence, policy statements, press releases...comments by governments on drafts produced by the International Law Commission,...recitals in treaties and other international instruments, a pattern of treaties in the same form, practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly."; from Brownlie, I, *Principles of Public International Law* 88-91 (4th ed. 1990), 5.

¹⁴² *North Sea Continental Shelf Cases* (1960) ICJ Reports, para 77; see, also, Article 38(1) of the Statute of the International Court of Justice (and in particular Article 38(1)(b) which defines customary international law as "international custom, as evidence of a general practice accepted as law").

¹⁴³ Above n 1, 158-63.

¹⁴⁴ *North Sea Continental Shelf Cases* (1960) ICJ Reports, para 77; see, also, above n 140, 4.

experience, the governments have never vetted any of their reports which comment on the status of the rights of indigenous peoples with the indigenous peoples' organizations. One would suppose, to read the periodic reports of the government of Canada to the two committees responsible for the implementation of the Covenants, that the indigenous peoples in Canada are the happiest and luckiest people in the world!"¹⁴⁵

Furthermore, a government's approach to indigenous peoples rights can vary from year to year depending on the domestic political climate. Australia, for instance, under the Labour Keating government, briefly considered accepting the inclusion of the right to self-determination, albeit with some limitations.¹⁴⁶ Under the conservative Howard government, Australia now advocates for the deletion of all references to the right of self-determination in the Declaration.¹⁴⁷

What about state practice which is inconsistent with the emerging rules? At what point does the inconsistent practice become the exception to the rule? Have we reached the stage in international law where conduct which is inconsistent with the customary norms identified by Anaya, Wiessner and others, can be treated as a breach of customary international law?

Adherence to the customary norms, surely must be widespread, uniform and settled before it can constitute customary international law. However, important states, such as the United Kingdom and the United States, do not participate in Working Group and Permanent Forum sessions, and the expectation is that they will not support the adoption of the Declaration, once it is agreed, because they do not recognise group rights.¹⁴⁸

Even in states, such as New Zealand, where government delegates have made statements supporting a Maori right to self-government and control of Maori lands, Maori interests and responsibilities with respect to the environment and our ancestral lands, are not well protected, despite legislative recognition in the Resource Management Act 1991.¹⁴⁹ Recent cases such as *Beadle v Minister of Corrections*, illustrate that Maori cultural and spiritual concepts (such as taniwha (spiritual and environmental guardians)) and the relationship with kaitiakitanga (or guardianship) are not understood by the domestic courts and consequently are not protected.¹⁵⁰ In Australia, aboriginal lands in Woomera, Kokartha, Bangarla and Kuyani (Central Australia) have been designated as the preferred site for a radioactive waste dump, without the consent of the traditional aboriginal owners of the land.¹⁵¹ In Hawaii, increased militarisation of land since 11 September has destroyed indigenous sacred and cultural sites, and approximately 23,000 acres of indigenous Hawaiian land has been acquired by the United States for military purposes, including training and live firebombing.¹⁵² In other areas, such as the Chiapas region of Mexico, sporadic armed encounters continue to erupt between indigenous peoples and Paramilitary groups.¹⁵³

Why the recognition of an unqualified right of self-determination is essential

What is clearly in dispute, with respect to the recognition of customary law rules, is the scope and meaning of the right of self-determination in the context of indigenous peoples' rights. As already discussed in part one, in the context of the Declaration, serious disagreements exist between states and indigenous peoples

¹⁴⁵ Moses, T, "Self-Determination and the Survival of Indigenous Peoples" in Aikio (eds), above n 38, 171.

¹⁴⁶ See Iorns-Magallanes, above n 5, 241.

¹⁴⁷ Ibid 241-242.

¹⁴⁸ See Torres Wick, R, above n 134, 291, 299; where she acknowledges that even those states who have accepted the norm continue to violate indigenous rights but these violations, in her view, do not negate the existence of the norm. The fact that the media often reports them for example, indicates that they constitute breaches of an accepted standard.

¹⁴⁹ See Resource Management Act 1991, (RS 32), sections 6-8.

¹⁵⁰ See *Beadle v Minister of Corrections*, (Environment Court Decision), A074/2002, 8 April 2002; see also the Waitangi Tribunal's comments in WAI 304, *NgaWha Geothermal Report*, Chapter 8.5.2, where the Tribunal criticises the scope and application of the Resource Management Act 1991.

¹⁵¹ Pacific Caucus Statement to the Permanent Forum on Indigenous Issues, Second Session, 12-23 May 2002.

¹⁵² Ibid.

¹⁵³ Above n 134, 291, 299;

about the right of self-determination, based predominantly on the fear of some states that the recognition of self-determination has the potential to fracture state boundaries.¹⁵⁴ How to define indigenous peoples, the formulation and recognition of indigenous group rights and the finalisation of a “catalogue of indigenous rights”, such as the Declaration, are issues which are also in dispute.¹⁵⁵

There is evidence that some states support the limited right of internal self-determination or self-government, provided there is no right to secession.¹⁵⁶ This more limited formulation of the right to internal self-determination includes the right to maintain and promote indigenous peoples’ interests through parallel political institutions and indigenous participation in existing power structures.¹⁵⁷

The limited recognition of the right of self-determination is unacceptable to many indigenous peoples.¹⁵⁸ The right of peoples to self-determination, as it has evolved from the UN Charter and from the practice of the United Nations, is one of the essential principles of customary international law.¹⁵⁹ The argument of some states, that international boundaries must not be disturbed and self-determination claims can only be exercised within the territorial boundaries of existing states, is not a particularly strong one for refusing to accept Article 3 of the Declaration in its current form. The argument that political instability and violence could result from the recognition of the right of self-determination, because indigenous microstates may attempt to gain control of land and resources to support ourselves, tends to ignore the fact that we are all bound by international human rights standards when exercising our rights. Furthermore, in most cases, indigenous groups do not want to secede from the state in which we live.¹⁶⁰

This inclusion of an unqualified right of self-determination, using the same wording as Article 1 of the ICCPR and ICESCR, is an essential step towards ensuring indigenous peoples’ survival. First, it sends a clear signal from the international community that indigenous peoples are entitled to the full range of human rights protections, without discrimination; second, it recognises the fundamental importance and difference of indigenous cultures and ways of living and provides protection for the continuation of an indigenous way of life; third, it indicates states’ (and the international community’s) realisation that established dominant political, social and cultural structures have not, and in most cases do not, serve

¹⁵⁴ Ibid 291, 299.

¹⁵⁵ Above n 3, 117.

¹⁵⁶ See Macklem P, *Indigenous Difference and the Constitution of Canada* (2001) 36; where he discusses the unsuccessful Belgium initiative to extend the principle of self-determination from separate colonies to groups within states. In response to the Belgium initiative, the Declaration on the Granting of Independence to Colonial Territories, GA Res 1514, 15 UN GAOR Supp. (No 16), UN Doc A/76218 (1969) was passed by the General Assembly. The Declaration restricted the right of self-determination to overseas colonies, stating that “any attempt at partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations.” (GAOR 15th session, Supplement 16,66), referred to in Macklem (2001) 36; see, also, Barsh, R, “Indigenous Peoples and the Right to Self-Determination in International Law” in Barbara Hocking (ed), *International Law and Aboriginal Human Rights* (1988) 68.

¹⁵⁷ See Macklem, *ibid* 37; see, also, Franck, T, “The Emerging Right to Democratic Governance”, (1992) 86 *Amer.J Int’l L* 46; see also *Reference re Secession of Quebec* [1998] 2 SCR 217.

¹⁵⁸ Personal Observations, Second Session, Permanent Forum on Indigenous Issues, 13 May 2002, (notes on file with the author).

¹⁵⁹ The *Case Concerning East Timor (Portugal v Australia)* (20 June 1995) ICJ 90, 102; and see Article 192 of the United Nations Charter, which lists the principle of self-determination as one of the purposes of the United Nations; Article 55 of the Charter calls for the promotion of social and economic goals which promote peaceful and friendly relations between nations based on respect for the principle of equal rights and self-determination of peoples. Article 1 of the ICCPR provides that “[a]ll peoples have the right of self-determination... [and to] freely determine their political status and freely pursue their economic, social and cultural development.” Self-Determination has been recognised as a right by the International Court of Justice in *Namibia* [1971] ICJ 16, 31; and *Western Sahara* [1975] ICJ 12, 31; see Macklem, *above n* 156, 35.

¹⁶⁰ As Moana Jackson has pointed out (with respect to Maori) “[w]here would we secede to?” See *above n* 4; other indigenous groups recognise that territorial independence, without an adequate resource and economic base, would not, at present, be in their best interests; see *above n* 1, 163; see, also, Buick-Constable, J, “A Right of Self-Determination for Indigenous Peoples in International Law” [2003] 6 *Human Rights Law and Practice* 226, 229.

indigenous peoples well. If this recognition requires states, in time, to fundamentally change their political and territorial arrangements so that all people can effectively contribute to, and benefit from, our society, then this should occur.

The continued failure of states to actively promote and enhance indigenous peoples' rights and interests, in conformity with the international law emerging norms and standards may justify indigenous claims for external self-determination - that is, full recognition of the right, including the right to secede.¹⁶¹ As the comments of Madame Erica-Irene Daes illustrate: "...[o]nce an independent [s]tate has been established and recognised, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new [s]tates. This requirement continues unless the national political system becomes so exclusive and non-democratic that it can no longer be said to be representing the whole people" and "...at that point, and if all international and diplomatic measures fail to protect the peoples concerned from the [s]tate, they may perhaps be justified in creating a new state".¹⁶²

Conclusion

There are many avenues for indigenous peoples to consider when seeking to enhance and protect our human rights in the international human rights arena. The range of declarations, treaties, jurisprudence and international bodies, such as the Permanent Forum, can be utilised by indigenous peoples to advance indigenous issues on the international stage. Some of the rules and guidelines emerging from the work being undertaken in these fora may in some instances constitute customary international law rules about minimum standards which apply in the area of indigenous peoples' rights.

However, we cannot afford to become complacent in the area of international law as it is developing with respect to indigenous peoples. There are problems with defining the scope, content and application of customary international law, which has led some writers to suggest that it should be marginalised, if not eliminated altogether.¹⁶³ In the area of indigenous peoples' rights, the rules of customary international law, identified by Wiessner, Torres and others, are honoured more in the breach than the observance.¹⁶⁴ Indigenous peoples throughout the world continue to suffer the worst human rights abuses.¹⁶⁵ This is particularly true for the majority of the world's indigenous peoples who live in rural environments, and who are adversely affected by development projects and the activities of multinational companies.¹⁶⁶

Undoubtedly, progress has been made in the area of international law and indigenous peoples' rights - the establishment of the Permanent Forum is evidence of this, but as the Special Rapporteur on the Situation of Human Rights and Indigenous Peoples has recently pointed out:¹⁶⁷

Whilst indigenous peoples have made important advances in recent decades, they are still considered second-class citizens whose needs and aspirations are seldom taken into account by the powers that be. They are often denied effective political participation in Government and the electoral system,

¹⁶¹ See UN Committee on the Elimination of Racial Discrimination comments (General Recommendation XXI (48)) that although international law has not recognised a general right of peoples unilaterally to declare secession from a state, this does not rule out "...the possibility of arrangements reached by free agreements of all parties concerned", quoted in Thornberry (2000) 53.

¹⁶² Madame Erica-Irene Daes, (ex) Chairperson of the Working Group on Indigenous Populations, Explanatory Note concerning the Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/26/Add.1 (released 19 July 1993) and quoted in Macklem, below n 164 at 38.

¹⁶³ See for example, Kelly, "The Twilight of Customary International Law" (Winter 2000) 40 *Virginia Journal of International Law* 449-553.

¹⁶⁴ See above n 3.

¹⁶⁵ Stavenhagen, R, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (21 January 2003) UN Doc E/CN.4/2003/90, 24.

¹⁶⁶ Ibid 5; see, also, Arundhati, R, *The Cost of Living* (1999) 20, where she discusses Dam building projects in India which have displaced 50 million people from their homes and land.

¹⁶⁷ Above n 165.

and their concerns are hardly being met by established political parties. Nor have local and national power structures been favourable to the empowerment of indigenous peoples. If their human rights are to be effectively protected, they must be able to participate freely as equal partners and citizens in the decision-making processes that affect their future survival as specific peoples.

Essential to our future survival as peoples, with our own political and economic systems and ways of doing things (in the context of international law), will be the adoption of the Declaration with Article 3 intact, and the subsequent strengthening of the role of the United Nations bodies and mechanisms which focus on indigenous issues and which, at present, have limited power (the Permanent Forum and Working Group, cannot, for example, consider specific allegations of breaches of group indigenous rights).

The reasons why the adoption of the Declaration is essential in order to strengthen the role of the United Nations bodies which focus on indigenous issues and to ensure progress towards the achievement of indigenous goals generally, is discussed in part three. I also discuss the reasons why proposals to change the wording of the Declaration should be carefully considered (if not resisted) by indigenous peoples participating in international human rights law fora.

Challenges to the emerging norm

Introduction

The range of international law avenues available to indigenous peoples seeking to remedy human rights abuses, combined with the emergence of possible customary rules of law to guide the behaviour of states and international institutions, suggests that, despite the serious human rights abuses that indigenous peoples continue to suffer, international law is contributing to the "...slow but steady achievement of indigenous goals".¹⁶⁸

This slow, but steady progress towards recognising and implementing indigenous peoples' goals is under serious threat, as long as the Declaration remains in draft form, and for as long as states continue to threaten the survival of the Working Group.¹⁶⁹

Some indigenous peoples are fearful that if the Declaration is not adopted by the end of the International Decade, the Declaration's credibility will be undermined and this will lead eventually to its abandonment.¹⁷⁰ States contribute to this fear by presenting the Declaration's lack of progress within the United Nations system as though indigenous peoples are at fault – forgetting that indigenous peoples have very little power within the state-centred United Nations system.

The approaching end of the International Decade, combined with increased pressure from states to agree to changes to the Declaration, recently led some members of the Indigenous Caucus¹⁷¹ attending the Permanent Forum's second session, to question the "no change" position to the Declaration which has previously been maintained by indigenous delegates attending Intercessional Working Group sessions.¹⁷² Some indigenous peoples argue that the no-change position is unreasonable and unsustainable in the face of continued state opposition to the Declaration. Furthermore, it is argued that the no-change position

¹⁶⁸ Above n 1, 165.

¹⁶⁹ See *infra* n 172 and accompanying text.

¹⁷⁰ See *infra* n 188.

¹⁷¹ The Indigenous Caucus is made up of all of the indigenous delegates attending the Permanent Forum, Working Group and Intercessional Working Group sessions.

¹⁷² Chakma, Suhas, "Draft Declaration on the Rights of Indigenous Peoples: The Damp Squib of the International Decade" (December 2002) available at www.aitpn.org (last visited 12 June 2003); and Notes from the Second Session of the Permanent Forum on Indigenous Issues (12-23 May) United Nations Headquarters, New York (on file with the author).

is contributing to the loss of goodwill and support from states (such as Denmark, Finland and Norway) who have previously indicated support for the Declaration in its current form.¹⁷³

The significance of the Declaration

Purely from an editing perspective, there may be room for improvement in the way a document is worded, and proposals to strengthen and improve the Declaration text may be welcome by some indigenous peoples (but certainly not all).¹⁷⁴ But, indigenous peoples' responses to proposals to change the wording of the Declaration must be carefully considered, both in terms of strategy (whether the Indigenous Caucus should continue to maintain a no-change position) and generally, in terms of how to respond to states' proposals to make substantial changes to the Declaration.

The abandonment of what is described as "...the long held [Indigenous] caucus position", which is to refuse to accept changes to the Declaration, is potentially dangerous because it is likely to encourage more state opposition to the Declaration and close "what once were solid spaces of support".¹⁷⁵ Indigenous peoples' success at maintaining the no-change position, during Intercessional Working Group meetings (and at the 2003 Permanent Forum session) has generated considerable state support for the Declaration.¹⁷⁶ In support of indigenous peoples' position, Mexico and Guatemala have consistently rejected proposed changes to the text, and more states are vocal in their support of the Declaration, than those who vocally advocate for change.¹⁷⁷

Unfortunately, the growing uncertainty within the Indigenous Caucus on the no-change position, has led previously supportive states to question why they should continue to oppose changes to the Declaration, when some indigenous delegates are prepared to accept them.¹⁷⁸

If indigenous delegates are prepared to enter into negotiations about changes to the Declaration (and this should only occur after widespread consultation with the indigenous groups indigenous delegates represent and are accountable to) then, as has been suggested by indigenous delegates, the question to put to those states proposing changes to the Declaration which should guide negotiations are: "What changes" and "Why should we consider accepting them"?¹⁷⁹

In particular, states proposing changes should show that the changes meet the tests formulated by indigenous peoples involved in drafting the Declaration. Mick Dodson, for example, has suggested that proposals to change the Declaration should only be considered if they (a) are necessary, (b) actually strengthen or improve the original text, and (c) are consistent with international standards of equality and non-discrimination.¹⁸⁰

Agreeing to consider changes simply to show goodwill, or because the International Decade is almost at an end, are not principled reasons for considering substantial amendments to a Declaration which took twelve

¹⁷³ Ibid.

¹⁷⁴ See *Conclusions and Recommendations of the Indigenous Peoples' Meeting on the United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen, Denmark, 3-5 May 2003, where it is noted: "...engagement of Indigenous peoples on any revision [of the Declaration] neither constitutes an endorsement of the revision, nor a waiver of their right to accept or reject the final Draft Declaration as a whole".

¹⁷⁵ "Another Perspective on the Progress Towards Adoption of the Draft Declaration for the Rights of Indigenous Peoples", presented for discussion by the International Indian Treaty Council, 25 March, 2003, 2; (on file with the author), 8.

¹⁷⁶ The Declaration is referred to by high-level agencies within the United Nations, and in the jurisprudence of states (such as the Waitangi Tribunal).

¹⁷⁷ Above n 175, 8.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid; I am grateful to Tracey Whare, (Aotearoa Indigenous Rights Trust), for her discussion on these points.

¹⁸⁰ Ibid.

years to draft. Furthermore, state-proposed changes to the Declaration, so far, have not met the test outlined by Mick Dodson. The majority of state-proposed changes actually diminish the text and pave the way for states to suggest major amendments to the Declaration. In the last Intercessional Working Group meeting in December 2002, Norway's proposal to amend the Article 3 right to self-determination (presented as a minor change), allowed other states to propose major changes to Article 3. The United States, for example, proposed the insertion of the term "internal" self-determination and Australia proposed the deletion of the term "self-determination" from the text of the Declaration entirely.¹⁸¹

The breakdown in the unity of the Indigenous Caucus on whether to maintain the "no-change" position, was noted by states, and this encouraged these proposals. In light of this experience, indigenous delegates warn:¹⁸²

...Indigenous delegations that believe that they can further adoption of [the] declaration by showing flexibility and good will and accepting "minor" changes proposed by "friendly" states need to address the possibility that, by doing so, they risk encouraging a snowball of proposals that no one can accept. In the current process [indigenous peoples] have very little ability to halt such proposals once the door has opened. They become part of the historical record and a part of the growing "annex" of proposed changes, most of which stray far from the current text.

Certainly, indigenous delegates are spending valuable time and resources attending Intercessional Working Group and Permanent Forum sessions, defending the Declaration and continuing to advocate for its adoption before the end of the International Decade. As long as our efforts are diverted to this work, we lose valuable time which could be better spent, for instance, developing and strengthening the other areas of human rights law that will emerge once the Declaration is adopted by the General Assembly.

Strengthening the Permanent Forum

The Permanent Forum has called for the adoption of the Declaration before the end of the International Decade and it has recommended that the International Decade be extended for a further ten years, to continue the work that has begun throughout the United Nations on indigenous issues.¹⁸³ The indigenous Permanent Forum members continue to advocate for the adoption of the Declaration in its current form, reminding us not to forget (and to protect) the twenty years of work that has already gone into the Declaration.¹⁸⁴

The Declaration, in its current form, provides a valuable comprehensive framework to guide the work of the Permanent Forum, but its adoption is essential in order to "...usher in a new international legal order, one in which indigenous peoples would no longer be denied the right of self-determination simply because they live within existing state structures."¹⁸⁵

This new legal order could include the establishment of a complaints procedure to investigate specific breaches of the Declaration. The Permanent Forum's mandate could be strengthened to empower it to consider and investigate specific complaints, to receive periodic state reports on the measures taken to remedy breaches of the Declaration rights and to enhance and protect those rights – all with the aim of assisting and promoting enforcement and recognition of indigenous human rights at the domestic level.

Not surprisingly, some states have reacted angrily to the suggestion that the Forum's mandate should be extended to investigate specific cases of abuse. Chile has argued that, to avoid overlap and inefficient

¹⁸¹ Ibid.

¹⁸² Ibid 2.

¹⁸³ See *infra* n 188.

¹⁸⁴ Above n 41.

¹⁸⁵ Above n 156, 38.

resource use, the Human Rights Committee is the proper forum for considering specific cases of alleged abuses of human rights, not the Permanent Forum.¹⁸⁶ Overlap occurs, however, between institutions in other areas of the United Nations, women, for example, can submit a discrimination complaint under the Optional Protocol to the ICCPR or the Optional Protocol to the Women's Convention.

Conclusion

This paper has explored some of the international law fora where indigenous rights can be addressed, with a particular emphasis on the United Nations' newest creation with respect to indigenous rights – the Permanent Forum on Indigenous Issues. It has also discussed some of the problems that hinder the work of indigenous peoples to implement and protect our human rights in the area of international human rights law, such as the refusal of some states to accept that indigenous peoples are entitled to the right of self-determination, and the threats to the Declaration in its current form.

Perhaps the most crucial question to ask in the context of a discussion about indigenous rights and international law, is what practical and useful outcomes (if any) can we hope to achieve in these fora? Is our time well-spent working to prepare statements which contradict governments, or generally raising issues on the international stage which concern us? What can we hope to achieve by submitting cases to international bodies, such as the Human Rights Committee and Women's Committee, who, although their members are experts in the area of international human rights law, may have no grasp of indigenous concepts (for example, tikanga Maori concepts such as kaitiakitanga and whakapapa).¹⁸⁷ Finally, and perhaps most importantly – why should we participate at the international level when there is so much work to do at home?

These are the questions which most concern me, when I think about the value of international human rights law, particularly when valuable time and resources are spent in United Nations meetings, such as the Permanent Forum, deliberating over issues which indigenous peoples see as obvious and easy to resolve – such as whether indigenous peoples should staff the Permanent Forum Secretariat, or whether indigenous youth can participate in the Permanent Forum sessions.¹⁸⁸ These deliberations can be very frustrating for indigenous peoples, many of whom have worked for years to seek justice and the full recognition of indigenous human rights – in the domestic and international arena.

Ultimately, indigenous peoples will continue to advocate for the protection of our rights and responsibilities, in as many places as possible, utilising as many tools as possible in our efforts to realise our collective right of self-determination and all that it could entail.

Indigenous peoples - as distinct and vibrant cultures, with our own social, political and economic aspirations and way of doing things - have survived, despite the impact of colonisation and (in New Zealand) the continuing breaches of te Tiriti o Waitangi. Although the progress towards achieving our right of self-determination is slow, the realisation of our full rights of self-determination is inevitable as long as we continue to work at home and in the international sphere for the full recognition of our fundamental human rights.

¹⁸⁶ The government representative was responding to allegations that the Chilean Government was responsible for ethnocide and genocide of indigenous peoples in its acquisition of land for a hydro-electric project; see Press Release HR/4598, "Permanent Forum Reviews Impact of UN System Activities on Indigenous Peoples" (20 May 2002) 2, at <http://www.un.org>, (last visited on 23 April 2003).

¹⁸⁷ Tikanga Maori can be translated as a flexible set of laws, practices and principles which have been handed down by tupuna (ancestors) and establish the correct way to live in harmony with one another and the environment; "Tika" is also used to refer to the right or correct way of doing or saying something. Whakapapa can be described as a web of relationships, connecting and binding us to our tupuna, each other and to the environment.

¹⁸⁸ Personal Observations, Second Session, Permanent Forum on Indigenous Issues, 13 May 2002, (notes on file with the author).

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Collective Rights For Indigenous Peoples: Do They Pose Any Difficulties In Relation To Individual Rights?

Julian Ludbrook¹

Introduction

One of the key distinguishing features of indigenous rights is the underlying importance of “collective rights”. Yet there has been considerable debate about whether at international law there are such things as “collective rights”? Are they merely rights described collectively but taking their meaning ultimately from their derivability from individual rights? Or if they have any form of distinct existence, can or should one refer to them as “rights” at all? Or at least as “human” rights? For the key focus of “human” rights law is to protect the human individual from the abuse of the group or collective, most often in the form of wider society. Might recognition of collective rights not therefore threaten to undermine individual human rights?

This paper seeks to examine the nature and purpose of collective rights in relation to indigenous peoples. It identifies those rights most commonly viewed as collective ones and refers briefly to the range of theoretical commentary relevant to the nature of collective (and individual) rights. However, its focus is less on the theoretical debate about the nature and existence of these rights and more on the nature and extent of the tension which might exist between them, and how that tension might be reconciled and dealt with in a way that is consistent with international human rights practice. It seeks to examine this tension, and solutions for it, in relation to concrete cases which have already arisen in domestic and international jurisprudence. And it seeks to clarify the issue of whether, in such a situation, individual rights have necessarily “trumped” collective rights.

The conclusion drawn is that collective rights, carefully drawn, need not be antithetical to individual human rights but that tensions can, and indeed are quite likely to, arise where competing interests come into conflict. However, in the same way that, in the human rights area, there can be a need to weigh or balance competing rights or interests in order to determine the shape of a particular solution, so too in any situation of tension between collective and individual rights.

For this reason, it is important that collective rights not be seen as absolutes but as rights or interests to be weighed alongside other competing interests. Care is needed not to suggest that individual rights will necessarily take primacy ahead of collective rights, since this presumes a result absent a prior examination of the competing interests. But care will always be needed to weigh very carefully any situation where a collective interest or right is judged to warrant overriding an individual right.

What are “collective rights”?

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Most of modern international law is founded on the notion of individual human rights, having grown out of the experiences of the two world wars early last century. But, following the First World War, one of the key features was in fact the protection, within the structure of the League of Nations, of various minorities in some of the defeated states and in central and northern Europe. The focus was therefore at that point arguably more on collective rights associated with these minorities than with individual human rights.

But there was some concern following the Second World War that the emphasis on minorities had proved misplaced in elevating their collective interests within existing states and fuelling some of the nationalist sentiments that played a key part in the lead up to the Second World War.

In the aftermath of that war, and driven by the gross abuses of human dignity and self-respect that occurred during it, but drawing also from the era of decolonisation and recognition that all people regardless of race or religion should enjoy equal rights, the latter half of the 20th Century saw the development of a successive range of far-reaching instruments recognising individual human rights. Never again should any individual have his or her rights subjugated to the purposes of the state or the broader community of which that individual forms a part. In all of these new instruments, the focus is almost exclusively on the recognition of and supremacy of individual human rights. There is just one major exception.

This is the right of self-determination,² which by its nature is a right that can only really be enjoyed by a group of individuals judged to constitute a people, therefore more accurately seen as a collective right.³

This collective right was recognised primarily in relation to the right of colonised people collectively to determine their own political future, whether as an independent state, as a self-governing state in free association with another, or as part of the state of which they formed a part at the time of exercising their right. However, it was also seen as a right that existed in respect of a people within a territory occupied by another but foreign power.⁴ It was additionally seen as applicable to a people within a state where a system of apartheid was being practiced.

The right has not been seen, however, as applicable to minorities within a state. Indeed, Article 27 of the ICCPR deliberately referred to the right there of minorities as a right of individuals, in community with others, to enjoy their culture, use their language and practice their religion. There is considerable commentary on the rights of minorities but it seems clear that the international community has, in the aftermath of the Second World War, trodden very carefully in this area so as to avoid promoting a situation where recognition of the collective rights of minorities could lead to the fragmentation and breakdown of existing states.

Similar caution has of course been evident in relation to the treatment of indigenous peoples. The latter have argued for a right of self-determination at the same level as the right accorded to other “peoples”. However, states have opposed an approach which could be interpreted as allowing indigenous peoples, through exercise of such a right, the option of secession from an existing state.

There has instead been talk of a distinctive “internal” right of self-determination whereby indigenous people within a state would be recognised as having the right collectively to determine their future within

² This is enunciated in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – referred to as “ICCPR” and “ICESCR” respectively.

³ It has been recognised as a collective, not an individual, right, by the Human Rights Committee and, because of this, is not able to be the subject of individual complaint under the individual complaint procedure under the First Optional Protocol to ICCPR – see, eg, the decision of the Human Rights Committee in *Kitok v Sweden* (Report of the Human Rights Committee, UNGAOR, 36th Session, Supp No 40, Ann 18, UN Doc A/36/40/1981).

⁴ See, eg, the language in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.

that state. There is however no accepted right of internal (or other) self-determination for indigenous peoples. This is though one of the issues under discussion in the negotiation of the draft Declaration on the Rights of Indigenous Peoples.⁵

Aside from the right of self-determination, there are a number of other collective rights commonly referred to in general commentary. Most of these arise in relation to indigenous peoples and minorities (eg their right to culture and language). But they also arise in relation to what are often generally referred to as “third generation” human rights. These encompass the aforementioned collective rights of minorities and indigenous peoples. But they also encompass other more recent so-called and also less settled “human rights”, such as the right to development and the right to the environment.

Given that these latter “rights” are stated at a very general level and are still very much in a stage of evolution, I do not propose to dwell on them. However, knowledge of their lack of clarity and status does remind us that the status of collective rights in international law generally remains rather undefined and uncertain. There is also a question as to whether, even if one accepts their existence as separate from individual human rights, they should be termed “human rights”. Leaving that question to one side, reference to “collective rights” is probably most advanced in relation to indigenous peoples.

Thus, the draft Declaration on the Rights of Indigenous Peoples contains a number of Articles which seek to accord recognition to collective rights, namely rights enjoyed by the collectivity of the indigenous people rather than merely by each individual. The draft is just that, since it has never been agreed or adopted by governments. At the same time, there does appear a willingness on the part of most governments to accept the notion of collective rights, if appropriately elaborated and as necessary qualified by reference to their relationship to individual rights. This is made easier for some by the fact that in their national law they already accord some measure of recognition to “collective rights”. I shall examine some of the domestic and international jurisprudence relevant to collective rights in this area, and as identified but not yet agreed in the draft Declaration, later in this paper.

One of the difficulties with collective rights, however, is that it is often difficult to disentangle the individual and the collective nature of the interest. This is because for most collective rights, the actual exercise of that right will in some measure devolve down to the individual. This then raises the question of how useful it is to talk of a “collective right” as if it is distinct from an individual right. The more fundamental difficulty, however, is that collective rights are often seen as anathema to individual human rights.

Theoretical debate

Some writers have thus opposed the notion of collective rights altogether on the basis that they go to the root of, and threaten to undermine, individual human rights.⁶ Others have sought to address the issue by examining the nature of the claimed collective right and breaking the right down to those situations where it is derivable back to the individual and those situations where it is not so derivable. Where it is derivable back to the individual,⁷ then it is little different from the situation of other individual human rights,⁸ and all can be put in the melting pot together and assessed one against the other.

⁵ The draft Declaration is currently under discussion by the Working Group on the draft Declaration on the Rights of Indigenous Peoples in Geneva.

⁶ See J Donnelly, *Universal Human Rights Theory and Practice* (Cornell University Press, Ithaca, 1989).

⁷ See Peter Jones’ “collective conception” of rights (Jones, Peter “Human Rights, Group Rights and People’s Rights” (1999) 21 *Human Rights Quarterly* 80) and also Will Kymlicka’s notion of “special rights” (Kymlicka, Will “Individual and Community Rights”, ch 1 of Judith Baker (ed) *Group Rights* (University of Toronto Press, 1994).

For those who do acknowledge that the right is not derivable back to the individual, but instead exists specifically to protect the interest of the group as a collectivity against other groups or the wider community, the mechanism for assessing that right or interest against other rights (eg individual or group) is more difficult.

Applying these ideas to some concrete examples, it does indeed seem that a lot of the collective rights claimed for indigenous people (self-determination aside) may be said at first sight to be derivable back to the interest of the individual. Thus, a right to use one's language or to practice one's culture is a right which, once described, is one that each individual in the collective can exercise individually. So also with other rights often seen as collective, such as the right to fish or hunt in traditional areas. It is true that many of these rights are only meaningful if others in the community can themselves also exercise them. But they could perhaps be expressed, as already in Article 27, as a right to be exercised in community with others, rather than as a collective right per se.

Are there though other rights which can only be exercised by the collectivity? Or at least which have an element that can only be exercised by the collective?

One example of this in some aboriginal communities might be land and resources. For here, where communal title is recognised and accepted, the individual has no right to the title in the land. The exercise of the right can only be assumed and exercised by the collectivity, according to the decision-making structures which that community employs and which are accepted in the particular legal jurisdiction.

And even in the case of rights to language or culture, or hunting and fishing, it seems likely that there may be an element of these rights too which are communal in nature. The fact is that the community may have a collective interest in the form and use of the language or culture, or the manner of exercise of the hunting or fishing right. Furthermore, the right cannot be satisfied merely by the provision of language teaching or films of cultural activities or supplies of canned fish. The nature of the activity in such situations involves the participation of others and the manifestation through that activity, in community with others, of the group's culture.

In addition, it is also important to note that the individual is in no position to determine the nature of the rights or interests which he or she then benefits from or exercises. This is a collective task and responsibility for the community to decide according to its decision-making procedures and consistent with its own traditions and cultural practices.

In this last scenario, it does not seem useful to see the collective interest as simply derivable back to the individual interests and therefore more akin to other individual rights and interests, and therefore to be assessed alongside them. But even where that approach is taken,⁹ the individual right still takes its shape from the collective interest to which it relates and is distinct from those individual rights which are universal in character.

Further, even where one accepts that there may be a collective right or interest, this does not necessarily say anything about the weight to be accorded that collective right or interest when weighed against particular individual rights or interests. As McDonald¹⁰ observes, where these sorts of rights conflict, there is no reason to think that strategies available to deal with other conflicts of rights will not also be available to

⁸ See, also, the analysis of Michael Hartney, who suggests that all rights are ultimately derivable to the individual and that the issue is one of individual rights in respect of a collective interest rather than a collective right per se (Michael Hartney, "Some Confusions concerning Collective Rights" (1991) 4 *Canadian Journal of Law and Jurisprudence* 293).

⁹ See, eg, Michael Hartney, *ibid* n 7.

¹⁰ Leighton McDonald "Can Collective and Individual Rights Coexist?" (1998) 22 *Melbourne University Law Review* 310.

cope with these ones. He cautions against a “balancing” type of approach, due to unease least an aggregative or utilitarian-type measure be applied. He emphasises a more distributive-right based approach which allows for a qualitative, not merely quantitative, assessment of the competing rights. But he also advocates a contextual approach involving a focus on the nature of the interests grounding the rights in question.

What the theoretical analysis usefully shows up is that there are potentially three areas of tension between individual and collective rights:

- between the collective as a group on the one hand and other groups in the society, or the wider society as a whole, on the other;
- between the collective as a group and individuals outside the group; and
- between the collective as a group and individuals within the group.

Let us now turn to an analysis of some of the situations where tensions appear to have arisen and how the jurisprudence has in practice dealt with these conflicts to see what lessons may be drawn from this concerning the way in which such tensions or conflicts may be resolved.

Relevant jurisprudence

Collective group versus other groups/wider society

The major area of tension here has been in relation to the claimed right of self-determination, and what any such right might mean in relation to others within the society concerned. This concern arises principally in relation to the possible threat that might be posed by secession. However, it can also arise through the fact of differentiated treatment for one group, thereby giving rise to claims of discrimination. Discrimination is though normally pursued as an individual complaint, and we shall address those cases in relation to the second category above, of tension between the group and individuals outside it.

The issue of tension between competing group interests was nevertheless addressed at some length in the Canadian case involving possible secession by Quebec, namely *Reference re Secession of Quebec*.¹¹ In that case, you had an assertion of a right to secession that took Quebec into conflict with a number of broader interests in Canada, namely those of the federal state as a whole, the other provinces, and certain aboriginal peoples within Canada as well.

The Canadian Supreme Court alluded to four fundamental and organising principles of the Canadian Constitution relevant to the question: federalism; democracy; constitutionalism and the rule of law; and respect for minorities. These principles functioned “in symbiosis”; no single principle was defined in isolation from the others. Nor did any principle “trump or exclude” the operation of any other. The Court did not rule out the need for an accommodation of Quebec's concerns, but emphasised that it would require a process of negotiation within the framework of the Constitution and those principles to develop a mutually agreed way forward and a reconciliation of the various rights and obligations.

On the specific question of a right of self-determination at international law involving secession, if this was chosen by Quebec, the Supreme Court ruled this out on the basis that the situation faced by Quebec did not fall within either of the two accepted situations for self-determination at international law, that of a people under colonial rule or that of a people under foreign subjugation, domination or exploitation. The Court also identified a third possibility mentioned by commentators where a people is blocked from the

¹¹ [1998] 2 S.C.R. 217.

meaningful exercise of its right to self-determination internally. The Court was uncertain of the extent to which this was an accepted international law standard, but nevertheless concluded that it would not in any event apply to Quebec, outlining the history of democratic participation available to Quebec. Quebecois could not be said to have been denied “meaningful access to government to pursue their political, economic, cultural and social development”.

If Quebec had been judged able to secede, its doing so would have brought it into direct conflict with the right of the indigenous people of Quebec, the Cree, themselves similarly to determine their future direction and participation. The Court found it unnecessary to comment on this issue, but it does highlight the potential for conflicting group interests to arise. And some commentators have been very critical of the Quebecois indifference to the views of the Cree, including in a situation where the Quebecois had no historical links or claims to the northern part of Quebec, which they nevertheless wanted to take with them as part of their secession.¹²

In this case, the Court did not reject secession out of hand but rather embarked on a careful examination of the constitutional and legal issues involved, including a careful weighing of the competing interests and claims affected. This was very much a case determined against the backdrop of Canadian constitutional law and international law, respectively. But the Court's approach is indicative of the balancing and contextual sort of approach that can be taken in the search for an appropriate way forward when competing “rights” may be involved, taking into account the full range of interests involved.

Most other Canadian jurisprudence relevant to the tension between the collective Indian groups and the wider society relates to the issue of aboriginal and treaty rights. In Canada, the courts have regarded aboriginal peoples as subject to Canadian sovereignty, with Parliament being ultimately supreme. But aboriginal interests and customary laws were presumed to survive and were absorbed into the common law unless they were either incompatible with the Crown's sovereignty, surrendered voluntarily via the treaty process, or extinguished by the government.¹³ The Constitution Act 1982 went further and gave a substantial (but not unqualified) degree of constitutional protection to then existing aboriginal and treaty rights.

The case law has therefore been concerned with the clarification of the nature and extent of the recognition given to such rights. Many of the cases have arisen where these rights have been claimed as a defence to a prosecution under Canadian legislation, for example, in relation to the regulation of fishing or hunting, and where the aboriginal claimants are therefore claiming exemption from the law as it relates to all other Canadians based on their claimed aboriginal or treaty rights.

One of the most seminal cases involved a claim by Canadian Indian plaintiffs for recognition of certain aboriginal rights (in the form of title) in land. In this case, *Delgamuukw v British Columbia*,¹⁴ the provincial government challenged the claim. Thus, you had competing claims between the aboriginal group and the wider provincial government in whose borders the land claimed was to be found. The Canadian Supreme Court made no specific determination on the facts, referring the case back to the trial judge. However, it laid down a set of key tests for the determination and recognition of aboriginal title in Canada. The case is interesting for a number of reasons.

First, it clearly recognised that aboriginal title to land is held communally. In support of this, it observed that decisions with respect to that land are made by the community.

¹² Rachel Guglielmo, "Three Nations warring in the Bosom of a Single State: An Explanation of Identity and Self-Determination in Quebec" (1997) 21 *SPG Fletcher Forum of World Affairs* 197.

¹³ See *Mitchell v Minister of National Revenue* [2001] 13 C.N.L.R. 122.

¹⁴ [1997] 3 S.C.R. 1010.

Second, it recognised the distinct *sui generis* character of such title, in contrast to the traditional more Western notion of title held in fee simple. There was, the Court said, an important aspect of the continuity of the community's relationship with land over time, including into the future. The land, for so long as it was retained as aboriginal land, could not be put to uses which would destroy its value for that use (eg for hunting and fishing or for ceremonial or cultural purposes).

Third, its use was nevertheless not limited to uses to which it has traditionally been employed. This would amount to a legal straitjacket on aboriginal use.

This case, like the *Mabo v Queensland [No 2]*¹⁵ decision in Australia, is significant for its attempted description of the character of an indigenous collective right in land, as well as its recognition of that right. Additionally, it established a number of tests to be applied by the Courts in assessing whether aboriginal title was preserved or had been overridden by other considerations. For the right to such title in Canada was not seen as absolute but was subject to these elaborated criteria by which the aboriginal interest and the wider public interest might be weighed. Accordingly, while recognising a collective right to the land which was theirs, the Court also sought to elaborate a set of criteria which might in certain circumstances nevertheless justify infringement of that title by reference to wider community interests. Thus, the infringement would need to:

- further a compelling and substantial legislative objective; while at the same time
- being consistent with the special fiduciary relationship between the Crown and the aboriginal peoples.

Interestingly, the development of agriculture, forestry, mining and hydro-electric power, the general economic development of the region, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims were mentioned as objectives consistent with this purpose.

Relevant to the question of consistency with the fiduciary relationship would be:

- the exclusivity of the right to use and occupy the land. The more exclusive, the greater the need to scrutinise the nature of the infringement.
- given the right to choose to what use land may be put (mindful that any use should not destroy the ability of the land to sustain future generations of aboriginal people), the Crown's fiduciary duty might be satisfied by involvement of aboriginal peoples in decisions about their land; and
- given the economic component of land, compensation may be relevant to the question of justification as well.

In this case one sees the recognition of a particular collective right (in this instance, to title in land). But one sees also a qualification by the court, taking into account the broader interests of the state as a whole, to underline that such rights are not absolute but that any infringement of such rights must be assessed according to clearly established criteria laid out by them.

This is seen also in a series of cases related to aboriginal and treaty rights in areas other than land. The courts there have elaborated a series of tests to determine:

¹⁵ (1992) 175 C.L.R. 1.

- whether the rights claimed were aboriginal or treaty rights;
- whether the rights had been extinguished;
- if they were aboriginal rights which had not been extinguished, whether the legislation in question infringed those rights; and
- if it did so, whether there was a sufficient justification for such infringement.

The justification test developed by the courts is similar to that mentioned above, as enunciated in *R. v. Delgamuukw*, namely does the legislative objective justify the infringement and does the legislative action meet the responsibility of the Crown to aboriginal peoples as part of its special trust relationship. Thus,

- does the infringement further a compelling and substantial objective?
- has there been as little infringement as possible in order to effect the desired result?
- in a situation of expropriation, is fair compensation available? and
- has the aboriginal group in question been consulted?¹⁶

The Canadian case law in this area is interesting for a number of other tests which the Canadian courts have developed:

- in determining whether aboriginal rights exist, some limiting considerations have been introduced. These include addressing the following questions. What was the nature and scope of the right in question?¹⁷ Did the practice in question exist at the time of first contact? Was it “integral to the distinctive culture” of the aboriginal people? Was there a reasonable degree of “continuity” between the modern practice and that claimed to found the right prior to contact, recognising that the nature of a right should not be “frozen” to the time of contact?¹⁸ Would the claimed right be incompatible with the sovereignty of the Crown?¹⁹
- as in the case of treaty rights, where any ambiguities should be resolved in favour of the Indians, any limitations on the rights of Indians should be construed narrowly, and any interpretation should be predicated on the Crown's integrity and intent to honour its obligations.
- where the rights are accepted as existing, they are nevertheless not absolute ones, whether aboriginal or treaty rights. Parliament can expressly override them. But there are clear parameters laid down governing such override, for example, the need for justification

¹⁶ *R v Sparrow*[1990] 1 S.C.R. 1075.

¹⁷ The Canadian courts appear to have interpreted quite narrowly the nature of the claimed right, taking into account broader community interests, so as to limit the extent to which it extended into commercial, and especially exclusive commercial, activity. They have generally been concerned to limit it to a subsistence form of right or, where there was some trade involved, to limit that trade to the provision of a modest income. Thus, in *R v Marshall* [1999] 3 S.C.R. 456, the right was interpreted as a right to trade for necessities.

¹⁸ In *R v Van der Peet* [1996] 2 S.C.R. 507, the Supreme Court established the “point of contact” test to determine whether an aboriginal practice existed; it also established a test of continuity as the means by which a “frozen right” approach might be avoided. In *R v Sundown* [1999] 1 S.C.R. 393, the Court accepted the case made for construction of a traditional hut for hunting.

¹⁹ This test was introduced in one of the judgments in *R v Mitchell*, above n 13, a case involving a claimed aboriginal right to transport goods across the border with the US such that the Indians involved would be exempt customs duties. The Judge said that this test would be sparingly applied but that it was applicable in that case. She considered that the claimed right “relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. Reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty.”

- (including factoring in the interests of others in the community), consultation, and possibly compensation.
- if there is claimed to be extinguishment, then the intent must be “clear and plain” and the onus is on the Crown to prove this intention.
 - consideration will be given to oral history, with a fair degree of credence able to be given to it.

Thus, while the Courts have been willing to recognise aboriginal and treaty rights in a number of areas, they have also been willing to recognise the importance of certain limitations to safeguard or take into account the wider interests of the community. In some of the cases, they have recognised the existence of an aboriginal or treaty right²⁰ in others, they have not been willing to.²¹

It is also important to note that the courts have addressed the existence of aboriginal and treaty rights in a very case-specific manner, reflecting the fact that there were many different tribes whose practices and entitlements varied one from another. Thus, in *R v Pamajewon*,²² the Supreme Court said that aboriginal rights must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.

Of interest also is the case of *Campbell v British Columbia (Attorney-General)*²³ which considered a challenge to an aboriginal right of self-government, in that case determined not to have been extinguished. The Court there upheld the agreement concluded by the Canadian Federal Government with the Nisga'a conferring on them a measure of self-government. There too the Court reiterated the residual power of Parliament to infringe aboriginal rights. Those rights were not absolute. “In circumstances where the exercise of an aboriginal right to self-government is inconsistent with the overall good of the polity, Parliament may intervene subject only to its ability to justify such interference in a manner consistent with the honour of the Crown.”

In *Ominayak v Canada*,²⁴ the Human Rights Committee concluded that the historical inequity of the failure to assure the Lubicon Lake Band a reservation to which it had a strong claim threatened their way of life and constituted a violation of Article 27 of the ICCPR. Like *Delgamuukw*, this case represented a claim to certain land/reservation rights. In this case, it was upheld not by reference to the existence of aboriginal or treaty rights relevant under Canadian law but by reference to the importance of that land for the preservation of the Band's way of life and culture. This obviously reflects the fact that this case was one taken before the Human Rights Committee, whose jurisdictional base is quite different. As a consequence, the right was recognised under Article 27 as an individual right, albeit one enjoyed in community with others.

In the United States, the focus of the jurisprudence has been different, reflecting its different constitutional history in relation to the treatment of aboriginal peoples. For there, the status of the Indian Nations flows from three seminal cases determined by the then Chief Justice, Marshall CJ, in the early 19th century. He determined that the indigenous peoples' right to govern themselves had been diminished but not extinguished²⁵ and he described them as “domestic dependant nations”.²⁶

²⁰ Eg *R v Sparrow* [1988] 1 S.C.R. 1075; *R v Van der Peet* [1996] 2 S.C.R. 507; *R v Gladstone* [1996] 2 S.C.R. 723; *R v Sundown* [1999] 1 S.C.R. 393.

²¹ Eg *R v Pamajewon* [1996] 2 S.C.R. 821; *Mitchell v Minister of National Revenue* [2001] 3 C.N.L.R. 122. [1996] 2 S.C.R. 821.

²² [2000] B.C.J. 1524.

²³ UNGAOR, 45th session, Suppl No. 40 at 107, UN Doc A/45/40(1996).

²⁴ See *Johnson v McIntosh*, 21 U.S. 543, 5 L. Ed. 681, 8 Wheat. 543 (1823).

²⁵ *Cherokee Nation v Georgia* 30 U.S. 5 Pet. 1 (1831).

While their original sovereignty was diminished by European colonisation and their inclusion in the boundaries of the United States, they nevertheless retained authority over their own territories and internal affairs. This authority derived from the “tribes' inherent powers of a limited sovereignty that has never been extinguished”.²⁷ This residual sovereignty is nevertheless subject to the plenary power of Congress over the Indian tribes, which can be used to diminish their authority.²⁸

They possess only those aspects of sovereignty that are neither withdrawn by treaty or statute nor by implication as a necessary result of their dependent status. Indian tribes do retain attributes of sovereignty over both their members and their territory. This tribal sovereignty, however, is dependent upon and subordinate to the federal government²⁹.

The jurisprudence in the United States has been less directed at aboriginal rights *per se* given that those rights have in some measure been recognised as existing within the perimeters of the reservations which are under the jurisdiction and control of each specific Indian Nation, those reservations taking their form from treaties concluded in the past with the federal government. The United States cases have instead been directed at challenging the extent to which Indian tribal authorities have jurisdiction within their reservations.

The case of *Worcester v Georgia*³⁰ was certainly an example of a case of a wider collectivity, in that case the state of Georgia, challenging the very existence of the Cherokee Nation located within it through purporting to incorporate certain Cherokee territory into the state and to extend Georgia's laws to the incorporated territory. In that case, the Supreme Court upheld the existence of the Cherokee Nation as beyond the jurisdiction of the state of Georgia and subject only to the powers of Congress.

A more recent case is that of *Montana v United States*,³¹ involving the question of whether the native Indian tribe in question, the Crow, retained the right to regulate non-Indian hunting and fishing on reservation land owned in fee simple by non-members of the tribe. The Court held that their inherent sovereignty did not reach this far. But the Court also laid down some clear guidelines governing the nature of Indian tribes' residual powers. In addition to their power to punish tribal offenders, the Indian tribes retained inherent power to determine tribal membership, to regulate domestic relations, and to prescribe rules of inheritance for members, but exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express Congressional delegation.

It went on to say that Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands, in order to regulate, through taxation, licensing or other means, activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements, or where the conduct of non-Indians on such lands threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe. These criteria have been relied on in more recent cases concerned with the scope of Indian jurisdiction.

²⁷ *United States v Wheeler*, 435 U.S. 313 (1978).

²⁸ It has been suggested that, to the extent that tribal sovereignty is not inconsistent with the tribes' incorporation into the United States and has not been limited by Congress, tribal governments can continue to exercise the inherent sovereignty of the Indian nations - see Kent McNeill, "Aboriginal Governments and the Charter: Lessons from the United States" Unpublished at the time of the research for this paper)

²⁹ see Patrick Cleveland "Apposition of Recent US Supreme Court Decisions regarding Tribal Sovereignty and International Indigenous Rights Declarations" 12 *Pace International Review* 397.

³⁰ 31 U.S. 515 (1832).

³¹ 450 U.S. 544 (1986).

One such case was *Nevada v Hicks*,³² which saw a continued narrowing of tribal authority. Here, the state of Nevada sought a declaratory judgment to limit the jurisdiction of the relevant tribal court concerning an action against state officials for execution of a search warrant on allotted land within the reservation for evidence of off-reservation offending. The Court concluded that the existence of tribal ownership of land was not alone enough to support the regulatory jurisdiction of the Indian tribe over non-members. And it then applied the *Montana* tests to assess whether this was an exception where tribal jurisdiction should be recognised. It concluded that it was not. It considered that the state's interest in execution of process is considerable and, even where it relates to Indian fee lands, it no more impairs the tribe's self-government than federal enforcement of federal laws impairs state government.

This case appears to be taking United States jurisprudence down the route whereby tribal jurisdiction exists on the basis of membership of the tribe, not territoriality. This is potentially quite a significant development. While the state of Nevada argued for this conclusion, the federal government was also a party to the proceedings and argued in support of tribal jurisdiction. Here therefore we have a situation of three different collectivities taking part in the argument. And the Supreme Court has sought to reconcile the competing claims by seeking to narrow further the jurisdiction of the tribal courts to matters affecting only their own members so as thereby to accommodate the conflicting interests that arise in this area.

These three cases have directly involved competing collective groupings, be they those of the federal government, the state, and the tribe. Many of the other cases, however, have involved individuals challenging the jurisdiction of the Indian authorities or courts. They probably therefore better fall into the second category of cases involving tensions between a collective and an individual outside the collective. But they nevertheless become the mechanism through which the Courts seek to find an accommodation between the competing collective interests, as well as those of the particular individual or individuals involved.

I should mention finally one further United States case involving a similar weighing by the Court of competing collective interests. This was *Lyng v Northwest Indian Cemetery Protective Association*.³³ Here, the Indian plaintiffs challenged a proposal of the United States Forest Service to build a road on public land on the ground that the road would effectively destroy the tranquility essential to the continuation of Indian meditative religious practices that had been pursued on this land for many generations. The plaintiffs were therefore trying to ensure recognition and respect for a traditional, arguably collective, practice.

While the Court acknowledged that federally-recognised Indian tribes occupy a special place in the United States legal system, and United States law recognised aspects of what is often called the “sovereignty” of Indian tribes, this was not seen as relevant to a claim that First Amendment rights of freedom of worship were affected. The rights of Indians were in this respect held to be the same as those of all others, and did not extend to the use of public lands. This decision appears not to have taken much account of the process by which land historically used for religious observance became public land. But the interest for which recognition and protection was sought was a collective one.

Collective group versus individuals outside the group

There are a number of different cases where persons outside the collective group have challenged particular rights of the collective. Often, they have involved a person outside the group challenging an action or decision of the group which affects their interests.

Thus, in *Corbiere v Canada (Minister of Indian and Northern Affairs)*,³⁴ band members were required by law to be ordinarily resident on the reserve in order to vote. Corbiere challenged his exclusion from being

³² 121 S.Ct. 2304 (2001).

³³ 485 U.S. 439 (1988).

³⁴ [1999] 3 C.N.L.R. 19.

able to vote. The Court upheld the challenge, considering that the distinction perpetuated the historic disadvantage experienced by off-reserve band members and did not satisfy the justification test applicable under relevant Canadian law. Exclusion from voting *per se* was not the determining factor. Rather, it was the particular circumstances of exclusion. The Court weighed the interests of the collective in limiting voting to those actually resident but concluded that there were strong reasons why the interests of the collective might be more fairly advanced by off-reserve Indians also being able to vote.

This was not a case, however, where non-Indians were claiming a right to vote in respect of matters relating to the Indian collective, as was the case in *Rice v Cayetano*.³⁵ But, in the latter case, United States law (including the Constitution) did not afford special protection and recognition to native Hawaiians akin to that afforded to Indian tribes. In this situation, the individual right to non-discrimination therefore prevailed and the exclusion of a non-native Hawaiian from voting for a body responsible solely for funding and related matters involving only native Hawaiians was ruled discriminatory. The same would seem likely to apply under United States law to any indigenous groups within the US not covered by the special treatment extended to Indians by virtue of the special provisions of the Constitution.

In *Sawbridge Band v Canada*,³⁶ three Albertan Indian Bands argued that reinstatement of aboriginal women would violate the Band's collective right to self-government, including their right to determine membership. Muldoon J rejected this claim, relying primarily on section 35(4) of the Canadian Constitution Act 1982 providing that "... aboriginal rights are guaranteed equally to male and female persons". He said that any aboriginal right based on a differentiated practice on who might live on the reserve had been "extinguished utterly by section 35(4)".

The case is interesting for the pre-eminence that it seems to give to the requirement of equality of treatment, based on the fact that section 35 can be interpreted as overriding the provisions of the Canadian Charter, contained in the preceding sections of the Constitution Act 1982. I shall return to this further below.

But it is also significant that, in Muldoon J's judgment, there was no aboriginal or treaty right to control their band or reserve membership. He examined the legislative and treaty history. He concluded that any aboriginal right or custom by which the identity and definition of Indians was to be established had with clear and plain intent been extinguished. Further, neither the Indian Act nor negotiations relating to the relevant treaties showed a recognition of such a treaty right of Indians.

An Australian case, *Gerhardy v Brown*,³⁷ raised similar questions. In that case, a defendant who was not a member of the Pitjantjatjara tribe and who thus had no right to enter lands restored to Pitjantjatjara communities under a state statute challenged his prosecution for illegal entry onto the lands by arguing that the statutory provision limiting his access breached a Commonwealth statute prohibiting racial discrimination. A majority of the High Court of Australia took the view that the statute was discriminatory in that only aboriginal people could be Pitjantjatjara and so entitled to free access to the land whereas non-Pitjantjatjara (including non-Pitjantjatjara aboriginal people like the defendant) were entitled to access only if other conditions were satisfied.

And, in an African case, *Ephrahim v Pastory and Kazilege*,³⁸ customary law allowed men to sell clan land outside the clan without its consent but allowed women only the power of usufruct, not alienation. The Tanzanian Judge in that case saw his role as encompassing reform of customary law to accord with the prohibition of sex discrimination in their Bill of Rights.

³⁵ 528 U.S. 495 (2000).

³⁶ [1995] 4 C.N.L.R.121.

³⁷ (1985) 57 A.L.R. 472.

³⁸ 87 I.L.R. 106 (Tanz. High Court 1990).

In each of these cases, the Courts in question ruled in favour of the individual or individuals whose interests or rights were threatened to be adversely affected by the actions of the group, in effect upholding the primacy of the individual's right not to be discriminated against through being able to assume the same rights as members of the group (eg the right to vote, the right of certain women members to be members of the clan on the same basis as men, the right to enter the land, and the right to sell land).

But other cases take an approach which gives greater weight, in the particular circumstances of the cases, to the collective or group interest that a particular practice or restriction is designed to preserve or respect.

One important such case is *Santa Clara Pueblo v Martinez*.³⁹ Martinez was a member of the Santa Clara Pueblo, a traditional reservation community of fewer than 1500 people in which gender was an important, explicit part of the definition of social roles. Her children had grown up on the reservation and spoke the local language. But they were excluded from membership, and thus from inheriting property or the right of residence on the reservation after her death, because Santa Clara membership rules excluded children of a female tribe member born to a marriage with a non-member, while including children of a male tribe-member in such circumstances.

In this case, the United States Supreme Court upheld the practice, based in good part on the Court's recognition that Indian tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty, are in many ways foreign to the constitutional institutions of the federal and state governments. There was also concern that federal judicial intervention might substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity and that membership issues will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.

The Court considered explicitly the full history of enactment of the Indian Civil Rights Act 1968 which sought to introduce a set of standards for Indian tribal courts to adhere to, thereby strengthening the position of individual tribe members vis-à-vis the tribe. However, Congress had not provided any mechanism for enforcement or redress external to the tribal courts themselves, save for the availability of *habeas corpus* in cases involving imprisonment. The Court for the reasons mentioned above was reluctant to interfere with the balance struck.

The Supreme Court's decision has been criticised as having been a possible factor in the Court's subsequent narrowing of the tribal sovereignty of the tribes due to concerns at the lack of due process and individual protection available to individual tribe members. Thus, Professor Robert Laurence⁴⁰ thought that the decision in *Oliphant v Suquamish Indian Tribe*,⁴¹ that tribal courts do not have inherent criminal jurisdiction over non-Indians, was likely to have been influenced by it. That was the first of a series of decisions in which, as noted above, the United States Supreme Court has systematically narrowed the jurisdiction of Indian tribes over non-members, first in criminal, then in civil matters.

Interestingly, the concurring judgment of Souter J. in *Nevada v Hicks*⁴² gives some credence to this view. Here he noted the differences which exist between tribal courts and other traditional American courts, referring to the fact that the Bill of Rights does not apply to them, that the Indian Civil Rights Act does not afford identical guarantees, and that there is a trend toward the tribal courts feeling that they have some leeway in interpreting the Act's due process and equal protection clauses.

³⁹ 436 U.S. 49 (1978).

⁴⁰ Robert Laurence, "A Quincentennial Essay on *Martinez v Santa Clara Pueblo*" (1991-92) 28 *Idaho Law Review* 307; see also commentary on Professor Laurence's article in Kent MacNeill's unpublished article, above n 28.

⁴¹ 435 U.S. 191 (1978).

⁴² Above n 32.

In *Morton v Mancari*,⁴³ the United States Supreme Court upheld an explicit policy of the United States Bureau for Indian Affairs to give a preference in hiring to members of federally-recognised tribes. It held that the preference was given to Indians not as a discrete tribal group but rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the USBIA in a unique manner.

These two cases⁴⁴ are very much shaped by the constitutional protection and recognition accorded to United States federally-recognised Indian tribes under the United States Constitution. But the *Santa Clara Pueblo* case is particularly significant as the Court there allowed what might otherwise have been seen as an individual right (of a female member of the tribe to equal and non-discriminatory treatment) to be overridden by the traditions and culture of the tribe.

In *Kitok v Sweden*,⁴⁵ the Human Rights Committee considered a situation where the Sami authorities, acting under national legislation conferring these powers on them, had felt it necessary to restrict the number of reindeer herders in order to maintain the viability of the reindeer herding lifestyle and thereby secure the preservation and well-being of the Sami minority. The Committee had reservations about certain provisions of the legislation in question but it was guided by the ratio of the *Lovelace* decision⁴⁶ (see below) that a restriction on an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. The Committee, after a careful review of all the elements involved in this case, concluded that there was no violation of the right under Article 27 of the ICCPR of persons belonging to minorities to enjoy their own culture and to use their own language in community with other members of their group, this being the ground of complaint considered most relevant to Kitok's complaint. The Committee in effect upheld the restrictions on the basis that they were justifiable to preserve the particular culture of the collective. It noted as relevant in this regard that Kitok was permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.

In contrast, in *Lovelace v Canada*,⁴⁷ the Committee ruled that there was a breach of Article 27. This case involved a complaint by an Indian woman to the Human Rights Committee against her loss of status as an Indian through marrying a non-Indian man, whereas Indian men who married non-Indian women did not lose their status. Interestingly, the Committee chose not to decide the case in relation to Canada's obligations under the non-discrimination article of the Covenant. Instead, it considered the complaint in relation to the alleged denial of Lovelace's right to her culture under Article 27. The Committee observed that not every interference is necessarily a breach of this right. However, it considered that any statutory restrictions interfering with it must have both a reasonable and objective justification and be consistent with other provisions of the Covenant.

In this case, the Committee looked at her situation on the basis that her marriage had broken up. In such a situation, it was natural that she should wish to return to the environment in which she had been born. Whatever therefore might be the merits of the Act in other respects, it did not consider the denial to Lovelace of a place on the reserve was reasonable, or necessary to preserve the identity of the tribe.

Thus, the Committee avoided saying that the legislation responsible for her predicament was necessarily wrong. It ruled instead that the denial to her of band status, based on the special circumstances of her case, was wrong. In its interpretation of whether there was a breach of Article 27, however, it read that article "in the context of the other provisions referred to", including those relating to discrimination. So, in this case, the Committee ultimately ruled in favour of the individual's right (to be part of the collective) over

⁴³ 417 U.S. 535 (1974).

⁴⁴ *Santa Clara Pueblo v Martinez* and *Morton v Mancari*.

⁴⁵ 43rd Session, Supp. No. 40 Annex 7, at 229, UN Doc A/43/40(1988).

⁴⁶ *Lovelace v Canada* (Report of the Human Rights Committee, UNGAOR, 36th Session, Supp No 40, Ann 18, UN Doc A/36/40/1981).

⁴⁷ Above n 46.

the collective's asserted interest in her exclusion. Whereas in *Kitok*, after very careful consideration, it reached the opposite conclusion.

These cases indicate the difficulty of the assessments involved in weighing such competing claims and interests of the collective on the one hand and the individual outside the group on the other hand. This is seen also in situations where individuals within the group may complain over the manner of their treatment by the collective.

Collective group versus individuals inside the group

Kymlicka in his writings⁴⁸ identifies the use of collective right claims to suppress internal dissent as the aspect often relied on to attack the existence of such collective rights (cf. recognition of the collective rights to protect the group from the impact of external decisions which, absent the protections, might see the cultural practices ultimately destroyed). But he claims that collective rights are not generally used or promoted by indigenous groups with this purpose in mind. Kingsbury⁴⁹ has suggested that the analysis of Kymlicka greatly simplifies the reality.

But even Kymlicka acknowledges that problems can arise. He mentions the case of the Pueblo Indians who have established a theocratic state that discriminates against those members who do not share the tribal religion. For example, housing benefits have been denied to those members of the community who have converted to Protestantism. Yet the actions of the tribe cannot be challenged before the tribal courts, notwithstanding the terms of the Indian Civil Rights Act 1968.

In *Thomas v Norris*,⁵⁰ Thomas was forcibly initiated into a Coast Salish tradition known as spirit dancing. He did not live on a reserve and had not been (and expressed no wish to be) educated in the cultural and religious life of the Salish. It was argued that Thomas' individual rights of personal security were subject to an overriding collective right to ensure the continuance of aboriginal traditions. Hood J rejected the general proposition that, in the contest between them, the individual rights of the plaintiff must automatically give way to the communal rights of the defendants. In fact, he was also not satisfied that the claimed right of initiation was an aboriginal right in the first place. But, that aside, he went further and said that, even if it was, those aspects of it which were contrary to English common law, both criminal and civil, such as the use of force, assault, battery and wrongful imprisonment, did not survive the coming into force of that law. Further, with the enactment of the Constitution Act 1982, the impugned aspects of the activity had been expressly extinguished. Further, he said that aboriginal rights are not absolute. No group, Indian or non-Indian, has the collective right to subject an individual to assault, battery or false imprisonment. Like most freedoms or rights, such an aboriginal right was "limited by laws, both civil and criminal, which protect those who may be injured by the exercise of the practice".

Although one can argue that this is a case of an individual outside the group since the plaintiff claimed not to be a member of the group, its interest lies in the suggestion that there are certain parameters around the exercise of an aboriginal right if that exercise involves physical violence to the individual in breach of normal criminal law provisions. One major area of discussion, and some difference, is whether the Canadian Charter provisions, contained in sections 1-34 of the Canadian Constitution Act 1982, apply to aboriginal and treaty rights. On the face of it, Article 35 in its affirmation and recognition of aboriginal and treaty rights suggests that they may not be subject to those Charter provisions. And section 25 in the Charter provides that the rights and freedoms guaranteed by the Charter shall not be construed so as to abrogate or derogate from those rights.

⁴⁸ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

⁴⁹ Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 *New York University Journal of International Law and Politics* 189.

⁵⁰ [1992] 2 *Canadian Native Law Reporter* 139.

The Canadian Supreme Court in *Campbell v Attorney General (British Columbia)*⁵¹ described section 25 as a shield to protect aboriginal, treaty and other rights from being adversely affected by provisions of the Charter. The concern raised there was that some Canadian citizens who were not Nisga'a citizens would find themselves subject to Nisga'a laws without the opportunity to vote for, or put themselves forward as a candidate for, the institution which made those laws. The Court said this was not unusual.

But many see it as a permeable shield such that the Charter provisions are likely, in any fine balancing that might arise between competing interests, to prevail. This appears consistent with the tenor of the Court's approach in *Thomas v Norris*.⁵² Interestingly, the Canadian government has in the self-government agreements which have been concluded insisted that this be made clear either in the Agreement or in the implementing agreement. And the Royal Commission on Aboriginal Peoples in its report saw the section as preserving First Nations' aboriginal right to self-government but not as excluding application of the Charter provisions to protect individuals within First Nations from the manner of exercise by First Nation collectivities of that right.

Similar issues have arisen in the United States in relation to the Indian Civil Rights Act 1968. This statute arose out of investigations undertaken by a Senate Subcommittee following allegations of Indian civil rights violations both by Indian tribal authorities but also by federal, state and local authorities. But whereas violations by this latter group were all subject to federal constitutional protections, those of Indian authorities were not. The Subcommittee Chair acknowledged that these violations occur "not from malice or ill-will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training and unfamiliarity with the traditions and forms of the American legal system". The Indian Civil Rights Act 1968 was the result. It sought to apply in a replicated form many of the rights of the American Bill of Rights, but with some exceptions to try to take account of the unique circumstances of Indian tribes. Importantly, also, it did not provide any mechanism for federal court review in the event of concerns by individual members, save in cases of imprisonment where a right of *habeas corpus* brought before the federal courts was allowed.

Concerns were expressed at the attempted super-imposition of American principles of justice on the tribal authorities as being incompatible with their own rights of self-government. Concerns were also expressed at the imposition of an adversarial system of justice. In the *Santa Clara Pueblo* case, the Supreme Court traced the history of the Act and rejected the suggestion that the Court should interpose itself to review the operation of the tribal authorities in that case. It was clear that Congress had chosen deliberately not to confer a general power of federal judicial review, in order to recognise tribal authorities' rights of self-government. The Court therefore considered it inappropriate to interfere with this. "As nothing in the ICRA purported to subject tribes to the jurisdiction of the federal courts in civil actions, he concluded that the tribes' sovereign immunity protected them from federal court actions for violation of the Act."

Justice Marshall went on to say that the Act had two purposes: "In addition to its objective of strengthening the position of individual members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" But, as mentioned above, some see the Court's interpretation of the Act in the *Santa Clara Pueblo* case, affirming the lack of recourse for an individual within a tribe concerned at decisions by the governing body, as having contributed to subsequent decisions of the Court seeming to reduce those areas over which tribal authorities have exclusive competence.

A review of practical experience with the Act in the early 90s suggested that, for some tribes, a lack of judicial independence was a problem. But their conclusion was not that there should be federal review but that there should be increased funding for the tribal courts, education of tribal councillors on the role of the judiciary and the importance of judicial independence, and inter-tribal appellate systems. More recent

⁵¹ Above n 23.

⁵² Above n 50.

assessments seem also to have concluded that the most serious problem with the tribal court system is a lack of adequate funding.⁵³

Curiously, the number of reported cases of complaint by a member against decisions of the group appear few, but this may be a reflection that these are matters in the case of the United States at least for the tribal courts, with no recourse beyond them. In the case of Canada, the more limited powers of tribal authorities, absent self-government agreements, may also be a factor. However, as more powers are conferred under such agreements, then issues relating to the rights of the dissenting individual may become more prominent.

There are, nevertheless, two cases where indigenous persons have complained at having been disadvantaged through being limited to use of the tribal courts and Indian laws.

One such case was *Fisher v District Court*.⁵⁴ That case involved an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. The mother sought to access the state court for determination of the dispute, but the Court said that the exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the tribe in question under federal law. “Even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”

The second case was *United States v Antelope*.⁵⁵ In this case, three reserve Indians were charged with serious criminal offences committed on their reservation. While the offences were subject to federal, not Indian, jurisdiction because of their seriousness, the accused complained that they were disadvantaged by not being prosecuted under state law where proof of premeditation would have been required. The Court rejected the argument that the applicable federal legislation was racist, pointing out first that legislation relating to Indian tribes was not based on impermissible racial classification but was instead rooted in the unique status of Indians as a separate people with their own political institutions, and second that the federal legislation applied generally in various enclaves, including but not limited to Indian reservations. Further, they pointed out that the fact of a different requirement at federal than state level did not violate requirements of equal protection when that federal law was itself even-handed.

While not issues specific to these two cases, concerns about due process and fairness in the tribal courts in the United States appear to have been a factor in the United States’ Supreme Court’s apparent tendency to narrow the jurisdiction of the tribal courts. Interestingly, the Indian First Nations there are responding by looking to develop new legislation addressing issues of governance. And a Bill also concerned with governance issues is before the Canadian Parliament, though in this case at the instigation of the federal government. Such legislative measures may help to alleviate concerns about the willingness of indigenous peoples to put in place proper accountability mechanisms to safeguard the use of resources passing through their hands but also decision-making by them which can materially affect the lives of individual members of their collective group.

There is one final area where a potential conflict can arise between the interests of an individual and that of the tribe. This is in the area of adoption and custody, already flagged in relation to the just-mentioned *Fisher* case. But in the United States the one area where tribal courts can have jurisdiction, or seek enforcement of their orders, beyond their territory is in relation to the adoption of Indian children. And this is an area where potentially the tribe might claim a collective interest in the upbringing of a child under its wings, so as to allow the child to absorb and draw support from its culture, which might run into conflict

⁵³ see the unpublished paper of Kent McNeill, above n 28.

⁵⁴ 424 U.S. 382 (1976).

⁵⁵ 430 U.S. 641 (1977).

with the views of others concerning what might be in the best interests of the child. There may of course be no incompatibility, where the benefits to the child of learning its culture and having the support of tribe members may offset other benefits associated with adoption by parents outside the tribe. But the tribes may well consider that insufficient weight is given to the importance of these tribal/cultural/extended family benefits.

As Kymlicka mentioned, the situation of an individual who may suffer at the hands of a collective decision is one of the areas of greatest potential difficulty. Indigenous people would perhaps say that this situation is no different for members of their community than it is for members of any state, where the individual must ultimately comply with the decisions of the wider community for them represented by national government. One important difference is that decisions at national level are made by decision-makers elected through democratic machinery to take those decisions. And machinery at the national level is generally subject to civil rights protections built in to protect the individual against bad decisions. The question then is whether indigenous communities, which may choose different decision-making systems based on their own traditions, have similar protections in place. Many probably do not.

One solution is to try to ensure that basic civil rights protections are preserved, in tandem with traditional practices, so that the individual does not find him- or her-self subjected to adverse treatment.

Conclusion

There is a proliferation of theoretical commentary on the nature and status of “collective rights”, prompted in large part by the fundamental nature of individual rights as a protection for the individual against abuse by the larger society, or by groups seizing authority and using it to the disadvantage of individuals within the society. Hence the question posed whether “collective rights”, even if they exist, are “human rights”. For care is needed to avoid devaluing the notion of rights in the human rights area.

This does not necessarily argue against there being some rights of a collective nature which might warrant comparable status. It does however reinforce the importance of assessing carefully which ones may warrant this. It also reinforces the importance of weighing carefully what their relationship may be with individual rights in situations where they may come into conflict.

The fact of conflict *per se* should not rule out the case for some appropriate level of recognition. But the possibility of such conflict does make it important to realise that such rights are not necessarily absolute ones but will instead need to be weighed carefully alongside other rights, collective or individual, with which they may come into conflict. Indeed, just as it is necessary at times to weigh up conflicting individual rights, so it may be necessary also to weigh up tensions between collective and individual rights. The fact that the collective right is one enjoyed by a group of persons should not necessarily give it greater primacy over the rights of the individual. For the balancing of the competing interests is not an aggregative utilitarian-type exercise.

The jurisprudence which I have examined shows the way in which tensions between individual and collective rights have arisen in the past and how judicial organs of various kinds have sought to weigh them up. In some cases, the individual right has prevailed. In some cases, the collective right has done so. In some cases the interest of wider society (or other groups in society) has prevailed; in other cases, the collective group’s interest has done so.

What becomes important is a full appreciation by the determining judicial body of the history and interests lying behind and grounding the respective asserted rights. Recognition of collective rights is intended to ensure that those interests lying behind the right are given due weight. But it is evident from the north American experience that it is also important that collectivities build in appropriate procedures to ensure

due process and accountability on the part of the collectivity so that the individual member does not feel that he or she has had their individual rights violated.

Where some degree of tension or conflict arises between an individual and a collective right, a careful balancing of the interests lying behind each will be required. The fundamental norms underlying individual human rights will continue to assume great prominence in this balancing process. But the nature and purpose of any claimed collective right or rights will also need to be taken into account in finding an appropriate balance between the two. That such a balance can be found in practice is supported by the north American jurisprudence which has been examined.

Indigenous Electoral Representation in International Human Rights Law

Catherine J. Iorns Magallanes*

Introduction

Indigenous peoples have been arguing in domestic and international fora that they need some form of guaranteed political representation at the highest levels of (local and national) state government.¹ This claim has been supported by some domestic political theorists and upheld in international human rights law as a form of indigenous self-determination. Some states have taken steps to accord indigenous peoples some such powers of government in their domestic systems.

With the inclusion of political representation as a subject within the area of indigenous human rights norms and discourse, I thought it useful to examine whether (and if so, how) indigenous peoples' rights were included as a subject within the emerging right of democratic political participation. This paper attempts a brief analysis of the intersection of indigenous peoples' rights and rights of political participation in international human rights law. It addresses:

- (1) The nature of individual and group rights in domestic liberal theory;
- (2) Approaches within democratic political theory to the protection of indigenous rights;
- (3) International legal recognition of indigenous rights to political participation in decision-making; and
- (4) The emerging right of political participation in international law.

The paper describes developments in these areas and identifies what appear to be trends. It focuses on perceived convergences and divergences between the two areas of international human rights law, those relating to indigenous peoples and to democratic political participation. It suggests that there appears to be more divergence than convergence between the two areas, and that argument thus needs to be directed at achieving more consistency.

The nature of individual and group rights

Human rights have traditionally had a focus on the individual rather than the group. The primary reason for this is that the concept of humans possessing rights was developed by liberal theorists as a means of solving a particular historical problem: the oppression, privilege and social duties of the feudal state. The liberals had a vision of human dignity: one of equal concern and respect being accorded to individuals, with each individual being born with natural or human rights to autonomy, or freedom, and equality. Entitlement to equal concern and respect requires standards of treatment simply because one is a human being and not because of, for example, one's status or the role that one plays in society. As a result, the rights devised have been primarily negative, civil and political rights, protecting individual freedom or autonomy from the power of the state.

Despite theorists from various traditions - liberal and otherwise - emphasising equality of some sort,² they at least initially neglected the rights of several social groups, including women, slaves and

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¹ Kymlicka suggests that "[o]ne of the most common demands of minority cultures is for greater representation within the political process." Kymlicka, W. *The Rights of Minority Cultures* (1995) 16.

² For example, JS Mill (1861) and Hobhouse (1909) are the most well known liberal theorists, although even Locke emphasised equality and the rights necessary to implement it. See, eg, Donnelly, D. *Universal Human Rights in Theory and Practice* (1989) ch 5; Kamenka, E. "Human Rights, Peoples Rights" in Crawford, J. (ed) *The Rights of Peoples* (1988).

minorities.³ One particular feature of these theories is that they both justified assimilating minorities within states and, most importantly, colonising other peoples overseas.⁴ While the ethnocentric views gave way to recognition that all human beings - including minorities - were entitled to the dignity and respect that liberalism stressed, they were still the rights of individuals. This is because rights which exist by virtue of being human can presumably only belong to an individual human being, and because it is individuals who ultimately suffer the conditions of oppression which human rights are designed to remedy.

In contrast, the notion of group rights relates to the protection of the existence of the groups themselves, as well as the individual rights of their members. While there are still many disagreements over the conceptual basis for group rights, it is generally agreed that group rights do exist (whether or not one labels them as *human* rights, for example). Where groups are recognised as having rights, the focus of liberalism is again on the rights necessary to remedy oppression from larger powers, which will typically be the state. For example, group rights are not usually conceived as protecting a group from its members. Thus, most group rights are conceived of as rights of individuals as members of groups to belong to, and maintain, the group in question. Cultural rights, for example, which have been developed in the twentieth century, are largely rights against the state and the wider community, accorded to individuals to practice their culture - their way of life. Participation in one's own particular (whether minority or majority) culture is now regarded as essential to human dignity.

Indigenous peoples are particularly vociferous in arguing that peoples' or group rights are essential for the protection of their cultures and existence as peoples. As with other human rights claims, their claims stem from the treatment they have suffered at the hands of states, and dominant majorities within them, and from what they consider necessary to remedy that oppression. In addition, they claim that a human rights approach to group rights is essential as they see their identity as fundamentally tied to the group, and that individual human rights are not enough to protect that.⁵

States have been reluctant to recognise group rights because of the difficulties that remain with accommodating indigenous demands in the existing liberal paradigm.⁶ But the indigenous argument is that this is a different type of problem to that which prompted the development of liberalism; it thus needs a different solution, one which may alter the liberal paradigm. Interestingly, in the area of democratic rights, which has been a cornerstone of liberalism, the arguments for accommodation of group rights have been responded to relatively favourably in democratic theory (though there is a much slower uptake of them in practice).

Democratic rights and indigenous peoples

In modern liberal democracies, democracy is identified with the concept of majority rule. While it is justified in differing ways, it is recognised as being at least a practical requirement: while government may rest on the consent of all of the governed, effective government requires decisive decision-making, which is justified if it carries the support of a majority. However, the fear of abuse of power by the majority has also given rise to constitutionalism, designed to limit the power of those in government.

³ For example, particularly in the 17th and 18th centuries, liberal theorists considered most smaller nations and minorities backward and in need of assimilation in order to achieve progress and participation in modernity. See, eg, JS Mill, *Considerations on Representative Government* (1861). Marxists and socialists have also been hostile to the claims of minority groups, ostensibly on the grounds of internationalism. As Kymlicka notes, such views were "shared by virtually all theorists in the nineteenth century, on both the right and left." He suggests that it is misleading to blame individualism or Marxist internationalism: "Instead, it reflects a rather blatant form of ethnocentric nationalism." Kymlicka, above n 1, at 6. See, generally, Van Dyke, V. *The Individual, the State and Ethnic Communities in Political Theory* (1977).

⁴ Idem.

⁵ Even Donnelly suggests that a human rights approach may be the most appropriate way to protect indigenous peoples' rights, even while he does not think that it is the case for other group rights. See, eg, Donnelly, above n 2, at 154.

⁶ The primary difficulty to date has been the conflict between these group rights and other individual rights. This is due to problems such as with the definition of beneficiaries of group rights and with their implementation: many group rights are implemented by limiting the basic rights of individuals, indigenous or otherwise.

Such limits restrain and control the exercise of authority by restricting the scope of majority rule, the substance of matters to be ruled upon and/or the procedure by which majority rule can be effected. There are many constitutional devices adopted to restrain majorities, including those that focus on the structure of the state (e.g. federalism), on the division of powers between different decision-making bodies (e.g. checks and balances, the separation of powers, and judicial review), on the structure of the legislative body (e.g. bicameralism), on the electoral system (e.g. proportional electoral systems), on decision-making processes within deliberative bodies (e.g. qualified majorities and veto rights), as well as on the substance of possible decisions (e.g. bills of rights).

Despite such restraints on democratic majorities, indigenous peoples complain that they are insufficient. They complain both that their human rights have been infringed within liberal democracies containing such constitutional rights protections, and that they need positive protection for the existence of their group. They argue that traditional, individualistic conceptions of democracy are insufficient for the protection of their *group* needs and rights, and that different approaches and measures need to be adopted.

Both indigenous peoples and political theorists have identified various possible alternative approaches, ranging from separate government to special accommodations within national governments. Those special accommodations include, *inter alia*, measures of autonomy (akin to models of federalism), guaranteed parliamentary representation, entrenched rights, veto powers, and proportional voting systems.⁷ One democratic device that indigenous peoples are increasingly arguing for is guaranteed

⁷ The various approaches don't pretend to remove or assimilate the differences between groups but regulate possible conflict between them through democratic devices. Two of the more popular models of democracy among political theorists are the closely-related consociational and consensus models, both of which aim to share and limit political power. The most significant work on both of these models is by Arend Lijphart. His most significant work on consociationalism is *Democracy in Plural Societies: A Comparative Exploration* (1977). His work which describes consensus democracy is *Democracies: Patterns of Majoritarian and Consensus Government in 21 Countries* (1984).

In more detail, consociational and consensus democracy replace simple majority rule with the principle of proportionality, both in the creation and operation of governments. There are four commonly accepted characteristics that are designed to cumulatively share, disperse, distribute, delegate and limit political power: a coalition of the leaders of significant groups in the society, veto rights in certain circumstances, proportionality, and autonomy over local affairs. Neither consociational nor consensus democracy prescribes any particular constitutional model, although some constitutional features are clearly more conducive to consociationalism and consensus than others (for example, parliamentary rather than presidential systems, election on the basis of proportional representation rather than first-past-the-post, and federalism rather than unitary states, where regional autonomy is adopted for geographically-based groups). See Lijphart, *Democracy in Plural Societies*, at 224.

Note that some of the devices suggested by political theorists as being appropriate are not necessarily applicable to indigenous peoples. Critics have argued, for example, that consociationalism is less likely to solve conflict that is based on ethnicity. See, eg, B Barry, "Political Accommodation and Consociational Democracy" (1975) *British Jnl of Political Science* 471. See, also, Barry, "The Consociational Model and its Dangers" (1975) *European Jnl of Political Research* 393. Nor is it helpful for resolving class conflict. See, eg, the Marxist analysis offered by L Graziano, "The Historic Compromise and Consociational Democracy" (1980) *Political Science Review* 345. Further, the relevance of either model to the resolution of conflicts specifically concerning indigenous or tribal peoples needs further exploration. In Lijphart's work, for example, such conflicts were not considered significant enough to even categorise some such countries as having plural, or divided, societies. See *Democracies: Patterns of Majoritarian and Consensus Government in 21 Countries* (1984). Will Kymlicka has paid attention to indigenous peoples in particular and discussed how their position is different from most other national minorities; but he also argues that more work needs to be done on this. See, eg, Kymlicka, *Multicultural Citizenship* (Clarendon Press, Oxford, 1995); Kymlicka & Shapiro (eds) *Ethnicity and Group Rights: Nomos XXXIX* (NYU Press, NY, 1997); Kymlicka, "American Multiculturalism and the 'Nations Within'" in *Political Theory and the Rights of Indigenous Peoples*, Ivison, Pattison & Sanders (eds) (Cambridge University Press, 2000) 216.

political representation.⁸ The aim is power-sharing at national, regional and local levels through indigenous political participation, by the individual and the group.⁹

There are two reasons given for the choice of this device. The first is instrumental: only through such high-level political participation in decisions that concern them, they argue, will their rights be able to be protected – both the traditional, liberal, individualistic human rights and the more contentious modern concepts of group rights.

The second reason focuses more on the group than the individual: that a key aspect of indigenous self-determination is self-government. For most indigenous peoples, self-determination will be exercised through self-government within the states in which they live, rather than through secession and formation of an independent indigenous state. So discussion has turned to how to achieve self-determination through self-government within the modern democratic state.

In this respect, indigenous peoples have argued that self-government entails control over internal and local affairs. Especially where the indigenous peoples do not exercise complete autonomy, many of these internal affairs are currently governed by the wider mainstream government. And even where indigenous peoples exercise degrees of local autonomy, their physical location within the wider state necessarily entails that a wider range of matters which concern them are decided outside that sphere of autonomy. Thus, in order for indigenous peoples to be self-governing and to achieve self-determination, they need to hold a greater degree of control within the mainstream state. As control is exercised from the top, they argue that they need to be participating in the decisions at the highest political levels. From a self-determination perspective, this needs to be a guaranteed feature of the constitutional and political landscape and not one left to the whim of non-indigenous voters. Such participation thus needs to be enshrined in constitutional legislation as guaranteed political representation.

Thus, both democratic theory – primarily designed to protect the rights of individuals – and self-determination theory – designed to protect the group as well as the individuals in it – have suggested the same conclusion. Indigenous peoples need some form of guaranteed political representation at the highest levels of mainstream politics and government, at local and national levels.

International law and indigenous peoples

In the international legal sphere the primary locus of debate over the extent and content of indigenous rights has been the UN-sponsored drafting of the Draft Declaration on the Rights of Indigenous Peoples. During this drafting process, indigenous peoples have made claims about the content of the Draft Declaration and states have responded. States have responded favourably to some indigenous claims while rejecting others.

The claim raising the most opposition from states is that for a general statement of a right of self-determination for indigenous peoples. Most states flatly refuse to countenance such a statement because of the fear that it could lead to argument that indigenous peoples have the right to secede from the states within which they live. On the other hand, most states have accepted that indigenous peoples have a right of internal self-determination – ie, a right to be exercised solely within the states in which they already live.

Debate over the wording and intended coverage of an indigenous right of self-determination has continued for more than ten years. While this debate has not been finalised, progress has been made

⁸ Note that this may be in addition to other devices such as autonomy over local affairs.

⁹ Note that the theories do not focus on the ability to implement different measures in practice. Notably, the reliance on the existence of political elites may make it difficult – or at least slow – to implement in many countries with indigenous peoples, because of the historical exclusion of such peoples from national politics. Indeed, Daalder argues that consociationalism, eg, generally requires a history of compromise and cooperation between the relevant elites: *The Consociational Democracy Theme* (1974).

over the years such that today there is fairly widespread acceptance of an internal right of self-determination, limited to coverage of governance issues within states.

In 1993, the Chair of the Working Group on Indigenous Peoples, Mme. Erica-Irene Daes, described the application of a right of self-determination to indigenous peoples as meaning:¹⁰

that the existing State has the duty to accommodate the aspirations of indigenous peoples through institutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise the right to self-determination by this means and other peaceful ways, to the extent possible.

Furthermore, the right of self-determination of indigenous peoples should ordinarily be interpreted as the right to negotiate freely their status and representation in the State in which they live.

A key theme of the Draft Declaration is indigenous control over and/or participation in decisions affecting them. The focus is primarily on self-government through separate indigenous institutions, though several states have rejected autonomy as a right, preferring instead stronger rights of participation in national government (e.g. New Zealand,¹¹ Norway,¹² Morocco, Argentina, Japan, Ecuador).¹³

According to Anaya, what we can take as accepted in international law is a right of belated state-building, deriving from – or constituting a key part of – indigenous self-determination.¹⁴ Belated state-building involves the re-definition of relations between indigenous peoples and the state, including re-defined powers of decision-making (It is belated because indigenous peoples were historically excluded from discussions which led to the current states being initially ‘built’). Details are expected to be left to states and indigenous peoples to negotiate in good faith, depending on their historical and current circumstances. It is expected that negotiations would range from historical grievances (such as land and resource losses) to future political decision-making and power-sharing. While no particular forms of power-sharing are prescribed, it is expected that some form of guaranteed indigenous political representation be adopted, whether this is via separate, autonomous institutions or included within mainstream institutions.

What is important for the purposes of this paper is that indigenous peoples are entitled to belated state-building within their states, which entitles them to some form of guaranteed political powers over decision-making. This right is made independently of any reference to political theory as to how best to achieve this end, because discussions simply do not focus on this level of detail in the drafting of international standards. However, this is certainly consistent with the domestic-level, Western political theory that indigenous peoples require some form of guaranteed political representation and power of decision-making, as a human rights concern.

¹⁰ Daes, E-I. A., *Explanatory note concerning the draft declaration on the rights of indigenous peoples*, UN Doc. E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993), at 5.

¹¹ See Statement by New Zealand government to the WGIP, 26 July 1994, below n 13.

¹² See Statement by Norway’s representative, Mr Petter Ville, to the UN WGIP, 1994: “On the question of self-determination it is our position that this notion in the context of a declaration on the rights of indigenous peoples, has to be understood as self-determination within the framework of existing states. The emphasis should be on political and democratic participation in the decision-making process in questions affecting indigenous peoples.”

¹³ For all these countries’ statements, see 1995 submissions to the Working Group of the Commission on Human Rights, UN Doc. E/CN.4/1995/WG.15/2 & Add.1. Note that, in 1995, Canada was also with this group of states; but Canada changed its position in 1996.

¹⁴ S. James Anaya, *Indigenous Peoples in International Law* (OUP, 1996) 130.

International legal rights to political participation

Human rights law has long recognised the right of a people to be governed by consent. For example, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both require that the will of the people shall be the basis of the authority of government and that this shall be exercised through the free choice of representatives via periodic and genuine elections, with universal and equal suffrage and secret ballot. However, despite what appear to be clear standards, the substance of the right has also long been contested on political grounds. For example, not all states have always agreed what counts as free or periodic elections. There have been theories - competing with Western liberal democratic theory - based on "the dictatorship of the proletariat" and/or Third World "modernization."¹⁵ Many of these disagreements were based on the ideological differences behind the Cold War. After the Cold War, attitudes toward the Western, liberal theories of democratic governance changed.

In 1992 an emerging right to Western-style democracy in international human rights law was identified.¹⁶ The argument was that government, by true consent of the governed, was becoming a global entitlement, and that the content of the emerging norm centred on Western interpretations of democracy: "free, open, multi-party electoral parliamentary democracy."¹⁷ The focus in 1992 was on free and fair elections, with the role of the international community being to assist states in achieving democratic elections and to monitor and certify whether or not states measured up.

In the last decade, international legal scholars and states, through the United Nations, have confirmed that there is such a human right in international law.¹⁸ Moreover, there is widespread agreement on what the right entails. For example, it requires:¹⁹

- that elections be held at periodic intervals;
- freely available and non-discriminatory candidature for office;
- party pluralism;
- that neither parties nor candidates can be rejected based on ideology or other discriminating norms;
- access to the mass media for opposition parties on a non-discriminatory basis;
- secret ballots (even in states with high percentages of illiterate voters);
- universal suffrage;
- voters to have freedom to choose between candidates;
- votes to be fairly counted.

While such a standard was defined in 1990 by CSCE members, it was considered at the time to be ahead of human rights law.²⁰ Now human rights law is thought to have caught up.

It is notable – especially for the purposes of this paper – that the content of the right as described above addresses only aspects of the conduct of elections for government. There is no standard or requirement as to the type of electoral system to be adopted, or the constitutional protections for minorities.²¹ Thus, under this right it is theoretically and legally possible to have a democracy where free and fair elections take place, but where other civil rights aren't protected fully.²² It is claimed, instead, that democracy is

¹⁵ Franck, below n 16, 48-49.

¹⁶ Thomas M. Franck, "The Emerging Right to Democratic Governance" [1992] *American Jnl of Int'l Law* 46; Gregory H. Fox, "The Right to Political Participation in International Law" 17 *Yale Jnl of Int'l Law* 539.

¹⁷ Franck, *ibid* 49.

¹⁸ See, eg, Thomas M. Franck, "The Democratic Entitlement" (1995) 29 *Uni of Richmond Law Rev* 1; Gregory H. Fox, "Election Monitoring: The International Legal Setting" (2001) 19 *Wisconsin Int'l Law Jnl* 295.

¹⁹ Franck, above n 16, at 67; Fox, *ibid*, 299-300.

²⁰ See, eg, Meron, "Democracy and the Rule of Law," (1990) 23, 24 *World Affairs* 153, as noted in Franck, above n 16, at n 101.

²¹ Fox, above n 16, at 556, n 72 and accompanying text.

²² Fox, above n 18, at 317, quoting Fareed Zakaria, "The Rise of Illiberal Democracies" *Foreign Affairs* (Nov/Dec 1997), 22.

a “master right” – at the top of the human rights pyramid.²³ Like self-determination, it is a pre-requisite for the protection of other human rights.

I suggest, however, that while this definition of the content of a right of democratic participation is necessary, it not sufficient as a master right for indigenous peoples; it is not sufficient for indigenous peoples’ democratic participation (let alone their other human rights).

This lack of concern with the choice of a particular electoral system is not new: it was identified during the drafting of the ICCPR, on the basis that each country should be free to adopt the system best in accord with its particular situation. So there is deliberately not even any suggestion in international human rights law about how best to protect the human rights of minorities - or indigenous peoples - in domestic constitutional laws or systems. This is borne out in the application of international law, when we see how United Nations election monitoring is conducted.²⁴

International election monitors will enter a country, often months before elections, to help ensure its laws are adequate to ensure free and fair elections; and that the campaign is conducted accordingly, as well as the procedures of voting and counting. In some missions, whole new constitutions have been required, as new states have been born – for example, Namibia and East Timor – or undemocratic constitutions have been replaced. However, the focus has still been on election procedures rather than on the system to be adopted. Ie, despite the fact that international advisers may be assisting with the creation of a new electoral system as well as procedures,²⁵ only the procedures are covered by international human rights standards.

Comments on Developments

While the above descriptions of the developments in human rights theory and international law are only in summary, I suggest that I have provided enough information to be able to make comments on the emerging international law.

Starting with the right to political participation itself, I notice that the focus of this right of democracy is the individual. It is not concerned with duties of citizens to the state but with their rights vis-à-vis government. Moreover, the rights do not include substantive protections from government, but are procedural and relate to the public aspects of civil society. In these senses, the right is quintessentially and paradigmatically liberal.

As discussed above, indigenous peoples do not consider that liberal individual rights are enough for their protection as peoples. They need more by way of substantive protections of group rights. They need attention to be paid to the political participation of their group, not just the individuals in it.

I suggest that there should be more attention paid to the substantive governance rights, not just the procedural. The current gap has a number of problems. For example, it is ostensibly objective and neutral with respect to different systems. However, one should be suspicious of this given its completely liberal, individualistic focus. Supposed objectivity and neutrality have not accorded indigenous peoples the protection they argue that they require for the group, because of the assumption that the individual is the subject of protection against the state.

²³ Farer, “The Human right to participate in Government: Toward an Operational Definition” (1988) 82 *Am. Soc’y Int’l Proc* 505; as noted in Fox, above n 18, at n 84.

²⁴ While the activities of UN elections monitors are not formally linked to the international legal standards, the rights protected by the election monitors are identical to those protected by the international legal right to democracy as described in this paper.

²⁵ See, eg, Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Martinus Nijhoff, 1994) 263: topics of advice and training by international experts include “constitutional and legislative reform, institution-building, independence of the judiciary,” as well as the more typical advice on election laws and conduct.

If substantive standards are not included as part of this human rights law then it is left to states' domestic affairs and/or other areas of human rights law to monitor. It is better to put a good structure in place in advance than permit a system that allows for a state's oppression of indigenous peoples, leaving the indigenous people to complain after the fact. We need to be suspicious of claims that something is not a matter for international monitoring.

If indigenous political participation is left 'unregulated' by international law – for example, not a matter for assessment by election monitors or constitutional advisors - then the options and decision-making processes are less visible and likely to be less structured. They are more likely to be subject to advice based on the personal experience of the relevant monitor or adviser, or the adoption of the most visible and well-known protection mechanisms, whether or not that is consistent with best practice for indigenous peoples.

For example, first-past-the-post (FPP) electoral systems, as found in the UK and USA, have been shown to provide more stable government than proportional representation (PR) systems. However, the power they provide majority interests more easily overrides the rights and interests of minority groups. Yet, as well-known, stable democracies, the UK and USA provide powerful examples for emerging democracies to emulate. Perhaps it is because of this that FPP systems appear to be more common than PR systems in the emerging democracies.²⁶ In order to counter the power of the majority in a FPP system, a state will often use constitutional mechanisms such as Bills of Rights to protect the rights of minorities. Indeed, there has been a proliferation of Bills of Rights world-wide. But, as discussed above, Bills of Rights are not enough to protect the range of indigenous peoples' rights, whereas many liberal human rights advocates think that indigenous peoples can be sufficiently protected through the sole use of such mechanisms. While the individual examples of emerging democracies may well have each adopted the best electoral system for their country situation, I suggest that considerations about group rights protection need to be more visibly integrated into the international standards on electoral participation.

I thus suggest that more attention needs to be paid to integrating the various different aspects of international human rights law. If indigenous peoples' rights are not to be limited to the periphery of international human rights law – as an afterthought – then they need to be integrated throughout all the relevant areas of human rights law. If guaranteed political representation is emerging as a group right in the development of indigenous human rights then it needs to be integrated into the development of the right of political participation.

Such integration is particularly important when the instrumental value of the right of political participation is considered: having certified free and fair elections gives legitimacy to the government concerned. If democratic legitimacy is used as a tool "by international law institutions wielding power to exact consequences for non-compliance," then we need to be clear about what is included in the right to political participation, and that everything that needs to be included is included.²⁷ If states are being judged on the fairness and representativeness of their democratic systems then institutional standards concerning the representation of indigenous peoples should be included in that judgement.

The practice of election-monitoring is both a creature of international law and its source. If we can change what is implemented on the ground – like the advice on electoral systems – then we can affect the development of international law norms. Consideration of indigenous political participation can be integrated into the activities of UN election monitoring now, on the basis of the developments in indigenous human rights through the activities of the UN Commission on Human Rights and the Sub-Commission on Minorities. UN election and constitutional advisers could actively suggest that particular electoral systems be altered to provide better representation for indigenous peoples. They could provide different options for doing so, much as different options for other methods of human rights protection are provided by constitutional advisers. As such practice developed, it would contribute to the development of the human right of political participation. Most notably, this would be

²⁶ See Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Martinus Nijhoff, 1994).

²⁷ Fox, above n 18, at 318.

seen to include standards in relation to the political participation of indigenous peoples as groups, not just as individuals.

If you stand back from the detail of the law of political participation itself, then two other trends become apparent. First, the “who” that is entitled to the right of political participation is the people of the whole territory – not sub-groups within it. This fits with the state assertions that only the whole population of a defined territory have the right to exercise self-determination, but goes against indigenous claims that they have an inherent right of self-determination, separate from that of the territory as a whole. This correlation with states’ views would not be enough on its own to evidence a hardening of states’ self-determination approach, but the right of political participation has also been expressly described as the exercise of the right of self-determination.²⁸ This does not help indigenous peoples and their claim for recognition of their inherent right to self-determination, as a people separate from that of the surrounding state. Indigenous people make this claim even if they do generally only claim an internal exercise of that right.

Second, it does, on the other hand, fit in with another trend in relation to self-determination: that self-determination is increasingly being seen as an internal right. Self-determination in practice is not primarily about secession and the formation of independent states, but concerned with the internal issues of constitution and governance of a state. This is consistent with indigenous peoples’ claims for a right to belated state-building as the key aspect of their self-determination. This also helps their claim that a general right of indigenous self-determination should be recognised, as they can argue that it is accepted that self-determination is a primary internal right (It just doesn’t help the argument that they have a right of self-determination separate from the people of the territory as a whole).

Conclusion

The right to democratic governance is often termed a right to political participation. But, for indigenous peoples, a right to political participation means more than just procedural rights in relation to the election itself. Indigenous peoples require more substantive results in relation to the powers of decision-making. So indigenous political participation requires the tailoring of the electoral system - perhaps through an exercise of belated state-building - to accommodate their special needs and emerging entitlements.

This paper has compared the trends in the development of the two separate areas of international human rights law: rights of indigenous peoples and of electoral participation. It has identified a major divergence between the two areas: that group rights to political participation - even if it requires major constitutional change - have been accepted in the area of indigenous rights but they appear to be being ignored in the strictly liberal political participation rights. While these two areas diverge, the right of political participation converges with state arguments about the development of the right of self-determination. But, again, these are at odds with indigenous arguments about the development of indigenous peoples’ human rights. It is thus arguable that these factors mean that the new right of political participation is emerging in a way that is inimical to indigenous peoples’ interests. I suggest that argument and action need to be directed at changing that.

²⁸ See Franck, above n 16, at 52: “Self-determination is the historic root from which the democratic entitlement grew.” Further, the two are related today, particularly in the determination of legitimacy of a state’s government.

Terrorising Human Rights: A Rights Based Critique of the Commonwealth Anti-Terrorism Laws

Claire Mahon*

The Commonwealth anti-terrorism laws have resulted in a ‘terrorisation’ of human rights that cannot be justified by reference to Australia’s compliance with other international law obligations nor rectified through reference to allowable derogations from international treaties. The key features of the legislation include a broad and indefinite definition of ‘terrorism’, wide powers to detain which may constitute arbitrary detention, and restrictions upon the practical ability to challenge detention and exercise rights such as access to family and legal representation. One of the most concerning aspects is the impact upon children and the diminution of the rights of the child. Other longstanding tenets of our criminal justice system have been undermined by these laws, including the right to silence and the presumption of innocence. While some claim that the suspension of strict adherence to human rights principles is necessary in the post-September 11 environment, we must beware that in the process of combating terrorism we have tolerated a previously unimaginable erosion of human rights standards. This article questions the assumed necessity to ‘strike a balance’ between effective anti-terrorism measures and upholding human rights, proposing that compromise to human rights standards is neither necessary nor desirable in the fight against terrorism.

Introduction

*every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion ...*¹

The word ‘terrorise’ is defined in the Oxford Dictionary as meaning to ‘use terrorism against’.² This paper will argue that Australia’s recent legislative response to terrorism has resulted in a ‘terrorisation’ of human rights. The Commonwealth government has used the threat of terrorism to act against the fulfilment of human rights and to justify a complete departure from its human rights obligations. These breaches of international human rights law cannot be justified by reference to any supposed conflicting international obligations resulting from the Security Council’s response to terrorism. Nor do they constitute allowable derogations from either our treaty obligations or customary international law. The perception that these laws were necessary to comply with international obligations such as the United Nations Security Council Resolution 1373 is misguided, and the limited ability to derogate from international human rights obligations does little to rectify the illegality of these breaches of fundamental rights.

In Australia, we have failed in the attempt to strike the so-called ‘balance’ between protecting both our national security and individual liberties. However, this article argues that the rhetoric of ‘balancing’ competing obligations is itself misconceived, as the fight against terrorism and the protection of human rights are not competing priorities but rather inseparable obligations that stem from the same ultimate source – the protection of the right to life, liberty and security of person.

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¹ Justice Michael Kirby, ‘Australian Law After September 11, 2001’ (Speech delivered to the Law Council of Australia and the 32nd Australian Legal Convention, Canberra, 11 October 2001).

² *The Oxford Dictionary and Thesaurus* (1995) 1614.

The anti-terrorism laws passed by the Australian Parliament in 2002 and 2003 have eroded many fundamental rights and core elements of our criminal justice system that have been entrenched for centuries. This article focuses on the way in which these laws remove many long protected principles of human rights and how they offend international law. Primarily five key areas of the legislation will be analysed from an international human rights law perspective: detention without charge and the potential for this to be arbitrary detention; access to legal representation and other associated rights to a fair trial; the rights of a person while detained including the right to silence, the right to presumption of innocence and the right to access family and friends; and the rights of the child.

The introduction of counter-terrorism legislation in Australia

In October 2001 the Australian Commonwealth government announced its intention to establish a range of new criminal offences and give expansive new powers to our intelligence authorities to deal with terrorism.³ The government introduced its package of anti-terrorism laws (comprising six bills) into Parliament in March 2002.⁴ The key elements of this legislative package were the Security Legislation Amendment (Terrorism) [No 2] Bill 2002 ('Terrorism Bill') and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 ('ASIO Bill'). The other bills that accompanied these were: the Suppression of the Financing of Terrorism Bill 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, the Border Security Legislation Amendment Bill 2002, and the Telecommunications Interception Legislation Amendment Bill 2002.

The Terrorism Bill sought to update the offence of 'treason' and introduce the offence of 'terrorism' into the Criminal Code,⁵ making it an offence to engage in a terrorist act or to possess a 'thing' associated with a terrorism act, amongst others.⁶ It established a system of 'proscription' for terrorist organisations,⁷ and criminalised numerous other activities including being a member of, or providing training or assistance to, any terrorist linked organisation.⁸ Under the Terrorism Bill, the majority of offences do not require that a terrorist act actually takes place, and the main offences are punishable by

³ Attorney-General Daryl Williams, 'New Counter-Terrorism Measures' (News Release, 2 October 2001). This news release was made during the election campaign, and it promised introduction of the legislation after the election. The Attorney-General proposed that the legislation would be reviewed by the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJC'), who would report by 1 December 2002. Once the legislation was introduced, this timeframe was revised, and the PJC was required to report by 3 May 2002 (this date was later extended until 5 June 2002). See, also, Attorney-General Daryl Williams, 'Upgrading Australia's Counter-Terrorism Capabilities' (News Release, 18 December 2001).

⁴ On 12 March 2002 the Security Legislation Amendment (Terrorism) Bill 2002 ('Terrorist Bill'), the Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, Border Security Legislation Amendment Bill 2002, and Telecommunications Interception Legislation Amendment Bill 2002 were introduced into the House of Representatives. On 13 March 2002 the Security Legislation Amendment (Terrorist) Bill 2002 was withdrawn due to a technicality and was replaced by the Security Legislation Amendment (Terrorism) Bill 2002 [No 2]. The Australian Security Intelligence Organisation Legislation (Amendment) Bill 2002 ('ASIO Bill') was introduced on 21 March 2002.

⁵ Schedule 1 of the Terrorism Bill inserts into the Criminal Code (Cth) a new chp 5: 'The integrity and security of the Commonwealth'.

⁶ Terrorism Bill sch 1, item 4, inserting div 101 into the Criminal Code. See, in particular: div 101.1 which makes it an offence to engage in a terrorist act; div 101.2 which makes it an offence to provide or receive training connected with terrorist acts; div 101.4 which makes it an offence to possess things connected with terrorist acts; div 101.5 which makes it an offence to collect or make documents likely to facilitate terrorist acts; div 101.6 which makes it an offence to do any act in preparation for, or plan, a terrorist act.

⁷ Terrorism Bill sch 1, item 4, inserting div 102 into the Criminal Code. See, in particular, div 102.1 which defines 'terrorist organisation' and sets out the proscription process.

⁸ Terrorism Bill sch 1, item 4, inserting div 102 into the Criminal Code. See, in particular, div 102.2 which makes it an offence to direct the activities of a terrorist organisation; div 102.3 which makes it an offence to be a member of a terrorist organisation; div 102.4 which makes it an offence to recruit for a terrorist organisation; div 102.5 which makes it an offence to train with a terrorist organisation or receive training from a terrorist organisation; div 102.6 which makes it an offence to provide of funds to or from a terrorist organisation; div 102.7 which makes it an offence to provide support to a terrorist organisation.

life imprisonment.⁹ The definition of a ‘terrorism offence’ in the Terrorism Bill¹⁰ was excessively broad and vague, and before the original bill was passed the definition was amended to slightly limit its initial wide reach. Just one of the potential human rights implications of this definition is that it may be discriminatory in the way in which it restricts the right to freedom of expression, assembly and association. In its practical application this Bill reverses the onus of proof, which contradicts the presumption of innocence.

The ASIO Bill introduced into Australian law a regime of questioning and detention of non suspects by ASIO authorities for the purpose of intelligence gathering.¹¹ In its initial form it allowed for the indefinite, incommunicado detention of non suspects, including children. It removed a detained person’s right to silence, infringed upon their right to challenge the legality of their detention and allowed for detention without access to a lawyer. It removed the privilege against self incrimination and the presumption of innocence.

Since they were initially tabled, these two main pieces of legislation in particular were the subject of much critique and amendment. Indeed, the government’s proposed prompt passage of the legislation, especially the ASIO Bill, was delayed significantly by the debate regarding human rights concerns. When the package of legislation was first introduced in Parliament in March 2002, the government referred the ASIO Bill to the Parliamentary Joint Committee on ASIO, ASIS and DSD (‘PJC’).¹² After being rapidly passed in the House of Representatives,¹³ the other five bills proceeded to the Senate where they were referred to the Senate Legal and Constitutional Legislation Committee (‘First Senate Committee’) for review.¹⁴ These two committees were initially only given until 3 May to report, although this timeframe was extended until 5 June 2002. In their reports, both of these committees recommended fundamental changes to the legislation, with the PJC claiming that the ASIO Bill ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.¹⁵

While the majority of the laws passed with some amendment in June 2002,¹⁶ the ASIO Bill was referred again to committee,¹⁷ and the Senate Legal and Constitutional References Committee (‘Second

⁹ In particular, the offence of engaging in a terrorist act set out in Terrorism Bill sch 1, item 4, inserting div 101.1 into the Criminal Code; the offence of doing any act in preparation for, or planning, a terrorist act as set out in div 101.6.

¹⁰ As set out in Terrorism Bill sch 1, item 4, inserting div 100.1(1), (2) into the Criminal Code.

¹¹ ASIO Bill sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth). See, in particular, s 34D which allows for the detention of a person for questioning; s 34G which requires a person to appear for questioning.

¹² Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, ‘Review of the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (2002)’ (March-June 2002) (‘PJC Inquiry’).

¹³ The five bills in the anti-terrorism ‘package’ were passed by the House of Representatives on 13 March 2002.

¹⁴ The five bills in the anti-terrorism ‘package’ were introduced into the Senate on 14 March 2002 and the second reading debate was adjourned as the Selection of Bills Committee recommended the referral of the bills to the Senate Legal and Constitutional Legislation Committee: Selection of Bills Committee, Parliament of Australia, *Report No 2 of 2002* (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, ‘Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and related Bills’ (March-June 2002) (‘First Senate Committee Inquiry’).

¹⁵ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) vii (‘PJC Report’). See, also, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of the Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2], Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, Border Security Legislation Amendment Bill 2002, Telecommunications Interception Legislation Amendment Bill 2002* (2002) (‘First Senate Committee Report’); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of the Legislation Referred to the Committee: Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002).

¹⁶ Security Legislation Amendment (Terrorism) Act 2002 (Cth) (‘Terrorist Act’); Suppression of the Financing of Terrorism Act 2002 (Cth); Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002

Senate Committee') was given until 3 December 2002 to report. After still more changes were recommended,¹⁸ the government made key concessions and agreed to some amendments, although it rejected a number of the key findings of the Second Senate Committee.¹⁹ As the Australian Labor Party and the minor parties still held strong in their opposition to this draconian legislation, the Senate remained a stumbling block to the government's hopes of passing the legislation. The ASIO Bill became the subject of an all night sitting of both Houses of Parliament in late December 2002, before eventually being laid aside due to a deadlock. It was reintroduced on 20 March 2003 and, after extensive negotiation and amendment, was passed in its final form by the Senate on 26 June 2003.²⁰

Criticisms levelled at the legislation have included not only human rights arguments, but also accusations that the laws may be constitutionally invalid.²¹ Due to concerns about the constitutionality of the Terrorism Act, states referred their powers to the Commonwealth under Section 51(xxvii) of the Constitution.²² In some jurisdictions, legislation has also been introduced to create a complimentary regime of terrorist offences at a state level.²³ However, many still claim that the laws may not stand up to a constitutional challenge.²⁴

The need for counter-terrorism legislation: satisfying our international obligations

While many believe that the very existence of these laws 'creates a climate of fear and lays the groundwork for future repression',²⁵ others maintain that although the initial proposal went too far, there was a real need for enhanced anti-terrorism legislation in Australia.²⁶ It has been explained that these steps were necessary, both from the perspective of needing to satisfy the voting public that the government was taking all possible precautions to ensure security, and also due to the belief that such a

(Cth); Border Security Legislation Amendment Act 2002 (Cth); Telecommunications Interception Legislation Amendment Act 2002 (Cth).

¹⁷ Senate Legal and Constitutional References Committee, Parliament of Australia, 'Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters' (October-December 2002) ('Second Senate Committee Inquiry').

¹⁸ See Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) ('Second Senate Committee Report').

¹⁹ See Attorney-General's Department, 'Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth): Amendments to ASIO Bill' (Press Release, 10 December 2002).

²⁰ Australian Security Intelligence Organisation Legislation (Amendment) Act 2003 (Cth) ('ASIO Act').

²¹ For an analysis of some of the constitutional issues regarding the legislation see, generally, First Senate Committee Report, above n 15, 25-26; Submission to First Senate Committee Inquiry (Professor George Williams, Director, Gilbert + Tobin Centre of Public Law, The University of New South Wales); Submission to First Senate Committee Inquiry (Joo-Cheong Tham); Submission to PJC Inquiry (Joo-Cheong Tham).

²² Criminal Code Amendment (Terrorism) Act 2002 (Cth); Terrorism (Commonwealth Powers) Act 2003 (Vic); Terrorism (Commonwealth Powers) Act 2002 (NSW); Terrorism (Commonwealth Powers) Act 2002 (Qld); Terrorism (Commonwealth Powers) Act 2002 (WA); Terrorism (Commonwealth Powers) Act 2002 (Tas); Terrorism (Commonwealth Powers) Act 2002 (SA); Terrorism (Northern Territory) Request Act 2003 (NT).

²³ See, eg, Terrorism (Powers and Obligations) Act 2003 (Vic); Terrorism (Community Protection) Act 2003 (Vic); Terrorism (Police Powers) Act 2002 (NSW); Terrorism (Emergency Powers) Act 2003 (NT).

²⁴ See Cynthia Banham, 'ASIO laws may be invalid, say legal experts', *Sydney Morning Herald*, (Sydney, 27 June 2003); George Williams, 'ASIO Bill may not pass the constitutionality test', *The Age*, (Melbourne, 24 June 2003). An analysis of the constitutionality of the legislation is beyond the scope of this article.

²⁵ Ivan Shearer 'Human Rights in an Age of Terrorism' (Speech delivered at the Castan Centre for Human Rights Law, Melbourne, 3 June 2003), in reference to the views of other commentators.

²⁶ Notably, two strong proponents for some form of legislative response to terrorism are Professor Ivan Shearer and Professor George Williams. See Shearer, above n 25; George Williams, 'Australia's Legal Response to September 11: The Need to Safeguard Democracy While Fighting Terrorism' (Paper presented at 'The War on Terrorism: Democracy under Challenge', Victoria University, 9 August 2002); George Williams, 'One Year On: Australia's Legal Response to September 11' (2002) 27(5) *Alternative Law Journal* 212; George Williams, 'Australian Values and the War against Terrorism' (Speech delivered at the National Press Club Telstra Australia Day Address, Canberra, 29 January 2003).

legislative response was the appropriate reaction as a good member of the international community.²⁷ The government claimed that '[s]ince 11 September there has been a profound shift in the international security environment. This has meant that Australia's profile as a terrorism target has risen and our interests abroad face a higher level of terrorist threat'.²⁸ Thus they claimed such measures were necessary to deal with this threat of domestic and international terrorism.

There is no doubt much critical analysis to be done in the future regarding the validity or otherwise of the first purported justification for the necessity of such a response, being the need to satisfy the community that tough measures were being taken to protect national security, especially when one takes into account the government's concurrent assurances that there was no known specific threat of terrorism in Australia.²⁹ The second claim that legislative measures were required to satisfy our international obligations can be assessed by analysing exactly what those international obligations were. Soon after the World Trade Centre tragedy in September 2001, the United Nations Security Council passed Resolution 1373.³⁰ Resolution 1373 called on states to cooperate to prevent and suppress terrorism and to enhance efforts to strengthen a global response to the threat to international security.³¹ The resolution obliged states to legislate to prevent the provision of funds to terrorists and to allow for the financial assets of terrorists to be frozen, and required that they take steps to ensure that 'terrorist acts are established as serious offences in domestic laws and that the **publication** duly reflects the seriousness of such acts'.³² Member states were required to report to the United Nations within 90 days regarding the steps that they had taken to implement the resolution.

Some argue therefore that the government was justified in introducing new laws to fulfil its obligation under Resolution 1373 to ensure that terrorist acts were established as serious offences in our municipal law. Professor Shearer claims that '[t]hose Australians who urged in May 2002 before the Senate for Legal and Constitutional Legislation Committee that no new laws were necessary to combat terrorism overlook the binding nature of the decisions of the Security Council under Article 25 of the UN Charter'.³³

However, the Security Council resolutions do not detail what level of legislative response was required, and it can be argued that many countries such as Australia embarked upon a process of using this resolution to justify disproportionate and unnecessary legislation. For example, if it can be established that terrorist acts already qualified as serious offences and that adequate punishment was in place under the existing criminal laws, then there was no obligation to take further steps as Australia would have already been in compliance with Resolution 1373. As the Law Council of Australia noted in its submission to the First Senate Committee, '[i]t is by no means clear [under Resolution 1373] that Australia's international obligations require the creation of *separate* terrorism offences'.³⁴

Many have argued that the provisions of the Australian criminal law in place at the time were sufficient to deal with any offences that would constitute terrorist acts.³⁵ In fact, on 2 October 2001 the Attorney-

²⁷ George Williams, 'Australia's Legal Response to September 11: The Need to Safeguard Democracy While Fighting Terrorism' (Paper presented at 'The War on Terrorism: Democracy under Challenge', Victoria University, 9 August 2002) 1; Jenny Hocking, 'Counter-terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49(3) *Australian Journal of Political History* 355, 8.

²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1040 (Daryl Williams, Attorney-General).

²⁹ Attorney-General Daryl Williams, 'Upgrading Australia's Counter-Terrorism Capabilities' (News Release, 18 December 2001). See also Submission to Second Senate Committee Inquiry, 3-4 (Attorney-General's Department).

³⁰ Resolution 1373, SC Res 1373, 4385th mtg, UN Doc S/RES/1373 (2001).

³¹ See, also, Security Council, 'Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls For Suppressing Financing, Improving International Cooperation' (Press Release, 28 September 2001), UN Doc SC/7158.

³² Resolution 1373, SC Res 1373, 4385th mtg, art 2(e), UN Doc S/RES/1373 (2001).

³³ Shearer, above n 25.

³⁴ Submission to First Senate Committee Inquiry, 32, (Law Council of Australia) (emphasis in original).

³⁵ The First Senate Committee noted in their Report that: '[m]any submissions opposed the [Terrorism] Bill in particular on the basis that the need for such legislation in Australia had not been demonstrated and that

General assured the public that '[w]e ... have a raft of Commonwealth, State and Territory legislation that deals with terrorism'.³⁶ The Law Council of Australia also pointed out that³⁷

Existing Commonwealth and State and Territory legislation covers offences of murder, conspiracy, aiding and abetting, kidnapping, conduct likely to involve serious risk of life, personal injury, damage to property, all involving heavy penalties, as well as dealing with proscribed organisations, intelligence, investigation and enforcement.

Senator Brian Greig, in his Dissenting Report to the Senate Legal and Constitutional Legislation Committee noted that '[a]cts that would be regarded by the community as terrorism would, with few and possibly no exceptions, already be classified as serious offences'.³⁸ If one is to support this assumption that existing laws covered the majority of criminal offences normally categorised as 'terrorist acts', it can be argued that the legislative response in Australia was both disproportionate and unnecessary to combat the threat at hand, and could not be adequately justified by reference to Resolution 1373. On this basis, the Law Council of Australia urged that '[a]nti-terrorism measures adopted in Australia should not exceed our obligations to the international community'.³⁹

Other opponents to the legislation have pointed out not only its excessiveness, but also its potential futility, stating that an increased legislative response to terrorism would not address the key problem faced by counter-terrorism agencies, being that of analysing and acting upon the intelligence gathered. In justifying the need for the legislation, the Director-General of Security in Australia, Mr Dennis Richardson, explained that⁴⁰

The proposed bills certainly will not stop terrorism, any more than legislation against murder and robbery of itself stops those crimes. But the legislation is, in my view, necessary to deter, to punish and to seek to prevent. It is the latter – that is, prevention – which is a central element in the legislation.

However, it has been said that it is not the collection of intelligence that has been lacking in this fight to prevent terrorism, but rather it is the failure to adequately analyse that intelligence that has led to disastrous situations like September 11 and Bali.⁴¹ Commentators have queried therefore whether this push for a legislative solution has diverted debate away from other important priorities for fighting terrorism. For example, Professor George Williams wonders whether '[t]he ASIO Bill, in providing coercive new means of information gathering, may miss the more significant issue of whether ASIO possesses the resources and capacity to analyse adequately the information it already has'.⁴² This raises the question 'will any diminution of our freedoms which occur in the name of this threat in fact make us safer?'.⁴³

Compliance with international human rights law

existing criminal offences such as murder, grievous bodily harm, criminal damage, arson, conspiracy and attempt were adequate to address terrorist acts': First Senate Committee Report, above n 15, 19[3.4].

³⁶ Attorney-General Daryl Williams, above n 2.

³⁷ Submission to First Senate Committee Inquiry, 31[47], (Law Council of Australia).

³⁸ Senator Brian Greig, 'Dissenting Report', in First Senate Committee Report, above n 15, 83.

³⁹ Submission to First Senate Committee Inquiry, 33[48], (Law Council of Australia).

⁴⁰ Commonwealth, *Parliamentary Debates*, Legal and Constitutional Legislation Committee, Canberra, 19 April 2002, 166 (Dennis Richardson, Director-General of Security, Australian Security Intelligence Organisation).

⁴¹ Professor George Williams states that: 'the Bill may be not particularly helpful ... in dealing with the threat of terrorism facing our nation ... Unlike legislation in the United Kingdom, Canada and the United States, this Bill is not aimed at terrorists, but at non-suspects who may have useful information. [But] [r]ecent debate in the United States has questioned whether the problem facing intelligence services is one of analysis of information rather than information gathering.' See further George Williams, 'One Year On: Australia's Legal Response to September 11' (2002) 27(5) *Alternative Law Journal* 212, 215.

⁴² *Ibid.*

⁴³ Dr James Renwick in Daryl Williams and James Renwick, 'The War Against Terrorism: National Security and the Constitution' (2003) *Summer Bar News: Journal of the NSW Bar Association* 42, 50.

Regardless of whether these new laws were necessary in light of pre-existing criminal offences, or even whether they will be effective in assisting with the problem at hand, resolutions adopted by the United Nations Commission on Human Rights ('CHR') in both 2000 and 2001 state that 'all measures to counter terrorism must be in strict conformity with international law, including international human rights standards'.⁴⁴ The High Commissioner for Human Rights has urged states enacting anti-terrorism laws 'to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent'.⁴⁵ The last sitting of the General Assembly adopted by consensus Resolution 57/219 'Protecting Human Rights and Fundamental Freedoms while Countering Terrorism', which affirms that 'States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law'.⁴⁶

When first proposing this legislation the government assured us that '[w]hile these are significant new powers, to deal with significant new threats, stringent safeguards will be introduced in relation to the exercise of these powers' in order to ensure compliance with human rights laws.⁴⁷ However, these safeguards are insufficient in the eyes of many human rights activists, who have insisted since the first introduction of the legislation that the provisions of these laws are contrary to many rights protected by international law, both under treaty law and customary international law, including those enshrined in the International Covenant on Civil and Political Rights ('ICCPR'),⁴⁸ the Universal Declaration of Human Rights ('UDHR')⁴⁹ and the Convention of the Rights of the Child ('CROC').⁵⁰

These treaty obligations can be interpreted with the guidance of other documents such as the United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment ('Body of Principles'),⁵¹ the Basic Principles of the Role of Lawyers ('Basic Principles')⁵² and other instruments.⁵³ Further, the High Commissioner for Human Rights has set out a

⁴⁴ CHR, *Human Rights and Terrorism*, CHR Res 2001/37, 72nd mtg, UN Doc E/CN.4/RES/2001/37 (2001); CHR, *Human Rights and Terrorism*, CHR Res 2002/35, 50th mtg, UN Doc E/CN.4/RES/2002/35 (2002). See, also, *Human Rights and Terrorism*, GA Res 56/160, UN GAOR, 56th sess, 88th plen mtg, UN Doc A/RES/56/160 (2002).

⁴⁵ Mary Robinson, United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights, 'Human Rights and Terrorism' (Joint Press Release, 29 November 2001).

⁴⁶ *Resolution on Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, GA Res 57/219, UN GAOR, 57th sess, 77th plen mtg, UN Doc A/RES/57/219 (2003).

⁴⁷ Attorney-General Daryl Williams, above n 2.

⁴⁸ For example: the right to freedom of expression contained in art 19; the right to freedom of assembly in art 21; the right to the freedom of association in art 22; the right to be presumed innocent, and the right to prepare a defence in art 14; the freedom from arbitrary detention, right to a fair trial, and access to legal representation, in art 9: International Covenant on Civil and Political Rights, opened for signature 16 December 1966, [1976] 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980) ('ICCPR').

⁴⁹ For example: the right to be presumed innocent contained in art 11: Universal Declaration of Human Rights, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948) ('UDHR').

⁵⁰ For example: the right to liberty and freedom from arbitrary detention contained in art 37; the presumption of innocence in art 40; the obligation to put the best interests of the child first in art 3: Convention on the Rights of the Child, opened for signature 20 November 1989, [1991] ATS 4 (entered into force generally 2 September 1990 and for Australia 16 January 1991) ('CROC').

⁵¹ For example: the right to have detention reviewed by a court contained in Principle 11 of the *United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (1998) ('Body of Principles').

⁵² For example: the rights of access to legal representation contained in Principle 8 of the *Basic Principles of the Role of Lawyers*, adopted by the 8th United Nations Congress on the Prevention of Crime and Treatment of Offenders, UN Doc A/CONF.144/28/Rev.1 (1990) ('Basic Principles').

⁵³ For example: the right to be presumed innocent contained in arts 66, 67 and 55 of the Rome Statute of the International Criminal Court ('Rome Statute'), adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and first opened for signature on 17 July 1998 (entered into force 1 July 2002); the prohibition against detention without charge or trial contained in art 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights'), opened for signature 4 November 1950, [1950] ETS 005 (entered into force 3 September 1953).

number of criteria upon which compliance with international human rights standards could be monitored when assessing anti-terrorism measures.⁵⁴ This requires that for limitations of rights to be lawful they must:

- (a) be prescribed by law;
- (b) be necessary for public safety or public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
- (c) not impair the essence of the right;
- (d) be interpreted strictly in favour of the rights at issue;
- (e) be necessary in a democratic society;
- (f) conform to the principle of proportionality;
- (g) be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
- (h) be compatible with the objects and purposes of human rights treaties;
- (i) respect the principle of non-discrimination; [and]
- (j) not be arbitrarily applied.⁵⁵

The definition of 'terrorism' and 'terrorism offences'

When conducting a human rights based analysis of the anti-terrorism laws, it must first be noted that the powers under the ASIO Act are dependant upon the definition of 'terrorism offence' as set out in the Terrorism Act and now contained in the Criminal Code.⁵⁶ This definition underpins the entire anti-terrorism legislative package, and there has been widespread concern about the ambiguous and imprecise language used,⁵⁷ and the way in which this fails to provide clarity and certainty regarding the bounds of criminality.

There have been many criticisms of the definition and the way in which it has the potential to criminalise various forms of political dissent, even in light of the amendments made to the definition prior to its enactment.⁵⁸ In his Dissenting Report, Senator Greig commented that '[t]he real impact of the definition [of terrorism] may be to make a range of lawful conduct and minor offences subject to life imprisonment'.⁵⁹

Such a broad definition is of concern if one believes that there must be an element of clarity and certainty at law. Justice Evatt submits that 'part of the rule of law is that people should know with certainty whether their acts are likely or not to be criminal':⁶⁰ there should be a requirement that 'criminal offences for which liberty can be deprived ... be clearly defined so that citizens can know permissible limits of activity'.⁶¹ This requirement of certainty complies with the Lockean theory of law as a social contract, whereby establishing and clearly expressing the limits of allowable conduct allows each member of society to regulate their actions accordingly.

⁵⁴ Mary Robinson, 'General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism' in *Report of the High Commissioner for Human Rights: Human Rights: A Uniting Framework*, UN ESCOR CHR, 48th sess, [2], UN Doc E/C/N.4/2002/18 (2002).

⁵⁵ *Ibid.*

⁵⁶ As set out in Terrorism Act sch 1, item 4, inserting div 100.1(1), (2) into the Criminal Code (Cth).

⁵⁷ Submission to First Senate Committee Inquiry, 39, (Law Council of Australia).

⁵⁸ Note, a thorough analysis of the problems associated with the definition of 'terrorism' and 'terrorism offences' is beyond the scope of this article.

⁵⁹ Senator Brian Greig, 'Dissenting Report', First Senate Committee Report, above n 15, 83.

⁶⁰ Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 1 May 2002, 228 (Justice Elizabeth Evatt).

⁶¹ Submission to First Senate Committee Inquiry, 54[89] (Law Council of Australia).

One of the detailed criteria the High Commissioner for Human Rights established for assessing the legality of anti-terrorism measures was that laws ‘should use precise criteria’ and ‘not confer unfettered discretion on those charged with their execution’.⁶² The risk arising from an insufficiently narrow definition is that it will result in an inevitable exercise of discretionary powers in interpretation by those deciding whether or not to apply the legislation at all, which has the potential to infringe the express need to avoid conferring unfettered discretion upon such decision makers. Further, Evatt claims that ‘vague or imprecise terms in a criminal offence could infringe the protection against retrospectivity’ contained in Article 15 of the ICCPR, as a broadly drafted definition does not comply with the requirement for criminal liability and punishment to be limited to clear and precise provisions in the law.⁶³

Under the definition of ‘terrorist act’ there is such wide ranging potential for criminalisation of actions that it is difficult to say with any certainty that many hitherto lawful acts would not be offences under this legislation. As the Attorney-General’s Department conceded in evidence to the First Senate Committee Inquiry, the definition is so broad that technically many activities may constitute offences, although it is not intended that the police or prosecution authorities would prosecute many of these acts as discretion would be used where appropriate.⁶⁴ ‘Some may argue that little harm is done by the creation of such offences, as ultimately the prosecutorial authorities are unlikely to lay charges of terrorism in relation to other than the most serious of acts and against other than the most dangerous and threatening of organisations.’⁶⁵ However, this provides little comfort and seems a rather back-to-front way of operating a criminal justice system. Further it is certainly not in compliance with the criteria set down by the High Commissioner for Human Rights,⁶⁶ as it is precisely this discretion that the High Commissioner was guarding against when stating that precise criteria should be used at all times.

Detention without charge – potential arbitrary detention

When looking at the ASIO Act, the main point to note is that it is directed towards the detention of non suspects.⁶⁷ Normally, under the criminal law, persons suspected of committing, or conspiring to commit, an offence may be detained for questioning for a limited period.⁶⁸ However, a suspect must

⁶² Mary Robinson, ‘General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism’ in *Report of the High Commissioner for Human Rights: Human Rights: A Uniting Framework*, UN ESCOR CHR, 48th sess, [2] criterion 3, UN Doc E/C/N.4/2002/18 (2002).

⁶³ As discussed in First Senate Committee Report, above n 15, 44 (footnote 124). See, also, Submission to the First Senate Committee, 8 (The Human Rights Council of Australia).

⁶⁴ Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 8 April 2002, 12-4, 19-20 (Mr Karl Alderson, Principal Legal Officer, Criminal Justice Division, Attorney-General’s Department and Ms Susan McIntosh, Principal Legal Officer, Security Law and Justice Branch, Information and Security Law Division, Attorney-General’s Department). See, also, Submission to First Senate Committee Inquiry, 3-4 (Attorney-General’s Department); Submission to First Senate Committee Inquiry, 9 (Australian Federal Police); Legal and Constitutional Legislation Committee, Parliament of Australia, 19 April 2002, Canberra, 193 (Federal Agent Brendan McDevitt, General Manager, National Operations, Australian Federal Police).

⁶⁵ Submission to First Senate Committee Inquiry, 39-40, (Law Council of Australia).

⁶⁶ See further the comments of Justice John Dowd on behalf of the International Commission of Jurists who noted that the very existence of such offences creates to potential for abuse: as referred to in the First Senate Committee Report, above n 15, 38[3.71].

⁶⁷ Under s 34C of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)) the Minister may consent to a request from the Director-General to seek a warrant if ‘there are reasonable grounds for believing that issuing the warrant ... will substantially assist the collection of intelligence that is important in relation to a terrorism offence’: s 34C(3)(a). Detention for questioning occurs when ‘there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person: (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce’: s 34C(3)(c).

⁶⁸ See, eg, Crimes Act 1914 (Cth) s 23C,D, which provides that a person may be detained for the purpose of investigating whether the person committed an offence (including any offence that an investigating official reasonably suspects the person to have committed), but must not be detained after the end of the

promptly be charged with an offence or released.⁶⁹ Under this legislation, there is no such requirement. It has been argued by many that '[t]his does not sit very easily with article 9(1) of the [ICCPR], which requires that 'no person shall be subjected to arbitrary arrest or detention''.⁷⁰ It is also contrary to Article 5(1) of the European Convention on Human Rights, which prohibits detention without charge or trial.⁷¹ While Australia is not bound to comply with this convention, it provides us with an insight into the internationally accepted standards regarding detention. It should also be remembered that this convention regulates a jurisdiction in which the issue of terrorism has been pertinent for decades.

Articles 9 and 10 of the ICCPR are directly relevant to a human rights law analysis of the ASIO Act. They provide that no person shall be subjected to 'arbitrary' detention and that persons arrested or detained shall be informed of the charges against them. They shall moreover be entitled to trial within a reasonable time, and to have access to a court to test the lawfulness of their detention. Article 9 of the ICCPR states that 'no one shall be deprived of his liberty except on grounds and in accordance with such procedure as are established by law'.⁷² Of course, the enactment of the ASIO Act into Australian law ensures that detention without charge is in accordance with the procedure established by our law.

While a deprivation of liberty is only allowed under Article 9(1) if it is in accordance with procedures established by law, the Human Rights Committee ('HRC') has found that the ability to challenge the lawfulness of detention under Article 9(4) hinges upon the definition of 'lawfulness' under the ICCPR rather than 'lawfulness' under state law.⁷³ Thus, even if the detention is lawful under Australian law, a review of the validity of the detention must take into account whether it is in violation of the ICCPR, and not merely limit its scope to reviewing whether it is lawful under Australian law. Joseph et al note that this redresses the potential for the right of *habeas corpus* (for example) to be 'a mere formal provision with little substantive value' if states were allowed to pass laws which were broad enough to authorise detention on any grounds.⁷⁴

The ASIO Act allows for detention for questioning for up to a total of 24 hours over a maximum period of seven days.⁷⁵ Not only does this excessive length of detention allowable under the ASIO Act create the potential that detention could be viewed as unreasonable and therefore arbitrary, but also it would seem contrary to the spirit of the provisions of Article 9 of the ICCPR if legislation could allow authorities to detain people they had no intention of prosecuting. The accusation of arbitrariness can be based essentially on two factors: the length of detention, and the unpredictability created by the definition of terrorism as described above.

First, the length of detention can be viewed as arbitrary as the HRC has interpreted 'arbitrary' to mean unreasonable and 'thus a lengthy detention on national security grounds requires justification in terms

investigation period: s 23C(2). The investigation period begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances, but does not extend beyond 4 hours for an adult (and 2 hours for a child or Aboriginal or Torres Strait Islander): s 23C(4). The investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once: s 23D(5).

⁶⁹ Under the Crimes Act 1914 (Cth) at s 23C(3) the person must be: (a) released (whether unconditionally or on bail) within the investigation period; or (b) brought before a judicial officer within that period or, if it is not practicable to do so within that period, as soon as practicable after the end of the investigation period.

⁷⁰ Shearer, above n 25.

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights'), opened for signature 4 November 1950, [1950] ETS 005 (entered into force 3 September 1953).

⁷² This protection against arbitrary detention is also set out in art 9 of the UDHR: Universal Declaration of Human Rights, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948).

⁷³ *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1993).

⁷⁴ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2000) 241.

⁷⁵ Section 34D(3)(c) and s 34HC set the maximum length of the questioning period at 168 continuous hours from the time when the person is first brought before a prescribed authority; s 34HB sets the maximum length of each questioning session at 8 hours, extendable a maximum of two times after the initial 8 hour period: ASIO Act sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth).

of its reasonableness and proportionality'.⁷⁶ It would be difficult to show that seven days detention (especially for children) is justified on this basis. In the matter of *Van Alphen v The Netherlands*⁷⁷ it was noted that 'remand in custody pursuant to lawful arrest must not only be lawful, but reasonable in all the circumstances. Further remand in custody must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime'.⁷⁸ The HRC found that failure to cooperate with a criminal investigation was not sufficient reason to justify detention in that instance. In relation to the ASIO Act, one could question whether the period of detention is necessary, or at the very least reasonable, given the other available options for questioning non suspects and information gathering.

It is not easy to say exactly what length of time would be considered to be necessary or reasonable by the HRC. However, some light can be gleaned from its previous determinations. For example, in the matter of *Tshionga a Mingna v Zaire*⁷⁹ a man was detained, apparently for the purposes of political persecution, for a mere half a day. Regardless of the brevity of this period of detention, the HRC found it to be in breach of Article 9. In *Spakmo v Norway*⁸⁰ the HRC determined that Mr Spakmo's detention for a period of eight hours after a second arrest was not reasonable and in breach of the ICCPR. In the matter of *Giry v Dominican Republic*⁸¹ detention for 2 hours and 40 minutes was also deemed to be a breach of Article 9. A period of 'preventative detention' for 15 days, with the possibility of a further 15 day extension, for persons suspected of terrorism, espionage and illicit drug trafficking has also drawn strong criticism from the HRC.⁸² Moreover, it is important to remember that many of the findings of the HRC regarding arbitrary detention relate to instances where the person has been arrested and held, unlike the situation under the ASIO Act which only envisages the detention of non suspects.⁸³

In *A v Australia*⁸⁴ the HRC noted that detention is arbitrary if it is disproportionate in the prevailing circumstances and if detention continues beyond the period for which the state can provide appropriate justification. As a consequence, the government has been careful to ensure that the ASIO Act requires that a person be immediately released from detention once the questioning process has been completed, or where it is believed that there is no further information to be gained.⁸⁵ Regardless, the detention of people without any intention to prosecute is likely to be difficult to justify, and satisfying the requirement for reasonableness, proportionality and necessity may well be problematic when one contemplates the 24 hour limit on questioning spread over a lengthy seven day period.

The length of detention is not the only facet of this legislation that raises concerns about whether the prohibition against arbitrary detention is compromised. Consideration must also be given to what impact the broad and vague terms of the terrorism offences (and subsequently therefore the detention powers) have upon compliance with the ICCPR's prohibition on arbitrary detention. In the decision of *Van Alphen v The Netherlands* the HRC said "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack

⁷⁶ Shearer, above n 25.

⁷⁷ *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (1998).

⁷⁸ *Ibid* (emphasis added).

⁷⁹ *Tshionga a Mingna v Zaire*, Communication No 366/1989, UN Doc CCPR/C/40/D/366/1989 (1999).

⁸⁰ *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).

⁸¹ *Giry v Dominican Republic*, Communication No 193/1985, UN Doc Supp 40 A/45/40 Vol II 38 (1990).

⁸² HRC, *Comments on Peru*, [18] UN Doc CCPR/C/79/Add.67 (1996).

⁸³ See above n 67; s 34C of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)). Note, however, that the rules for children who are at least 16 but under 18 are different and require that they must be 'suspects' in order to be detained. Section 34NA(4) requires that the Minister must be satisfied on reasonable grounds that it is likely that the child will commit, is committing or has committed a terrorism offence: s 34NA of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

⁸⁴ *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1993).

⁸⁵ Section 34D(2)(b)(i) allows for a person to be detained for the questioning period, which, under s 34D(3)(a) ends when the officer exercising authority under the warrant does not have any further questions or requests for information: s 34D(2) and 34DC of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

of predictability'.⁸⁶ In Nowak's commonly cited definition 'arbitrariness' contains 'elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality'.⁸⁷ On this basis, it is possible that the broad definition of terrorism and the potentially wide application of terrorism offences could bring these laws within the ambit of 'arbitrariness' as.⁸⁸

an unacceptable element of arbitrariness and unpredictability arises in that determining whether or not a person is charged with a terrorist offence, with another offence or with any offence at all (a determination which has profound implications in terms of the onus of proof, available defences, stigma of conviction and heaviness of penalties), is left to the prosecutorial authorities without any transparency or public scrutiny.

There are further ways in which the legislation could be applied in such a way that would lead to arbitrary detention. For example, if a detainee resolutely refused to answer questions, it is possible that continued detention could become arbitrary in that it would be unreasonable or unnecessary (given its ineffectiveness) for the purposes of information gathering (information gathering being the primary purpose of detention under the ASIO Act⁸⁹). There is also the possibility that detention could be in breach of other rights – for example, the right to protection against cruel, inhuman or degrading treatment or punishment which could be breached, for example if a whole family (or certain members of it) were detained to 'get at' a suspect or investigatory target.⁹⁰

Whether the element of unpredictability, the length of the seven day period of detention or any other elements of the ASIO Act constitute arbitrary detention and thus breach Article 9 will be a matter for the HRC to determine either in response to an individual complaint, or as part of the review of the state compulsory reporting obligations.⁹¹ Professor Shearer states that '[i]t is an open question whether the flexibility of the word 'arbitrary (reasonable) in article 9 of the Covenant would extend so far as to enable a lengthy period of detention such as proposed under the ASIO Bill to be justified'.⁹² He also notes that this length of detention may not be the only problem for the government should an individual complaint be made to the HRC: 'the availability of judicial review of the detention and access to legal assistance would also come into account'.⁹³

Challenging detention – right to information and judicial review

Thus the other rights provided for under Article 9 are also very important. For example, they provide that anyone arrested or detained on a criminal charge shall be entitled to be brought before a judge for a trial within a reasonable time or to be released.⁹⁴ Article 9 also maintains that persons awaiting trial shall not be detained in custody as a general rule.⁹⁵ It can be argued that if these are the requirements for a person detained on a criminal charge or arrested in accordance with the law, no lesser rights should be accorded to someone detained merely for investigative purposes and not on suspicion of any criminal activity as provided for under the ASIO Act. These rights contained in Article 9 of the ICCPR are mirrored in other instruments such as the Body of Principles which states at Principle 11: 'A person

⁸⁶ *Van Alphen v The Netherlands*, Communication No 305/1988, [5.8], UN Doc CCPR/C/39/D/305/1988 (1998).

⁸⁷ M Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (1993) 172. See, also, Submission to PJC Inquiry, 19[32] (Law Council of Australia).

⁸⁸ Submission to First Senate Committee Inquiry, 39-40, (Law Council of Australia).

⁸⁹ See Second Senate Committee Report, above n 18, 81.

⁹⁰ *Ibid*, 83.

⁹¹ Note that Australia is not due to report again until 2005.

⁹² Shearer, above n 25.

⁹³ *Ibid*.

⁹⁴ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 9(3) (entered into force generally 23 March 1976 and for Australia 13 August 1980) ('ICCPR').

⁹⁵ *Ibid*.

shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.⁹⁶

In General Comment 8 of the HRC:⁹⁷

The Committee points out that paragraph 1 [of Article 9 of the ICCPR] is applicable to all deprivations of liberty, whether in criminal cases or in other cases ... It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. The rest, and in particular, the important guarantee laid down in paragraph 4, ie. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. ... Also if so-called preventative detention is used, for reasons of public security, it must be controlled by these same provisions, ie. it must not be arbitrary, and it must be based on grounds and procedures established by law (para 1), information of the reasons must be given (para 2) and court control of the detention must be available (para 4) as well as compensation in the case of a breach (para 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted.⁹⁸

It is clear that the ASIO Act potentially breaches some of these aspects of Article 9. First of all, the question remains whether detention for up to seven days can be viewed as reasonable (and therefore not arbitrary), as discussed above. Second, the legislation does not require that a detained person be informed of the reasons for their detention, in fact, under the national security restrictions, it may be virtually impossible for a detained person to ever obtain information about this.⁹⁹ While there is the ability for a detained person to challenge the validity of their detention, including the ability seek relief from the Federal Court,¹⁰⁰ restrictions upon access to information and legal representation make this right difficult to both access and enforce in practicality. Further, the ASIO Act does not set out a right for someone detained unlawfully to be entitled to compensation, and it is questionable whether a person would ever be successful in a claim of this nature, given the restrictions on information about their detention on the basis of national security.

In the matter of *Berry v Jamaica*¹⁰¹ the HRC draws on the relationship between access to legal representation (discussed below) and the enjoyment of the right to challenge the validity of detention under Article 9(4). 'In practice, it is virtually impossible for people to challenge their detention without legal representation.'¹⁰² Further, Amnesty International notes:¹⁰³

it is important that when challenging the legality of detention, a suspect and his or her legal representative should have access to the legal and factual basis upon which the state justifies detention. Amnesty International is concerned that people will be detained on the basis of secret

⁹⁶ *United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, 43rd sess, 76th plen mtg, Principle 18, Principle 11, UN Doc A/RES/43/173 (1998).

⁹⁷ HRC, *General Comment 8: Right to Liberty and Security of Persons*, 16th sess, UN Doc HRI/GEN/1/Rev.1 at 8 (1994).

⁹⁸ Joseph et al, above n 74, 210.

⁹⁹ An example of the restrictions upon accessing information contained in this legislation is illustrated by s 34VA which sets out that the regulations relating to the ASIO Act 'may prohibit or regulate access to information, access to which is otherwise controlled or limited on security grounds, by lawyers acting for a person in connection with proceedings for a remedy relating to: (a) a warrant issued under section 34D in relation to the person; or (b) the treatment of the person in connection with such a warrant': 34VA of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹⁰⁰ Section 34E(1)(f) requires the prescribed authority to inform a detained person of their right to seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant: 34E(1) of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹⁰¹ *Berry v Jamaica*, Communication No 330/1988, UN Doc CCPR/C/50/D/330/1988 (1994).

¹⁰² Joseph et al, above n 74, 233.

¹⁰³ PJC Report, above n 15, 13.

and therefore possibly inaccurate and misinterpreted information. They should be afforded the opportunity to address and correct this information.

Although the HRC has stated that '[t]he requirement of prompt information ... only applies once the individual has been formally charged with a criminal offence',¹⁰⁴ 'it would be very odd if the ICCPR granted greater rights to persons officially arrested on criminal charges than to those who are compulsorily detained for questioning in relation to criminal offences'.¹⁰⁵ It will be extremely difficult for a person detained under the ASIO Act to challenge the validity of their detention if they are not provided with access to the reasons for their detention. It will therefore be imperative that a detainee has full and proper access to timely and effective legal representation (that is, a legal representative whom is not themselves unduly hampered in their ability to access relevant information)¹⁰⁶ to assist in overcoming this practical barrier to judicial review, and guarantee the satisfaction of some of the minimal rights maintained under this legislation.

The government has attempted to avoid a potential minefield of problems by amending the legislation to allow for both access to legal representation and judicial review of detention, neither of which were adequately protected in the original drafts of the ASIO Bill.¹⁰⁷ However, as the Second Senate Committee noted, safeguards such as the right to challenge the validity of detention 'may have no residual value once a person has been detained and released'.¹⁰⁸ Thus the prescribed authority will need to be vigilant in facilitating the prompt fulfilment of requests for judicial review, so as to avoid instances such as that that encountered in the matter of *Borisenko v Hungary*,¹⁰⁹ where the HRC found a violation of Article 9(3) of the ICCPR based on the fact that the complainant had been detained for three days before being brought before a judicial officer, or in the matter of *Freemantle v Jamaica*, where a four-day delay in bringing a detainee before a judge constituted a breach of the ICCPR.¹¹⁰

Questions also remain as to whether the requirement to access judicial review under Articles 9(3) and 9(4) are satisfied by the provision of access to a prescribed authority, given the quasi-judicial nature of this body. The HRC noted in the matter of *Kulomin v Hungary*,¹¹¹ that the functions under Articles 9(3) and 9(4) can only be carried out by a judicial body, and not a quasi-judicial substitute (this was also found in *Torres v Finland*¹¹² and *Vuolanne v Finland*¹¹³). The non-judicial oversight of the prescribed authority does not satisfy compliance with these provisions. It is important to remember that not only are the Administrative Appeals Tribunal ('AAT') members of the prescribed authority technically non-judicial officers and lacking 'entrenched independence or tenure',¹¹⁴ but also those serving in a judicial capacity are exercising power under the ASIO Act in a non-judicial capacity.¹¹⁵

Article 14 also requires that the authority that determines the individual's rights and obligations (such as the right to legal representation, which is addressed below) should be competent, independent and impartial. Many organisations have questioned the role of a non-judicial prescribed authority in this

¹⁰⁴ *Kelly v Jamaica*, Communication No 253/1987, UN Doc Supp No 40 A/46/40 241 (1991).

¹⁰⁵ Submission to PJC Inquiry, 1 (Castan Centre for Human Rights).

¹⁰⁶ However, on this point, see above n 99.

¹⁰⁷ For example, in the original version of the ASIO Bill, a detained person was not informed of their ability to seek judicial review, and they were detained without access to a lawyer – this effectively nullified any theoretical ability to seek judicial review, as their detention was incommunicado, and because of this no one with the ability or motivation to apply for *habeas corpus* on their behalf would be aware of their detention. See, further, the Second Senate Committee Report, above n 18, 121-6. Regarding the potential human rights implications of the restrictions imposed in the earlier Bill, see, further, Joseph, above n 74, 222-3. See, also, HRC, *General Comment 8: Right to Liberty and Security of Persons*, 16th sess, UN Doc HRI/GEN/1/Rev.1 at 8 (1994).

¹⁰⁸ Second Senate Committee Report, above n 18, 56.

¹⁰⁹ *Borisenko v Hungary*, Communication No 852/1999, UN Doc CCPR/C/75/D/852/1999 (1997).

¹¹⁰ *Freemantle v Jamaica*, Communication No 625/1995, UN Doc Supp No 40 A/55/40 11 (2000).

¹¹¹ *Kulomin v Hungary*, Communication No 521/1992, UN Doc CCPR/C/50/D/521/1992 (1996).

¹¹² *Torres v Finland*, Communication No 291/1988, UN Doc CCPR/C/38/D/291/1988 (1990).

¹¹³ *Vuolanne v Finland*, Communication No 265/1987, UN Doc Supp No 40 A/44/40 249 (1989).

¹¹⁴ Williams, above n 25, 7.

¹¹⁵ See s 34SA(2) of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

context also, given that the prescribed authority determines such rights as access to legal representation throughout the questioning process. The concern here is that members of the AAT are non-judicial appointees, whose fixed term appointments and reappointments are subject to the will of the government. This is arguably a political appointment, which would fail to satisfy the criteria required for an independent and impartial authority. A member of the AAT ‘does not have traditional judicial independence which raises the obvious concern that this procedure may be seen as little more than a rubber stamping of Executive power’.¹¹⁶

The restriction of full and proper access to legal representation

Article 14(3)(b) of the ICCPR provides for a detained person to ‘communicate with counsel of his own choosing’. This right is protected in the Basic Principles, which recognises the right to have a lawyer of choice present at all stages of criminal proceedings.¹¹⁷ It is also a right implied in Principle 17 of the Body of Principles.¹¹⁸ The HRC has held that this right of communication in Article 14(3) of the ICCPR is ‘wider than the right to legal assistance at the trial itself ... and appl[ies] in cases of incommunicado detention before charges have been laid’.¹¹⁹ While, under the ASIO Act, the right to access legal representation of own choice has been one of the hard fought battles finally won by human rights activists, this right is still limited in a number of ways. First, ASIO has an effective right to veto an indefinite number of legal counsel by seeking to have them disallowed, so under the ASIO Act there is no true and absolute right to a lawyer of your own choice, but rather access to a lawyer of your own choice as long as ASIO does not succeed in its objection to that choice.¹²⁰

Second, and perhaps even more worrying, a person detained for questioning under the ASIO Act is not permitted to consult with their lawyer in private. Under the provisions of the legislation, ASIO has the power to monitor all communication between lawyer and client.¹²¹ Not only must consultation take place within sight of ASIO officers, but all communications may be required to be conducted within earshot of ASIO officers. This breach of the right to communicate with counsel in confidence is in direct violation of Principle 8 of the Basic Principles, which states that ‘all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception and censorship and in full confidentiality’.¹²² Further, Principle 18 of the Body of Principles provides that ‘interviews between the prisoner and his legal adviser may be within sight but not within hearing of a police or institutional official’.

Moreover, the restrictions imposed upon the lawyer during the questioning process also go against the Basic Principles by effectively stifling the lawyer from properly fulfilling their role and preventing them from thoroughly advising and protecting their client.¹²³ Another aspect of the right to legal

¹¹⁶ Submission to PJC Inquiry, 5 (Dr Jenny Hocking).

¹¹⁷ *Basic Principles on the Role of Lawyers*, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Principle 1, UN Doc A/CONF.144/28/Rev.1 (1990).

¹¹⁸ *United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, 43rd sess, 76th plen mtg, Principle 17, UN Doc A/RES/43/173 (1998).

¹¹⁹ Shearer, above n 25.

¹²⁰ The limitations placed upon contact with a lawyer of own choice are contained within s 34TA of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹²¹ Section 34U(2) of the ASIO Act states ‘contact [between lawyer and detained person] must be made in a way that can be monitored by a person exercising authority under the warrant’: s 34U of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹²² *Basic Principles on the Role of Lawyers*, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Principle 8, UN Doc A/CONF.144/28/Rev.1 (1990)

¹²³ See, eg, s 34U(3) of the ASIO Act which limits the legal advisers’ ability to advise the subject to ‘breaks in the questioning’; s 34U(4) which prohibits the legal adviser from intervening in questioning of the subject or addressing the prescribed authority before whom a subject is being questioned, except to request clarification of an ambiguous question; s 34U(5) which allows the prescribed authority to remove a legal adviser if they consider the legal adviser’s conduct to be unduly disrupting the questioning: s 34U of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

representation which is clearly compromised by this legislation is the requirement that a detained person must be entitled to consult with a lawyer ‘without delay’.¹²⁴ Under the ASIO Act, the questioning process is permitted to start before the arrival of legal representation, even if the detained person has specifically requested legal representation to be provided.¹²⁵

Abrogation of the right to silence and diminution of the freedom from self-incrimination

The right to silence is a central tenet to our criminal justice system and is protected under Australian law under s 23S of the Crimes Act 1914 (Cth). The right to silence is linked to the principle that it is the role of the prosecution to prove guilt beyond reasonable doubt, and the right of the accused to be presumed innocent until proven guilty. In this regard, Amnesty International believes it to be ‘an indispensable aspect of the right to a fair trial, and its removal would thus lead to a violation of this right’.¹²⁶ In the ASIO Act the right to silence is removed: the ASIO Act makes any failure to answer questions asked or provide information requested an offence punishable by up to 5 years imprisonment.¹²⁷

Violation of the right to silence is notorious for being a part of the legislative arsenal in countries where draconian regimes are bolstered by laws allowing for torture. In other countries, such laws have been used to convict and imprison detainees merely on the basis that they have refused to answer questions, even when they have been acquitted of all crimes.¹²⁸ As Amnesty International points out, it is for this reason that the right of an accused person to remain silent is expressly recognised in the Rome Statute of the International Criminal Court (‘Rome Statute’) at Article 55(2)(b).¹²⁹ Remembering that the Rome Statute covers crimes such as genocide, crimes against humanity and war crimes, Amnesty International states that ‘[i]t would seem extraordinary that such a right is protected in relation to those terrible crimes, yet limited in this proposed legislation’.¹³⁰

Article 14(3)(g) of the ICCPR provides freedom from self-incrimination and places upon the state an obligation to show that a confession has been obtained without duress. While the legislation in its amended form does now provide for limited immunity from self-incrimination, the abrogation of the right to silence and the allowance of coercive questioning could threaten the ability to show that any information provided was not done so under duress. Professor Williams argues that ‘[t]he lack of procedural fairness resulting from how the evidence has been collected may prejudice the reliability of the material and the capacity to have a fair trial’.¹³¹

The Second Senate Committee looked closely at this aspect of the removal of the full freedom from self-incrimination, showing that while the ASIO Act ‘protects the person against direct use of the answers in criminal proceedings against them ... that is, it provides a *use immunity* ... [it] does not protect the person from indirect or *derivative use* of any answers they give’.¹³² Dr Donaghue explained to the Second Senate Committee that one of the consequences of the capacity for derivative use is that

¹²⁴ *United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, 43rd sess, 76th plen mtg, Principle 18, UN Doc A/RES/43/173 (1998).

¹²⁵ Section 34TB of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹²⁶ Submission to PJC Inquiry, 16 (Amnesty International).

¹²⁷ Under s34G(3) ‘a person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant. Penalty: Imprisonment for 5 years’: s 34G of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹²⁸ See, eg, *Heany and McGuinness v Ireland* (2000) XII Eur Court HR.

¹²⁹ Rome Statute, adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and first opened for signature on 17 July 1998 (entered into force 1 July 2002) (ratified by Australia on 1 July 2002).

¹³⁰ Submission to PJC Inquiry, 16 (Amnesty International).

¹³¹ Submission to Submission to Second Senate Committee Inquiry, 7 (Professor George Williams). See also Second Senate Committee Report, above n 18, 65.

¹³² Second Senate Committee Report, above n 18, 61 (emphasis in original).

‘the correspondence between the immunities and the privilege against self-incrimination has been broken’.¹³³

If you still have your privilege against self-incrimination, you get two things: firstly, you get to not confess ...; and, secondly, you get to not give answers that will get investigators going down a train of inquiry that will ultimately lead to your incrimination. The privilege, when it exists ..., gives you both those things.¹³⁴

Under the provisions of the ASIO Act, a questioned person gets neither of these elements as there is no right not to confess, on the contrary the right to silence has been removed, and therefore although direct use immunity is provided for, the ability for prosecutors and investigators to derivatively use information obtained threatens the full enjoyment of the freedom from self-incrimination. This places Australia ‘out of step with the USA, Canada and Europe’ where ‘the removal of the privilege against self-incrimination without providing protection against derivative use of the information [is] not permitted’.¹³⁵

Guilty until proven innocent – the removal of the presumption of innocence

The presumption of innocence has also been a long held right, both in domestic and international law. It is enshrined in Article 14(2) of the ICCPR¹³⁶ and Article 11 of the UDHR,¹³⁷ and is recognised in Principle 36(1) of the Body of Principles.¹³⁸ This right, that those charged with a criminal offence have to be presumed innocent until proven guilty according to law, is a non-derogable right.

It was originally proposed that under the Terrorism Bill, there would be a reverse onus of proof in relation to terrorist offences,¹³⁹ although this element was removed in accordance with the recommendations of the First Senate Committee.¹⁴⁰ However, a reverse onus of proof remains in the ASIO Act.¹⁴¹ Under the ASIO Act, there is no requirement for the prosecution to build a *prima facie* case against the defendant. Rather, the burden of proof is shifted onto the accused, in violation of the right to be presumed innocent until proven guilty. This reverse onus applies to the requirement to provide information in response to questions by ASIO officers. Under section 34(G) of the ASIO Act, it is an offence punishable by up to five years imprisonment to fail to give information requested of you as part of the questioning process, and while that offence and penalty do not apply if you do not have the information requested, the burden is upon you to prove your lack of knowledge. It will foreseeably be a very difficult task indeed to prove that you do not know what ASIO thinks you know, especially as any insight into what it is looking for is likely to be the subject of ‘national security’ restrictions.

Under both international and domestic law, this right to be presumed innocent until proven guilty according to law has been protected for centuries. It is interesting to note that more recently, even the Rome Statute maintains this right.¹⁴² Articles 66 and 67 of the Rome Statute require the presumption of innocence and rights of the accused to be upheld, and likewise Article 55 protects those providing

¹³³ Second Senate Committee Report, above n 18, 63.

¹³⁴ Commonwealth, *Parliamentary Debates*, Legal and Constitutional Legislation Committee, Canberra, 22 November 2002, 174 (Dr Stephen Donaghue). See, also, Second Senate Committee Report, above n 18, 63.

¹³⁵ Second Senate Committee Report, above n 18, 63.

¹³⁶ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 14(2) (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹³⁷ UDHR, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg, art 11, UN Doc A/RES/217A (III) (1948).

¹³⁸ *United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, 43rd sess, 76th plen mtg, Principle 36(1), UN Doc A/RES/43/173 (1998).

¹³⁹ Proposed ss 101.2, 101.4, 101.5 and 102.4 of the Terrorism Bill sch 1, item 4, inserting div 101 into the Criminal Code.

¹⁴⁰ First Senate Committee Report, above n 15.

¹⁴¹ Under s34G(4) a defendant bears an evidential burden in relation to whether they have the information requested: s 34G of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹⁴² Rome Statute, adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and first opened for signature on 17 July 1998, arts 66, 67 and 55 (entered into force 1 July 2002) (ratified by Australia on 1 July 2002).

information during an investigation. Amnesty International has pointed out that '[i]t would be contradictory indeed if the rights set out for those charged with some of the heinous crimes – crimes against humanity, war crimes and genocide – were not to be applied to those who are simply being held for questioning without charge'.¹⁴³ Article 14(2) of the ICCPR states that 'everyone charged with a criminal offence shall have the right to be presumed innocent until they are proved guilty according to law'.¹⁴⁴ It is illogical to suggest that someone who is not even charged with a criminal offence, not even suspected of committing a criminal offence, should not also be entitled to this presumption of innocence.

Restricting access to family and friends

The HRC noted in its General Comment 20 on Article 7 (concerning the prohibition of torture and cruel, inhuman or degrading treatment or punishment) that 'the protection of the detainee also requires that prompt and regular access be given to ... family members under appropriate supervision when the investigation so requires'.¹⁴⁵ 'It follows that where there are no such provisions or the access in question is not granted promptly, the proposed regime may fall foul of article 7'.¹⁴⁶ The ASIO Act does not allow for the automatic provision of access to family, in fact there is no right to contact any family member unless such contact is specifically allowed for under the warrant, and is therefore available only at the discretion of the prescribed authority at the time of issuing the warrant.¹⁴⁷ 'There is no indication as to when such a power should be exercised or on what basis'.¹⁴⁸ Likewise, the Body of Principles provides at Principle 16 that a detained person shall be able to notify their family or other appropriate persons of their choice, of their detention and of the place where they are being held in custody.¹⁴⁹ Again, this right is not protected in the legislation.

Detention without access to family or friends could also amount to a breach of Article 17 of the ICCPR, which guarantees the freedom from arbitrary interferences with family life. The European Commission on Human Rights found in the case of *McVeigh, O'Neal and Evans v UK*¹⁵⁰ that the detention of terrorist suspects for 45 hours breached a similar right in the European Convention, as the suspects were denied access to their wives. It can therefore be likewise assumed that the provisions of this legislation will be potentially in breach of Article 17 if access to family is denied.

Protecting the rights of the child

Perhaps one of the most concerning aspects of this legislation is its provisions relating to children.¹⁵¹ The Law Institute of Victoria's Young Lawyers Section ('LIV') in their submission to the First Senate Committee claimed that:¹⁵²

The definition of a terrorist act is likely to fall unduly harshly on young people and innocent acts of civil disobedience may be prosecuted as terrorist acts, at worst resulting in 25 years imprisonment and at best labelling the young person a terrorist for the rest of their life.

¹⁴³ Submission to First Senate Committee Inquiry, 5 (Amnesty International).

¹⁴⁴ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 14(2) (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁴⁵ HRC, *General Comment 20: Regarding Prohibition of Torture and Cruel Treatment or Punishment*, CHR, 44th sess, [11] UN Doc HRI/GEN/1/Rev.1 (1992).

¹⁴⁶ Submission to PJC Inquiry, 21[38] (Law Council of Australia).

¹⁴⁷ Under s 34F(8) a person who has been taken into custody, or detained, is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention, unless the warrant permits them to contact that person. Under s 34D(4) 'the warrant may identify someone whom the person is permitted to contact by reference to the fact that he or she is the lawyer of the person's choice or has a particular legal or familial relationship with the person': ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹⁴⁸ Submission to PJC Inquiry, 8[47], (Human Rights and Equal Opportunity Commission).

¹⁴⁹ *United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, GA Res 43/173, 43rd sess, 76th plen mtg, Principle 16, UN Doc A/RES/43/173 (1998).

¹⁵⁰ *Mcveigh, O'Neill and Evans v The United Kingdom* (1981) Eur Com HR.

¹⁵¹ Rules for children who are at least 16 but under 18 are contained in s 34NA of the ASIO Act (contained in sch 1, item 24, inserting div 3 into the Australian Security Intelligence Organisation Act 1979 (Cth)).

¹⁵² Submission to First Senate Committee Inquiry, 1 (Law Institute of Victoria).

The LIV, along with numerous other groups, claimed that both the Terrorist Bill and the ASIO Bill breached the CROC, and argued that the reverse onus provisions in both Bills would fall unduly harshly on children ‘who generally are likely to lack the skills and resources required to provide the necessary proof’.¹⁵³ Many people lobbied strongly against children being subjected to the same lengthy period of detention as adults, pointing to the provisions of the Crimes Act 1914 (Cth), that only allowed the detention of children for 2 hours (half the time allowed for adults).¹⁵⁴ In light of the overarching provisions of the CROC that state ‘by reason of [their] physical and mental immaturity [children] need... special safeguards and care, including appropriate legal protection’,¹⁵⁵ it can be argued that a number of provisions would be breached by the legislation, especially Article 3.1 which provides that in all actions concerning children the best interests of the child shall be a primary consideration.

Besides the general requirements under the CROC that children should be treated with special safeguards and with their best interests at heart, the LIV submitted to the Second Senate Committee that two particular provisions of CROC were breached:¹⁵⁶

Article 37 provides that no child should be deprived of his or her liberty arbitrarily. Any detention should be used only as a measure of last resort and for the *shortest appropriate period of time*. Further any child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. ... [and] article 40 provides that a child is to be presumed innocent until proven guilty.

The Tasmanian Commissioner for Children also suggested that the government should also have due regard to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty¹⁵⁷ and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,¹⁵⁸ as ‘[t]hese [i]nternational best practice guidelines provide minimum standards that should be observed in the investigation and detention of children who are suspected of committing crimes’.¹⁵⁹

Safeguards to protect against torture, inhuman or degrading treatment

A submission from the Castan Centre for Human Rights also claims that there is a possibility that this legislation breaches both Article 7 (freedom from torture, inhuman and degrading treatment) and Article 10 (guarantee of humane treatment for all detainees) of the ICCPR if such detention is to be maintained for a lengthy period of time.¹⁶⁰ Lengthy periods of detention, especially incommunicado detention, and instances where detention is combined with coercive interrogation, increases the risk that lawful detention could move into the realm of constituting torture, inhuman or degrading treatment. Article 2 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment provides that no exceptional circumstances whatsoever may be invoked as a justification of torture.¹⁶¹

The government and opposition have assured the public that the ASIO Act contains various safeguards to protect rights. Many have concurred that ‘[w]ith appropriate safeguards, this intrusion into our usual freedom to be left alone and not to be required to answer questions from the government can easily be

¹⁵³ Ibid.

¹⁵⁴ The Crimes Act 1914 (Cth) provides that a person may be detained for the purpose of investigating whether the person committed an offence but the investigation period must not extend beyond 4 hours for an adult and 2 hours for a child or Aboriginal or Torres Strait Islander: s 23C(4), s 23D.

¹⁵⁵ Submission to Second Senate Committee Inquiry, 2 (Law Institute of Victoria).

¹⁵⁶ Ibid, 4.

¹⁵⁷ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45 UN GAOR Supp (No 49A) 205, 45th sess, 68th plen mtg, UN Doc A/45/49 (1990).

¹⁵⁸ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40 UN GAOR Supp (No 53) 207, 40th sess, 96th plen mtg, UN Doc A/40/53 (1985).

¹⁵⁹ Submission to Second Senate Committee Inquiry, 2 (Patmalar Ambikapathy, Tasmanian Commissioner for Children).

¹⁶⁰ Submission to PJC Inquiry, 2 (Castan Centre for Human Rights).

¹⁶¹ Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, [1987] art 2 (entered into force generally 26 June 1987 and for Australia 7 September 1989).

justified. [However] [t]he devil is in the details of any safeguards':¹⁶² they must include appropriate guarantees and penalties, '[o]therwise, we should stop beating about the bush and start devising regulated torture'.¹⁶³ One such safeguard the government has often referred to is s 34(J), which requires that a person must be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment. The offence for a breach of this provision is up to 2 years' imprisonment. However, under s 92 of the Australian Security Intelligence Organisation Act 1979 (Cth), it is illegal to identify an ASIO officer. Therefore, it makes it extremely difficult in reality to enforce this provision. Hocking considers that 'the secrecy of the detention together with the usual secrecy on matters of national security establishes a situation in which government agents may well be placed beyond the reach of the law'.¹⁶⁴

Derogation from human rights obligations

Of course it must be remembered that our human rights treaty obligations are not absolute, they allow for a balance to be struck between competing interests and contain the possibility of derogating from human rights obligations in some extreme circumstances. In instances where emergencies 'threaten the life of the nation' states may be justified in limiting their compliance with some human rights obligations in order to react to that emergency.¹⁶⁵ However, this derogation must at all times be made in compliance with Article 4(1) of the ICCPR, and such a derogation is only allowed for the duration of the emergency.

Non-derogable rights

Some of the rights referred to above are non-derogable rights.¹⁶⁶ There is a core group of rights that are specifically referred to in some treaties as non-derogable and these rights must be applied fully at all times. Some of the rights set out in the ICCPR¹⁶⁷ as being non-derogable rights include the right to life,¹⁶⁸ the right not to be tortured,¹⁶⁹ the right not to be enslaved,¹⁷⁰ the prohibition against retroactive criminal legislation,¹⁷¹ the right to recognition under law¹⁷² and the right to freedom of thought, conscience and religion.¹⁷³ None of these rights may be avoided, even during times of emergency.

¹⁶² Brett Walker, 'On Guard Against Suspect Use of Detention Powers', *Sydney Morning Herald* (Sydney, 12 December 2001).

¹⁶³ Ibid.

¹⁶⁴ Submission to PJC Inquiry, 7 (Dr Jenny Hocking).

¹⁶⁵ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 4(1) (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁶⁶ In accordance with arts 4(1) and 4(2) of the ICCPR: ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 14(2) (entered into force generally 23 March 1976 and for Australia 13 August 1980); HRC *General Comment 29: States of Emergency*, CHR, 1950th mtg, UN Doc CCR/C/21/Rev.1/Add.11 (2001).

¹⁶⁷ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 4(2) (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁶⁸ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 6 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁶⁹ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 7 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁷⁰ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 8 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁷¹ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 15 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁷² ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 16 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁷³ ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 18 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

There are yet more rights that the HRC considers to be non-derogable, as they are either customary or peremptory rules of international law. The HRC in its General Comment 29¹⁷⁴ on Article 4 of the ICCPR, states that such rules expand the non-derogable obligations to include the obligation to treat detained persons with humanity, and certain elements of the right to a fair trial, particularly arbitrary detention and the presumption of innocence.¹⁷⁵ These other rights such as those in Articles 9(4) and 14(2) and the prohibition on arbitrary detention in Article 9(1) can also be viewed as non-derogable because they are, in the view of the HRC, impliedly essential for the effective enjoyment of the express non-derogable rights as set out in Article 4(2).¹⁷⁶

The derogation process

In instances where some may make argument for the need to derogate from particular rights, Australia has not taken steps to formally do so in accordance with international law, and therefore remains in breach of its international obligations. To date, Australia has not taken any steps to formally derogate from its obligations under the ICCPR, nor has it indicated that it considers this to be necessary. Shearer claims that '[p]resumably Australia considers that the degree of flexibility inherent in the relevant provisions would allow Australia's response to pass muster on a showing of the reasonableness of the measures in all the circumstances'.¹⁷⁷ This 'flexibility allowed for in the application of a human right', or the margin of appreciation, 'has limits and the ICCPR is drafted so that after a particular point a State is expected to utilise the derogation procedure extant in article 4'.¹⁷⁸

Here Australia's approach is in direct contrast to that of the United Kingdom, who on 18 December 2001 gave notice of their intention to derogate from Article 9(1) to the Secretary General of the United Nations. The UK sought this derogation to allow them to detain foreign nationals under the Anti-Terrorism, Crime and Security Act 2001. The UK had officially announced a state of emergency in response to the terrorism attacks of September 11. This process of a public proclamation of emergency, and notification of intention to derogate being communicated to the Secretary-General, are all pre-requisites to the ability to derogate under Article 4.

The requirement to inform the international community, particularly the Secretary-General or other organs of the United Nations, is an important element of any derogation. It ensures that measures can be scrutinised to check that they are necessary and proportionate, and allows other state parties to take appropriate action, including bilateral representations or inter-state complaints when human rights treaties provide for such mechanisms. These strict safeguards upon the use of derogations are essential for ensuring that states do not use the justification of an emergency to enact permanent laws that unnecessarily limit the enjoyment of human rights.

Article 4 of the ICCPR requires that derogations are only permissible during 'a time of public emergency which threatens the life of the nation and existence of which is officially proclaimed', and so technically Australia is not able to rely upon an ability to derogate under the ICCPR as no proclamation of emergency has been made in compliance with Article 4(2). And, as has been pointed out by organisations such as Australian Lawyers for Human Rights, 'there is no evidence that Australia is suffering under a "public emergency which threatens the life of a nation" such as would justify derogation'.¹⁷⁹

Restrictions on the state's ability to derogate

¹⁷⁴ HRC, *General Comment 29: States of Emergency*, CHR, 1950th mtg, UN Doc CCR/C/21/Rev.1/Add. 11 (2001).

¹⁷⁵ Submission to Second Senate Committee Inquiry, 5 (Amnesty International). See further HRC, *General Comment 29: States of Emergency*, CHR, 1950th mtg, [11], UN Doc CCR/C/21/Rev.1/Add. 11 (2001).

¹⁷⁶ HRC, *General Comment 29: States of Emergency*, CHR, 1950th mtg, [16], UN Doc CCR/C/21/Rev.1/Add. 11 (2001).

¹⁷⁷ Shearer, above n 25.

¹⁷⁸ Submission to PJC Inquiry, 4[25] (Human Rights and Equal Opportunity Commission).

¹⁷⁹ Submission to First Senate Committee Inquiry, 5[22] (Human Rights Council of Australia) (emphasis in original).

The HRC in General Comment 29¹⁸⁰ provides for a very narrow interpretation of Article 4. It states:

the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation ... no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a state party ... the legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes ... a duty to conduct a careful analysis under each article of the covenant based on an objective assessment of the actual situation.¹⁸¹

Thus derogations are only allowable 'to the extent strictly required by the exigencies of the situation'.¹⁸² This is 'not what is *justified* by the emergency but what is *required* by it'.¹⁸³ As has been argued on many occasions, it is questionable whether the measures taken by Australia can be justified as being proportionate and necessary, let alone *required* in response to the purported threat of terrorism. It is important to keep in mind here, that at the time of introducing the legislation, the Attorney-General made it very clear that Australia was not the subject of any direct terrorist threat.¹⁸⁴ Further, when assessing whether a derogation is possible, the test of proportionality is required. Here, many commentators have drawn comparisons between the situation in Australia and the situation in the UK. As there has been no direct terrorist threat in Australia, it is difficult to show how the situation in Australia can compare to that of the UK where terrorism has been a part of day to day life for a number of decades.

The HRC's comments on Article 4 also explain that measures taken must be exceptional and temporary in nature and 'only last as long as the life of the nation concerned is threatened'.¹⁸⁵ Conte states that any claim that the HRC's conditions can be satisfied is flawed for several reasons:¹⁸⁶

Firstly, counter-terrorism measures ... include ... events prior to and after terrorist conduct and therefore outside what might be considered to be any state of emergency. Next, some measures are not temporary in nature – [for example] activities designed to learn of terrorist threats prior to their being effected and thereby prevent them... Furthermore, the rights and freedoms upon which counter-terrorism measures impact, or have potential to impact upon, include the non-derogable right of freedom from torture or to cruel, inhuman or degrading treatment or punishment.

Professor Shearer places further doubts on whether any derogation would actually be acceptable in light of this requirement that such a derogation be 'of an exceptional and temporary nature' as '[i]t must be wondered whether, in an age of terrorism, special measures, if they are of such a nature to require formal notification as derogations, could ever be regarded as 'temporary''.¹⁸⁷

Thus if no derogation from the ICCPR has been sought, and no public emergency justifies the legislative reaction, the measures taken must at all times be consistent with the rights embodied in the treaty obligations and those found under customary international law. In this respect, the Castan Centre for Human Rights summed up the feeling of many international lawyers in their submission to the PJC,

¹⁸⁰ HRC, *General Comment 29: States of Emergency*, CHR, 1950th mtg, UN Doc CCR/C/21/Rev.1/Add. 11 (2001).

¹⁸¹ Shearer, above n 25.

¹⁸² ICCPR, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 4(1) (entered into force generally 23 March 1976 and for Australia 13 August 1980).

¹⁸³ Data' Param Kumaraswamy, 'Terrorism: Meeting the Challenges / Finding the Balance' (Paper presented at the Commonwealth Law Conference, Melbourne, 15 April 2003) 7.

¹⁸⁴ See above n 27.

¹⁸⁵ HRC, *General Comment 29: States of Emergency*, CHR, 1950th mtg, UN Doc CCR/C/21/Rev.1/Add. 11 (2001). See, also, Alex Conte, 'Terror meets Tyranny? The Interface between Counter Terrorism and Human Rights' (2002) 9(3) *E Law: Murdoch University Electronic Journal of Law* 37.

¹⁸⁶ Conte, above n 185, 38.

¹⁸⁷ Shearer, above n 25.

stating that even ‘a derogation would not save the ASIO Amendments from constituting a breach of the ICCPR’.¹⁸⁸ If the provisions of the Australian anti-terrorism legislation do breach treaties such as the ICCPR, and Australia has not complied with its formal derogation requirements, it risks attracting the scrutiny of the HRC and could be the subject of communications by states or individuals. The HRC has already expressed the view that ‘in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made’.¹⁸⁹

Balancing national security and human rights

Contrary to the claims of some international human rights law antagonists, ‘international human rights law is not a straightjacket that restricts a government from taking action to secure the security of its citizens’.¹⁹⁰ Therefore, in the debate about the legislative response to terrorism, much comment has been made about finding an adequate ‘balance’ between national security and human rights. The Attorney-General stated in his Second Reading Speech that ‘the government recognises the need to maintain the balance between the security of the community and individual right and avoid the potential for abuse’.¹⁹¹ His Department stated that:¹⁹²

All Government action requires a balance to be achieved between different interests. In this case, the balance is between the need to safeguard the security of all Australians, and the need to preserve individual liberty. The evil at which the proposed legislation is aimed justifies the balance that has been achieved.

However many disagree and insist that an appropriate balance has not been attained.

The Human Rights and Equal Opportunity Commission claims that this balancing act ‘is inherent in human rights instruments such as the ICCPR ... [it] was uppermost in the minds of the drafters and has been revisited often by the Human Rights Committee ... when hearing communications alleging breaches of the Covenant’.¹⁹³ Conte points out that need to balance counter-terrorism and human rights obligations comes from ‘a tension that exists at both the domestic and international level’ and claims that the tension is ‘a conflict between the objectives of the United Nations to maintain peace and security on the one hand and to protect human rights on the other: a tension that has existed throughout the history of the United Nations’.¹⁹⁴

Amnesty International proposes that there is an ‘equal obligation to ensure that any measures taken in the interest of national security include safeguards for the protection of fundamental non-derogable human rights’.¹⁹⁵ But Conte questions whether these two objectives are compatible, stating that in the pursuit of both a ‘conflict of wills is exposed’.¹⁹⁶ However, rather than asking the question ‘can human rights be limited within a free and democratic society in the pursuit of counter-terrorism endeavours and, if so, to what extent?’¹⁹⁷ one could ask whether compromising human rights must axiomatically come hand in hand with the pursuit of counter terrorism measures? Recent discourse has been relatively taciturn on the issue of whether the achievement of the protection of human rights and the prevention of terrorism are actually (or should be) mutually exclusive goals.¹⁹⁸ Professor Charlesworth notes that ‘the debate about the human rights implications of the “war against terrorism” has become

¹⁸⁸ Submission to PJC Inquiry, 1 (Castan Centre for Human Rights).

¹⁸⁹ HRC, *General Comment 29: States of Emergency*, CHR, 1950th mtg, [3], UN Doc CCR/C/21/Rev.1/Add. 11 (2001). See, also, Alex Conte, above n 185, footnote 59.

¹⁹⁰ Cumaraswamy, above n 183, 8.

¹⁹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 March 2002, 1607 (Daryl Williams, Attorney-General).

¹⁹² Submission to Submission to Second Senate Committee Inquiry, 7 (Attorney-General’s Department).

¹⁹³ Submission to PJC Inquiry, 4[22] (Human Rights and Equal Opportunity Commission).

¹⁹⁴ Conte, above n 185, 1.

¹⁹⁵ Submission to First Senate Committee Inquiry, 3 (Amnesty International).

¹⁹⁶ Conte, above n 185, 26.

¹⁹⁷ Ibid.

¹⁹⁸ See, however, Hilary Charlesworth, ‘Human Rights in the Wake of Terrorism’ (2003) 82 *Reform* 26, 28.

far too quickly polarised into a debate about human rights *versus* protecting the security of the civilian population, as if human rights were somehow inevitably at odds with a nation's security interests'.¹⁹⁹

Both obligations (that of protecting human rights and protecting national security) originate from the same source – that source being the agreement by states that they have an obligation to protect the rights of their citizens including and especially the right to life. The Australian Lawyers for Human Rights noted in their submission to the First Senate Committee that violations of the sorts of crimes that this legislation is intended to address, '[c]rimes against humanity such as those committed on September 11', 'were the catalyst for the promulgation of the UDHR'.²⁰⁰ Many have pointed to the way in which terrorism attacks the fundamental right to life, and thus is of course of itself one of the most serious threats posed to human rights.²⁰¹

Of course '[i]t is easy to argue that security necessarily comes at a cost to liberty ... [t]hat is, we can only enjoy the right to feel safe and secure if we forgo certain other rights',²⁰² however '[t]his is not necessarily the case'.²⁰³ Surely '[d]espite these difficulties in reconciling an apparent conflict between national security interests and other political and civil interest, it is possible to develop political and legal means of protecting the state whilst at the same time protecting the democratic rights of its citizens'.²⁰⁴ to fail to do so would be a failure to comply with international law. The fear underlying this principle is that, in the words of Benjamin Franklin, '[t]hose who would give up a little freedom for a little security will end up with neither'.²⁰⁵

Theoretically these two goals should be achievable without unnecessary compromises to either. One could say that this is the methodology behind making some rights derogable and others not – some rights are so inherent to our values system that it is impossible to achieve any other social, legal or political goals without also protecting those rights, unless the entire system is undermined and rendered valueless. The concept of balancing is inappropriate as it implies sacrifices from one or the other objective, or both. It implies a zero-sum game where the payoff for one is the negative of that going to the other, and where it is impossible for both 'players' to 'win'. Thus by dividing and separating these goals and labelling them as different and conflicting, we play a dangerous game where one priority gets to 'conquer' the other. This makes it easier to argue that security necessarily comes at a cost to liberty, rather than insisting that both strengthen and facilitate the other. Hocking contends that:²⁰⁶

The dichotomy suggested in this popular view, the argued trade-off between liberty and security, is a "flawed calculus" which has triggered the "startling surrender of fundamental democratic principles" in the heightened security environment since 11 September. ...[However] national security and individual liberties, far from being in competition with one another in a simplistic zero-sum game, are in fact mutually reinforcing.

If we accept the proposition that both objectives are essentially directed towards the same goal – that of protecting the right to life, liberty and security – no 'balance' or sacrifice to either objective should be required. In other words, protecting national security should not inevitably require a diminution in human rights. For '[t]he preservation of rights and liberties ... can never undermine security but will

¹⁹⁹ Ibid (emphasis in original).

²⁰⁰ Submission to First Senate Committee Inquiry, 3[14] (Human Rights Council of Australia). (Although it is doubtful whether the September 11 incident strictly constitutes a crime against humanity at international law.)

²⁰¹ Charlesworth, above n 198; Conte, above n 185, 40. See, also, *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res 50/6, 49 UN GAOR Supp (No 49) 13, 50th sess, 40th plen mtg, UN Doc A/RES/50/6 (1995); *Human Rights and Terrorism*, GA Res 54/164, 54 UN GAOR Supp (No 49) 300, 54th sess, 83rd plen mtg, UN Doc A/RES/54/164 (2000).

²⁰² Submission to First Senate Committee Inquiry, 2[8] (Federal Privacy Commission).

²⁰³ Ibid.

²⁰⁴ Hocking, above n 25, 3 (emphasis in original).

²⁰⁵ As quoted in Conte, above n 185, 69.

²⁰⁶ Hocking, above n 25, 3, quoting James Dempsey, 'Civil liberties in a time of crisis' (2002) 29(1) *Human Rights* 8.

constitute the very means of sustaining it'.²⁰⁷ Thus, '[t]o fight terrorism effectively, we must ensure that our methods respect and protect human rights and do not fall into the logic of ends justifying means, as this is the logic of terrorism itself'.²⁰⁸

Even the language of the United Nations General Assembly is clear that counter-terrorism measures must be 'in accordance with relevant provisions of international law, including international human rights standards'.²⁰⁹ No mention is made here of a need to balance the two, but rather there is a clear prioritisation of the need to combat terrorism *within* the framework of international human rights law. In her 2002 address on the topic of human rights and terrorism, the United Nations High Commissioner for Human Rights maintained:²¹⁰

An effective strategy to counter terrorism should use human rights as its unifying framework ... The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. International human rights and humanitarian law define the boundaries of permissible political and military conduct ... [B]uilding a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated.

Example setting in the international context

While this article argues that the Australian anti-terrorism laws have resulted in a terrorisation of human rights at home, it should not be forgotten that such legislation also has the ability to terrorise human rights on a global scale. Through the introduction and passing of the anti-terrorism legislation, we have witnessed a situation where '[i]n the rush to respond to the threat of international terrorism, we are exposing ourselves to the risk that ends will enable uncritical justification of means'.²¹¹ Rather than merely accepting this uncritical justification, it is crucial that we continue to 'ensure that the war on terrorism compliments rather than contradicts worldwide democracy'.²¹² This is critical not just for the preservation of appropriate human rights standards in Australia, but also for the protection of the rule of law in many other countries in our region and beyond. In Australia, we enjoy the benefits of a free and democratic society, in which the need for special measures to deal with terrorism can be openly debated. However, 'national security legislation in many countries in our region is often misused as a tool of oppression'.²¹³

We cannot therefore underestimate the precedential impact of each simple attenuation of human rights at home. Carothers points to the way in which such example setting in the international context has had

²⁰⁷ Hocking, above n 25, 4.

²⁰⁸ Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 1 May 2002, 220 (Ms Sandra Cornish, National Executive Officer, Australian Catholic Social Justice Council).

²⁰⁹ *Human Rights and Terrorism*, GA Res 54/164, 54 UN GAOR Supp (No 49) 300, 54th sess, 83rd plen mtg, [4], UN Doc A/RES/54/164 (2000) (emphasis added); *Resolution on Human Rights and Terrorism*, GA Res 56/160, UN GAOR, 56th sess, 88th pln mtg, [6], UN Doc A/RES/56/160 (2002); CHR, *Human Rights and Terrorism*, CHR Res 1999/27, 55th mtg, [4], UN Doc E/CN.4/RES/1999/27 (1999); CHR, *Human Rights and Terrorism*, CHR Res 2001/37, 72nd mtg, UN Doc E/CN.4/RES/2001/37 (2001).

²¹⁰ Mary Robinson, *Report of the High Commissioner for Human Rights: Human Rights: A Uniting Framework*, UN ESCOR CHR, 48th sess, [5] and [55], UN Doc E/CN.4/2002/18 (2002).

²¹¹ Jutta Brunnée, 'Terrorism and Legal Change: An International Law Lesson' in Ronald J Daniels, Patrick Macklem and Kent Roach, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2002) 341, 348.

²¹² Thomas Carothers, 'Promoting Democracy and Fighting Terror' (2003) Jan/Feb *Foreign Affairs* 84, 97.

²¹³ Evidence to Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 1 May 2002, 220 (Ms Sandra Cornish, National Executive Officer, Australian Catholic Social Justice Council).

‘negative ripple effects’, claiming that the greatest negative impact of the war on terrorism has been the way in which the ‘harsh approach’ adopted in domestic anti-terrorism legislation has²¹⁴

sent a powerful negative signal around the world, emboldening governments as diverse as those of Belarus, Cuba, and India to curtail domestic liberties, supposedly in aid of their own struggles against terrorism ... In many countries ... the rule of law is weak and copycat restrictions on rights resound much more harmfully.

The United Nations Special Rapporteur on the Independence of Judges and Lawyers has commented that ‘what is potentially more damaging than any of the specific categories of violations ... that have characterized the war on terrorism, is the image that the action of certain states in violation of international law presents to others’.²¹⁵ Thus it is important to recognise the potentially detrimental flow-on impact that Australia’s anti-terrorism laws have upon a broader audience, as well as upon those citizens relying upon Australia’s traditional culture of justice and equality.

Conclusion

To be a permissible restriction on rights in compliance with international legal obligations, anti-terrorism measures must be: prescribed by law; serve a specific legitimate aim; and be deemed necessary (this latter requirement including a test of proportionality).²¹⁶ Restrictions should also not limit human rights more than is necessary to achieve the aim, and the means chosen should be appropriate to achieve the aim.²¹⁷ The many individuals and organisations that made submissions to both Senate Inquiries accusing the Commonwealth government of breaching these requirements of international law and undermining human rights through the provisions of the anti-terrorism legislation, in particular the ASIO Act, formed cogent arguments about how the laws were unnecessary, disproportionate and unable to achieve the proscribed aim.²¹⁸

In terms of compliance with Australia’s international human rights obligations, ... [we are] not satisfied that in placing restrictions on the enjoyment of some human rights, the provisions use sufficiently precise criteria, avoid conferring effectively unfettered discretion on those charged with their execution, are necessary for public safety or public order, conform to the principle of proportionality, and avoid arbitrary application.

The view from civil society has been overwhelming – the perceived need to legislate to protect against the threat of terrorism has had an undesirable effect, it has attacked the application of international human rights standards in Australia. When looking in particular at the ASIO Act and after analysing it from an international human rights law perspective, it becomes clear that there are many examples of potential breaches of treaty provisions and customary international law, and many instances where the legislation can be considered to go beyond what is necessary, proportionate and appropriate.

Even if one does adopt the somewhat flawed language of ‘balancing’ needs, it should be remembered that ‘in striking the right balance between the needs of security and the rights and liberties of the individual, the possibility of other means of combating the perceived security threat should always be considered’.²¹⁹ It is vital that ‘any special powers relating to terrorism [must] be strictly confined to

²¹⁴ Carothers, above n 212, 90-91.

²¹⁵ Cumaraswamy, above n 183, 14. He points to the example of Malaysia, and quotes from the 2001 Annual Report of the Malaysian Human Rights Commission: ‘As old democracies such as the United States and Britain resort to preventative detention laws in their war against terrorism, the Malaysian Government sees their action as further validation for the retention of the ISA’.

²¹⁶ Mary Robinson, ‘General Guidance: Criteria for the Balancing of Human Rights Protection and the Combating of Terrorism’ in *Report of the High Commissioner for Human Rights: Human Rights: A Uniting Framework*, UN ESCOR CHR, 48th sess, [10], UN Doc E/C/N.4/2002/18 (2002).

²¹⁷ Submission to PJC Inquiry, 5[27] (Human Rights and Equal Opportunity Commission).

²¹⁸ Submission to PJC Inquiry, 25[47] (Law Council of Australia).

²¹⁹ Sarah Prichard, ‘The Counter-Terrorism Bills’ (2002) *Winter Bar News: Journal of the NSW Bar Association* 10, 10.

those acts and threats which truly necessitate an extraordinary curtailment of the principles of the rule of law and human rights'.²²⁰ Above all, the considerations of strict proportionality set out in General Comment No 29 of the HRC should be taken into account, and weighed heavily against the objectively assessed present dangers to our society.

While some may argue that the suspension of strict adherence to human rights principles is necessary in the post-September 11 and Bali environment, we must be wary of the fact that in the process of combating terrorism we have allowed a previously unimaginable erosion of long-standing human rights standards to occur. By terrorising human rights on the home front, we have again become the victims of terrorism.

²²⁰ Submission to PJC Inquiry, 8[11] (Law Council of Australia).

Islamic Law, Human Rights and Terrorism

Dr Steven Stern*

Introduction

The proposition in this paper is that the Muslim peoples of the world are entitled to exercise their legitimate collective right to self-determination in terms of Islamic identity, including application of Islamic law, if they wish to do so, provided they do not violate the legitimate right to self-determination of individuals and groups both within and outside Muslim communities, so that within the framework of an Islamic law perspective, one can address the issue of human rights.¹

Conversely, what is commonly known as *Shari'ah* is not the whole of Islam, but instead an interpretation of its fundamental sources, as understood in a particular historical context. Once it is appreciated that the *Shari'ah* was constructed by its founding jurists, it is possible to think about reconstructing certain aspects of *Shari'ah*, provided that such a reconstruction is based on the same fundamental sources of Islam and is fully consistent with its essential moral and religious precepts.²

Democracy, republicanism and the rule of law

In the Western model, the following considerations apply: representative compared to direct democracy; with representative systems, the Westminster and Washington Systems; the initiative and referendum; and the role of the rule of law.³ In regard to the rule of law, on a Western model there are four basic approaches: the law enforcement approach, the procedural justice approach, the substantive or material justice approach, and the protection of basic rights approach.⁴ In relation to the substantive or material justice approach, the issue arises as to what is substantive or material justice? In relation to the protection of basic rights approach, the issue arises as to what are basic rights and their source?

The ruler of the Muslims after the Prophet was called *Khalifat Rasul al – Allah*, the Caliph or successor of the Prophet. For the Sunni majority, the Caliph was therefore the successor to the rule of the Prophet, as the supreme political ruler of the Muslim community, without succeeding him in the role of the Prophet and as a recipient of divine guidance.

When we look at the Medina model, we find that the Caliph was selected by a small group of Muslims, as appointed by the preceding Caliph, and then confirmed by the general Muslim population through a mass oath of allegiance (*by'a*). The vagueness of the basis of political legitimacy and the informality of procedures under the Medina model permitted the appointment of a Caliph to degenerate to a direct hereditary monarchy, whereby the *by'a* for the next Caliph was secured during the lifetime of the existing Caliph.

In relation to the *Sh'ia*, they insist that the rightful imam should be the descendant of the Prophet through his daughter Fatima and Ali, and be the living entity of the infallible divine law, its interpreter,

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¹ Abdullah Ahmed An-na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press, New York, 1990).

² Ibid XIV.

³ A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, Liberty Classics, Indianapolis, 1914); *re Initiative and Referendum Act* [1919] AC 135 (PC).

⁴ Anthony Mathews, *Freedom State Security and the Rule of Law – Dilemmas of the Apartheid Society* (Juta & Co Ltd, Cape Town, 1986); Geoffrey de Q Walker, *The Rule of Law, Foundation of Constitutional Democracy* (Melbourne University Press Melbourne, 1988).

maker and executor. Therefore, the concept of law for the majority of the *Shi'a* is regarded by *An-na'im* as more authoritarian and far more detached from social reality than the Sunni concept.⁵

The Caliph's right to rule is based on a popular belief in the Caliph's moral integrity and faithfulness to the teachings of the Prophet. There is no way for verifying the basis of political legitimacy once an initial appointment and confirmation of the Caliph was made, through the *by'a* (the oath of allegiance) to withdraw support and allegiance at any subsequent stage. There was no principle or mechanism by which popular support, even if freely given, could be restricted or withdrawn.⁶

The notion of *Shura*, whereby the ruler is supposed to consult with leading members of the community on affairs of state, is neither comprehensive in scope nor binding effect. There was never any procedure or mechanism for consultation, and no legal consequences followed from the failure of a ruler to consult his subjects or follow advice that was given to him. Abu Bakr went against the vast majority of leading Companions when he decided to fight Arab tribesman who rebelled after the Prophet's death (*al-mutardin*). Umar, the second Caliph, went against the view of the vast majority of leading Companions over the distribution of land taken as spoils of war in southern Iraq.⁷

Religion and law in Australian and English common law

At least until the early 19th century, people saw the Bible as a direct source of legal rules. Arguments directly from the scripture were generally accepted in the courts until about the end of the 18th Century. Judgements directly applied scriptural stories or injunctions from time to time.⁸ The influence of religion on various aspects of civil and criminal law is indirect.⁹

In the Muslim setting, we find that the hold of *Shari'ah* was strongest in family law and inheritance; weakest in penal law, taxation, constitutional law, and the law of war; with the law of contracts, and obligations in the middle. This variation in observance of various aspects or fields of *Shari'ah* was partly due to the greater degree of detailed regulation of these fields in the *Qur'an* and *Sunnah*. The detailed provision in the *Qur'an* for family law and inheritance, for example, led to the stronger identification of relevant rules of *Shari'ah* with religious belief and practice.¹⁰

Source and method of Shari'ah

The source and method of Islamic law are as follows:

Qur'an – this is the perfect revelation. It is the literal and final word of Allah. Rather than a law book, the *Qur'an* is an eloquent appeal to obey the law of Allah.

The *Sunnah* are the practices of the Prophet and represent model behaviour.

The *Hadiths* represent deducing the law from its sources, based upon evidence of the practices of the Prophet and of his Companions.

Textual implications involve a situation where, of the 6,219 verses in the *Qur'an*, only about 500 to 600 have legal elements, and the vast majority of these deal with worship rituals, leaving only about 80

⁵ An-na'im, above n 1, 30-1.

⁶ Ibid 76-7.

⁷ Ibid 79.

⁸ Keith Mason, *Constancy and Change: Moral Religious Values in the Australian Legal System* (The Federation Press and the Australian Society of Legal Philosophy, Leichardt, New South Wales, 1990).

⁹ The Hon Chief Justice Murray Gleeson, "The relevance of religion" (2001) 75 *Australian Law Journal* 93,93.

¹⁰ An-na'im, above n 1, 32.

verses of legal subject matter in the strict sense. These 80 verses have been constructed to extract the upmost ounce of meaning,¹¹ but non-legal verses have been constructed to render legal content and guidance in various ways.

Naskh involves abrogation, for example, the abrogation of Jerusalem and its replacement by Mecca as the centre for prayer, and has the potential to play a significant role in law reform.

Ijma, or consensus of opinion, represents the consensus of the Companions of the Prophet and their community in Medina and not the majority of a community comprising Muslims and non-Muslims. At most, today, it may represent the consensus of the scholars or the broader community or totality of Muslims, but not of non-Muslims.

Qiyas, or analogical deduction, involved concluding from a given principle, embodied in a precedent, that a new case falls under this principle, or is similar to this precedent, on the strengths of a common essential feature called the “reason” or *‘lla*.

There are revealed laws preceding the *Qur’an*; in particular, the Torah and the Gospels that may be relevant in broadening the jurisprudential basis for Islamic law reform.

Istihsan, or equity, avoids a strict analogical deduction abolishing an already existing and salutary, or at least harmless, practice, or causing an unnecessarily harsh result.

Maslahah Mursalah, or consideration of public interest, involves adopting an approach leading towards the maintenance of religion, life, reason or mind, descendants and property.

With *urf*, or custom, the *Hanafi an Maliki* schools recognise *urf* within limits, so that in the *Hanafi* school, *urf* may prevail over *qiyas* (analogy), but never over *nass* (text) of the *Qur’an* or *Sunnah*.

With *Ijtihad* (personal reasoning) there is an obligation to exercise independent juristic reasoning to provide answers when the *Qur’an* and *Sunnah* are silent; however, the gates of *Ijtihad* are believed to have remained closed since approximately the 10th century CE.¹²

General characteristics of Islamic legislation

These are as follows:

1. Establish general principles.
2. If something is not prohibited, it is generally permissible.
3. Even with a prohibition, there may be a modification in specific or general circumstances to meet social development.
4. Generally, a prohibited act may become permissible when a pressing need arises.
5. Something of utility may be adopted when it is not against the texts of the *Qur’an* and *Sunnah*.
6. Scope for the use of reasoning to find out what is good and acceptable.¹³

¹¹ An-na’im, above n 1, 20.

¹² For a fuller discussion see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Text Society, Cambridge, 1991); An-na’im, above n 1, 20-31.

¹³ Tan Sri Ahmad Ibrahim, “Superiority of the Islamic System of Justice” (1994) *IIUM Law Journal* 1, 4.

Some scholars have expressed the view that since Allah is the legislator in Islam, there can be no room for legislation or legislative powers under Islamic law. Human judgement is always exercised in determining the applicable principles and rules of Islamic law. Both the *Qur'an* and the *Sunnah* had to be interpreted to develop legal principles and rules without trespassing upon the function reserved exclusively for Allah of making law, needing a temporal authority which understood and interpreted divine law and elaborated its details. Often the *Shari'ah* states a principle and leaves it to human beings to work out the legal details and regulations that flow from the principle. Or *Shari'ah* may specifically release to the sphere of reason and understanding the setting up of regulations on certain matters. The very existence of different Islamic law schools show that a great deal of Islamic law is interpretative and derivative from the *Shari'ah* in nature, and for such an interpretation, derivation and elaboration, a legislative temporal authority should be identifiable.¹⁴

The legislative function was under the ultimate control of the Caliph, although he could rely on the opinion of his judges and other jurists. Usually a difference of opinion among the jurists resulted in an acknowledged right of the ruler to impose one opinion among conflicting authorities, which the ruler considered best suited to the case in point.¹⁵

Rules relevant to prohibition of terrorism

1. Harm must be eliminated.
2. Harm may not be eliminated by its equivalent.
3. Harm is to be prevented to the extent that it is possible.
4. A lesser harm may be tolerated in order to eliminate the greater harm.
5. A particular harm may be tolerated in order to prevent a general one.
6. Harm is neither inflicted nor reciprocated.
7. Necessity makes the unlawful lawful.
8. Suicide prohibited.
9. Necessity must be measured in accordance with its true proportions.
10. Where decision concerns community in general, only lawful government authorised to make it.¹⁶

Four conditions must be observed in eliminating harm

1. Must be in harmony with the basic objectives.
2. Must be a present reality, as opposed to a mere expectation.
3. Must not lead to an evil equal or greater to the one that is averted by it.
4. Must be to the extent only to avert the danger, and comes to an end when that danger is no longer present.¹⁷

Hirabah

The crime of "*hirabah*" "covers any act of terrorising innocent people in their homes, shops or streets, even if there is no physical harm or taking of property. It also covers the causing of wide-spread fear by acts of violence (bombings) or repeated rapes or mutilations of the body. In general, it covers any

¹⁴ An-na'im, above n 1, 78.

¹⁵ Ibid 78.

¹⁶ Professor Mohammad Hashim Kamali, "Protection Against Disease" (1995) 5 *IJUM Law Journal* 1.

¹⁷ Ibid 11-12.

spreading of gross corruption on earth, such as poisoning of drinking water, wreaking great havoc by arson or great criminal damage to the security or economy of the state.”¹⁸

Meaning of Jihad

In general, “*Jihad*” means that every effort is done to obey Allah’s word. For example, a person who is not rich gives charity to others, preferring to live with very little. Another example is a person who has to work hard during the day, preferring to sleep only a few hours during the night, using the rest of the night to study religious texts.

In specific terms, “*Jihad*” means self defence against those who persecute Muslims and prevent their religious freedom. The Muslim army involved in *Jihad* is not a terrorist or “geurilla” group, and must respect the following conditions:

1. It must fight as an army against another army, without harming monks, rabbis, women, children and civil populations who are not involved in the conflict.
2. It must not over react.
3. It must always look for an opportunity to make peace with the enemy.

The traditional school of “orthodox Islam” is called “*Sunni*”. According to this school, a legitimate Jihad must be led by a Caliph, or by a Sultan appointed by a Caliph. There is no Caliphate today. As long as government grants Muslims their religious freedom, rebelling against this government is “*fitnah*” (Sedition). A school of *Salafis* or *Wahhabis* imposes the traditional Sunni Muslim doctrine against *fitnah* (Sedition).¹⁹

Legal rulings

According to the legal science called *Usul al-fiqh* (Principles of Jurisprudence), a *fatwa* or legal ruling is binding when the following conditions are satisfied:

1. It is in line with the relevant legal proofs, deduced from the *Qur’an* and *hadiths* (oral traditions).
2. It is issued by someone having due knowledge and sincerity of heart.
3. It is free from individual opportunism, and not depending on political servitude.
4. It is appropriate to the needs of the contemporary world.
5. Many *fatwas* of old, that were fully legitimate when they were issued, are obsolete and not binding today; for example, an authoritative medieval *fatwa* says that: A Muslim who is not able to ride a camel, a horse or an ass should not become a leader of a group that travels toward Mecca for the pilgrimage.

¹⁸ Muhammad Ata Alsid Sidahmad, *Islamic Criminal Law: The Hudud* (62, Sidahmad, Malaysia, 1995).

¹⁹ Shaykh Professor Abdul Hadi Palazzi, *Ask the Imam* <http://www.rb.org.il>
Salaffis or Wahhabis once seen as heretical by orthodox Sunni Islam: eg, Usha Sanyal, “Are Wahhabis Kaffirs? Ahmad Riza Khan Barelwi and His Sword of the Haramyan” in Muhammad Khalid Masud, Brinkley Messick and David S Powers (eds) *Islamic Legal Interpretation: Muftis and their Fatwas* (204 Harvard University Press, Cambridge Massachusetts 1996).

Today there is neither a *Khilafat ar-Rashida* (the rightly guided Caliphates of Abu Bakr, ‘Omar, ‘Othman and ‘Ali) nor a *Khilafat al’amm* (general Caliphate) – the last general Caliphate was the Ottoman sultanate.²⁰

A legitimate Mufti must have these qualifications:

1. Appointment by a Caliph, or by the Caliph’s delegate, or by one who exercises political sovereignty, or by a person or group authorised by the sovereign power.
2. Expertise in Islamic studies.
3. Regarded as a trustworthy Muslim by Islamic scholars who live in the area under his jurisdiction.²¹

Conclusion

There is substantial authority to support the proposition that what is commonly presented as Islamic fundamentalism, does not represent orthodox Islam.²² Islam has a complex legal framework. Islam

²⁰ Shaykh Professor Abdul Hadi Palazzi, *Eretz Yisrael Is A ‘Dar al-Islah’ (Realm of Prosperity)* (1998) Rome <http://www.rb.org.il>.

²¹ Shaykh Professor Abdul Hadi Palazzi, *The Jerusalem ‘Mufti’ Appointed by the Palestinian Authority is a Fraud* (1998) Rome <http://www.rb.org.il>.

²² **Jerusalem** - Marmaduke Pickthall, *The Glorious Koran: A Bi-Lingual Edition with English Translation, Introduction and Notes* (George Allen & Unwin, London, 1930) – “The First *Qiblah* [the place towards which the face is turned at prayer] of the Muslims was Jerusalem, which gave rise to a misunderstanding on the part of the Jews of Al-Madinah, who wished to draw the Muslims into Judaism. This was the cause of the Prophet’s anxiety mentioned in the next verse but one.” Muhammad Asad, *The Message of the Qur’an* (1980) 31 Daral-andalus, Gibraltar – prayer of Abraham and Ishmael at Ka’bah in Mecca contrasted with “Jewish concentration on Jerusalem”. Qur’an, Surah 2 Al-Baqarah, verse 142 *Qiblah* for Muslims changed by Allah from Jerusalem to Mecca. Ibid Verse 143: Jerusalem was formerly appointed as the *Qiblah* as a hard and difficult test for Muslims because of Jerusalem’s association with the Jews “only that We might know him who followeth the messenger, from him who turns on his heels”. Ibid Verse 144: Allah has seen the Prophet seeking guidance from Heaven so has changed the *Qiblah* for Muslims from Jerusalem to the Ka’bah in Mecca “which is dear to thee. So turn thy face towards the Inviolable Place of Worship”. Ibid Verse 145: Jews must not pray towards Ka’bah at Mecca; nor should Muslims anymore pray towards Jerusalem.

Land of Israel - Qur’an: Surah 3 *Ali Imran*, Verse 26 “O Allah! Owner of Sovereignty! Thou givest sovereignty unto whom Thou wilt, and Thou withdrawest sovereignty from whom Thou wilt.” Ibid Qur’an: Surah 5 *Al Ma’idah*, Verse 21 “Oh my people: go into the holy land which Allah hath ordained for you. Turn not in flight, for surely ye turn back as losers.” Ibid Verse 22: Jews say to Moses that a giant people dwell in the holy land so that they will enter only when the giant people go forth from thence. Ibid Verse 23: Two who feared Allah respond “for if ye enter by it, lo: ye will be victorious. So put your trust in Allah if ye are indeed believers.” Ibid Verse 24: People say to Moses to “go thou and thy Lord and fight: we will sit here”. Ibid Verse 25: Moses asks Allah to distinguish between us and the wrongdoing folk. Ibid Verse 26: The Jews will only enter the land after 40 years. Qur’an: Surah 17 *Banii Israail*, Verse 103 Pharoah sought to scare the Children of Israel from the holy land, but Allah drowned the Pharoah and those with him, altogether. Ibid Verse 104: “And we said unto the Children of Israel after him: Dwell in the land; but when the promise of the Hereafter cometh to pass We shall bring you as a crowd gathered out of various nations.” Pickthall, op cit 378 note 1, writes that the reference to the Children of Israel being brought back to the holy land “when the promise of the Hereafter cometh to pass ... as a crowd gathered out of various nations” is a reference to the prior “dispersal of the Jews as the consequence of their own deeds after God had established them in the land”. Qur’an: Surah 10 *Jonah*, Verse 90: “And We brought the Children of Israel across the sea, and Pharoah with his hosts pursuing them in rebellion and transgression, till, when the (fate of) drowning overtook him, he exclaimed: I believe that there is no God save Him in Whom the Children of Israel believe, and I am of those who surrender (unto Him)”. Ibid Verse 93: “And We verily did allot unto the Children of Israel a fixed Abode, and did provide them with good things.” Qur’an: Surah 21 *Al-Anbiyaa* Verses 95 and 96 destruction of Jewish community in Jerusalem and subsequent return to holy land.

Nationalism as Contrasted with Islam - Qur’an: Surah 2 *Al Baqarah*, Verse 47 “Oh Children of Israel: remember My favour where with I favoured you and how I preferred you to (all) creatures.” Qur’an: Surah

requires the rule of law. Islam is consistent with the universal Noachide laws of no killing, stealing, cruelty to animals, sexual immorality, idolatry or blasphemy, and the establishment of justice.²³ Orthodox Sunni Islam is representative of universal Noachide laws, consistent with human rights and incompatible with terrorism.²⁴

45 *Ad-Dukhaan*, Verse 16 “And verily We gave the Children of Israel the Scripture and the Command and the Prophethood, and provided them with good things and favoured them above (all) peoples.” Qur’an: Surah 19 *Maryam*, Verse 49 Allah gave Abraham, Issac and Jacob. “Each of them We made a Prophet.” Ibid Verse 50: “And We gave them [Abraham, Issac and Jacob] of Our mercy and assigned to them a high and true renown.” Ibid Verse 54: “And make mention in the Scripture of Ishmael. Lo was a keeper of his promise, and he was a messenger (of Allah), Prophet.” Ibid Verse 55: “He [Ishmael] enjoined upon his people worship and alms giving, and was acceptable in the sight of his Lord.” Contrast Nur Masalha, *Imperial Israel and the Palestinians: The Politics of Expansion* (2 Pluto Press, London, 2000) “There is no concurrence between biblical stories and demonstrable historical facts before about the eighth century BC.” “following decades of extensive excavation in Palestine/Israel, archaeologists have found that the patriarch’s [sic] are legendary”: Ibid, contrast with the Qur’an. “the Israelites did not sojourn in Egypt or wander in the desert”: Ibid, contrast with the Qur’an. “Neither is there any evidence of the empire of David and Solomon.”: Ibid. Contrast ,eg, Qur’an: Surah 21 *Al Anbiyaa*, Verse 78-9 (major contribution of David and Solomon to Islamic law with straying sheep); Verse 79 (the psalms of David “similar to the Qur’anic Verses” Asad, op cit 497); Verse 80 (prowess of David); Verse 81 (wisdom and wealth of Solomon); and Verse 82 (Allah kept watch over David and Solomon).

Origin of Islam - Abraham I Katsh, *Judaism in Islam: Biblical and Talmudic Backgrounds of the Koran and its Commentaries* (3rd ed, Sepher-Hermon Press, Inc., New York, 1980): “a verse-by-verse study of two of the most important chapters of the Koran, tracing its background in the Old Testament, Jewish legends, and rabbinic lore”. Dr M R Lehmann, “Koran is Largely Based on the Talmud and Jewish Sources” (20 Jan. 1995) *Algemeiner Journal* B3. At beginning of 20th Century, Rabbi Dr Jakob Hoffman wrote his doctoral dissertation on the Talmudic roots of the laws contained in the Koran. Here are the main laws of the Koran, which Dr Hoffman traces to the Talmud and the Midrashim: Prayers Time for daily prayers: Direction in prayer and posture of worshiper; Devotion in prayer; Ritual purification before prayer; Importance of good deeds; Giving of alms; Who should get alms; What should be given in alms; How should alms be given. Hoffman was a pioneer in the study of *Halakhot* (Torah law) as the foundations of laws in the Koran. Many scholars have traced the roots of the stories in the Koran to Midrashim. For example, stories told in the Koran about Josef can be found in Midrash Tanchuma.

“The chief incidents of Jewish history are recorded in the Qur’an with a strange and curious admixture of Rabbinical fables. ... Many of the doctrines and social precepts of the Qur’an are also from Judaism. ... Whilst, therefore, Muhammad took little of his religious system from Christianity, he was vastly indebted to Judaism, both for his historical narratives and his doctrines and precepts. Islam is nothing more nor less than Judaism plus the Apostleship of Muhammad. The teachings of Jesus form no part of his religious system.”: Thomas Patrick Hughes, *Dictionary of Islam* (236, Oriental Books Reprint Corporation, New Delhi, 1886).

Religious Tolerance is a Part of Islam – Qur’an: Surah 5 *Al Ma’idah*, Verse 48 “For each We have appointed a divine law and a traced-out way. Had Allah willed He could have made you one community. But that He may try you by that which He hath given you (He hath made you as ye are). So vie one with another in good works. Unto Allah ye will all return, and He will then inform you of that wherein ye differ.”

²³ Qur’an: Surah 11 *Huud*, Verses 25-48 on Noah; and Surah 71 *NuuH* (Noah)

²⁴ Dr Asher Eder, *Peace is Possible Between Ishmael and Israel According to the Qur’an and the Tanach (Bible)* (1969) at <http://www.rb.org.il> – Based on Qur’an: Surah 3 *Ali Imraan*, Verse 67; 16 *An-Nahl* Verse 123 and 22 *Al-hajj* Verse 78, “Muslim” before the Prophet was applied in its etymological sense, meaning, one who submits to God, a God fearer who followed the universal laws of Noah given to all humanity, rather than to a member of a specific later religion.

Extraterritorial Abductions: Legitimate Instrument to Fight International Crimes and Terrorism or Threat to the Protection of Human Rights and the International Legal Order?

Alberto Costi*

Introduction

The fight against international terrorism has recently provided the setting for legitimising state-sponsored abductions carried out overseas. The capture of Abdullah Öcalan by Turkish special agents in Kenya in 1999, the much-publicised arrest and surrender of former President Milosevic to the International Criminal Tribunal for Yugoslavia in June 2001 and the capture and imprisonment of Taliban and Al Qaeda fighters in the aftermath of the tragic events of 11 September 2001 show the topical character of the subject.

The state practice of apprehending alleged criminals on foreign territory is not new. Neither is condemnation of such practice in the legal literature. What is new, however, is the widely publicised and supported international war on terrorism.

The paper addresses the issues underlying extraterritorial abductions, seeking to understand the reasons for resorting to extraterritorial abductions and the legal, policy and moral tensions such practice causes.

Sources of conflicts underlying extraterritorial abductions: The real issues

Abductions, terrorism and international crimes pose great challenges to the precepts underlying international law. The tensions caused by, on the one hand, the need for state authorities to ascertain that the offender is brought (and seen to be brought) to justice and, on the other, the limited assurances of the traditional instruments, principles and processes to provide such an outcome with both speed and certainty, can lead states to envisage drastic measures to achieve their objectives and defend their vital interests. The tensions play out into four different settings each of which will be briefly exposed in this part.

Multilateralism vs unilateralism

Bringing alleged terrorists and international criminals to justice is an important objective of the international community. This is widely acknowledged and has been addressed in both multilateral treaties and bilateral extradition arrangements. Extradition remains to this day the only recognised means through which a state may obtain custody of an alleged offender located abroad. The interpretation of such treaties, however, is not always straightforward and can lead to disputes. An extradition treaty might not cover the offence for which the request is made or the individual may raise a legitimate objection to its application.¹ Potential for frustrating an otherwise legitimate request for extradition is there, resulting in a state considering an alternative course of action to achieve its goal.

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¹ See *Restatement (Third) of the Law: The Foreign Relations of the United States* (1987), s 486 for a list of grounds for refusing extradition. For instance, the constitution of a state may forbid the extradition of nationals. For a historical account of the subject, see Michael Plachta, '(Non-) Extradition of Nationals: A

Raison d'état vs rule of law

Another reason explaining why states proceed to extraterritorial abductions resides in their desire to widen the reach of their laws beyond national borders in response to expanding transnational criminal activities.² However, in cases where the conduct of the alleged offender does not qualify as a crime in the state where it is performed, extradition from that state becomes impossible. In these circumstances, it might be tempting for a state to fall back on abduction as an extreme measure when it considers that it is essential to submit an alleged offender to the process of its courts. States are willing to go to great lengths to obtain custody of an alleged criminal wherever the latter sought asylum and this might create tensions between the prosecuting state and the state of refuge.

In relation to terrorist acts or international crimes, it would be expected, nevertheless, that the state either extradites or prosecutes alleged offenders³ and, if necessary, that the Security Council be called upon to address a potential dispute between the states concerned.⁴

Abuse of executive powers vs respect of the judicial process

The all-out war against terrorism and the ability of a powerful country like the United States to act unilaterally introduces another layer of concern for those who believe that due process matters. Respect for the process of the courts might be questioned when a person appears before the judge of the prosecuting state as a result of a forcible removal, unilateral or with consent of the local authorities, in the absence of any procedural safeguards, to stand trial. Government-sponsored abductions raise fundamental questions about the level of protection to which alleged international criminals and terrorists are entitled once captured, leaving it to the courts to determine whether the violation of the rights of the abducted criminal against arrest and prosecution in circumstances disclosing an irregular apprehension should yield to the interests of the state in view of the gravity of the crimes concerned.⁵

Never-ending Story' (1999) 13 *Emory Int'l L Rev* 77. Extradition may be refused on the ground that the offence charged was an offence of a political character: *In re Castioni* [1891] 1 QB 149.

² See, eg, The International Crimes and International Criminal Court Act 2000 (New Zealand statute comprising a number of offences against the administration of justice for which extraterritorial jurisdiction is asserted against New Zealand citizens); Antiterrorism and Effective Death Penalty Act 18 USC ss 2339A, 2339B (1996) (United States statute making material support to foreign organisations engaged in terrorist activities unlawful).

³ Such an obligation is contained in numerous treaties, eg, Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, Art 7 (entered into force 14 October 1971); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UNTS 177, Art 7 (entered into force 26 January 1973); International Convention for the Suppression of Financing of Terrorism, G.A. Res. 109, U.N. GAOR 6th Comm, 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109 (1999), Art 10.

⁴ This is what happened in the Lockerbie case: see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Reports 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States) (Provisional Measures)* [1992] ICJ Reports 225.

⁵ There is an abundant literature on the subject. Only a few references are mentioned here: Felice Morgenstern, 'Jurisdiction in Seizures Effected in Violation of International Law' (1952) 29 *BYIL* 265; Bart de Schutter, 'Competence of the National Judiciary Power in Case the Accused Has Been Unlawfully Brought Within the National Frontiers' (1965) 1 *Revue Belge de Droit International* 88; Martin Feinrider, 'Extraterritorial Abductions: A Newly Developing International Standard' (1980) 14 *Akron Law Review* 27; John Quigley, 'Government Vigilantes at Large: The Danger to Human Rights From Kidnapping of Suspected Terrorists' (1988) 10 *Human Rights Quarterly* 193; Francis A Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law' in Francis A Mann (ed), *Further Studies in International Law* (1990) 339; Abraham Abramovsky, 'Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok' (1991) 31 *Va J Int'l L* 151; Rosemary Rayfuse, 'International Abduction and the United States Supreme Court: The Law of the Jungle Reigns' (1993) 42 *ICLQ* 882; Douglas Kash, 'Abductions of Terrorists in International Airspace and on the High Seas' (1993) 8 *Fla J Int'l L* 65; Paul Michell, 'English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain' (1996) 29 *Cornell Int'l L J* 283; Stephan Wilske and Theresa Schiller, 'Jurisdiction Over Persons Abducted in violation of International Law in the Aftermath of US v Machain' (1998) 5 *U Chicago Law School Roundtable* 205; Christopher M Supernor, 'International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice' (2001) 50 *Air Force L Rev* 215; Mary Alice Kovac, Comment,

Impunity vs justice

The fight against terrorism and international crimes is a legitimate preoccupation of the international community. In the name of state security interests, governments consider it to be imperative to protect their institutions and their citizens. This is a primary objective and one with which no one would take issue. Whether terrorism and international crimes constitute special categories of crimes demanding that alleged offenders be prosecuted at any cost is another matter. From the moral point of view, the existence of a duty to bring to justice alleged terrorists and international criminals is crucial. Punishing those responsible for such activities is necessary to implement and to preserve confidence in the international legal order. Harsh punishment, especially if publicised, may also be used as a deterrent to prevent the planning and perpetration of such acts in the future.

The problem encountered by the recognition of an international protection of the rights of an alleged criminal rests, in the end, on an ethical or philosophical choice. Granting rights to individuals who commit horrendous crimes might be perceived as acting against the interests of the international community and as being morally wrong. The international community faces the challenging task of managing concurrent and at times conflicting interests. These interests include (i) bringing to justice those responsible for horrendous crimes, (ii) preserving individual rights, (iii) protecting the territorial integrity of the state, and (iv) maintaining the rule of law. How such conflicting interests are balanced or managed depends to some extent on the prevailing international or national climate.

Legally speaking, though, the use of illegal methods to obtain custody of a person who has breached the law could also be counterproductive and serve as an incentive to act outside the law. Legalistic and simplistic as it may sound, respect for the basic principles underlying the common interests of the international community – sovereignty, territorial integrity, equality, and fundamental human rights – demands that states, no matter how powerful, act within the realm of the law.

Basic rule: abduction as a violation of international law

Abductions carried out by agents instructed by a state within the territory of another state constitute a violation of international law. This rule is firmly rooted in the principle of respect for territorial sovereignty and integrity of other states and in the ensuing obligation of non-intervention in the internal and external affairs of another state.⁶ In the *Eichmann* case, for instance, Argentina claimed that the abduction of the former Gestapo official performed on its territory by Israeli agents amounted to a violation of its sovereignty and territorial integrity. The UN Security Council adopted a resolution condemning the violation of Argentina's sovereignty and deploring the acts undertaken by Israel.⁷

There is also ample support for the view that extraterritorial abductions violate the obligations undertaken by a state under the terms of an extradition treaty.⁸ There is only limited interest in

'Apprehension of War Crimes Indictées: Should the United Nations' Courts Outsource Private Actors to Catch Them?' (2002) 51 *Cath U L Rev* 619.

⁶ See Charter of the United Nations, 1 UNTS xvi, Art 2(1), 2(2), 2(4) (entered into force 24 October 1945); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, United Nations, GA Res 2625, UN Doc A/5217 (1970). A long-standing practice confirms that such exercise of sovereign powers beyond the state's boundaries is contrary to international law and could a priori engage the international responsibility of the abducting state: see Restatement Third, above n 1, s 432(2); Andreas F Lowenfeld, 'US Law Enforcement Abroad: The Constitution and International Law, Continued' (1990) 84 *AJIL* 444, 472; Gregory Townsend, 'State Responsibility for Acts of de facto Agents' (1997) 14 *Arizona J Int'l & Comp L* 635, 661-673; Harvard Research in International Law, 'Draft Convention on Jurisdiction With Respect to Crime' (1935) 29 *AJIL Special Supplement Part II* 435, 623-624.

⁷ United Nations Security Council Resolution 138, 15 UN SCOR Res and Decl 4, UN Doc S/4349 (23 June 1960).

⁸ The former legal adviser of the State Department Abraham D Sofaer, stated in *Bill to Authorize Prosecution of Terrorists and Others Who Attack US Government Employees and Citizens Abroad: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong, 1st Sess (1985) 63: "[i]n general, I would say that seizure by US officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of a foreign state, and could violate local kidnapping laws ... Such acts

discussing this issue since treaties must be interpreted in the light of the general principles of international law mentioned above. The absence of reference to a prohibition to abduct individuals in extradition treaties does not *a contrario* legitimise such acts.⁹

The injured state is entitled to demand that such conduct cease and to obtain reparation for the infringement of its sovereignty.¹⁰ Normally, the remedy should involve the return of the abducted individual to the state of refuge.¹¹ The injured state may further raise a claim for damages or demand another form of compensation.¹² In the *Eichmann* case, the Security Council Resolution requested Israel “to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law”.¹³ Nevertheless, the Argentine government chose to forego its claim, expressing satisfaction at Israel’s formal apology.¹⁴ In some cases, the prosecuting state has accepted to extradite the agents responsible for the abduction to the state of refuge.¹⁵

Exceptions to the rule and other attempted justifications for abductions

No violation of sovereignty, however, occurs when the state of refuge grants permission to, or allows, foreign agents to proceed with an arrest within its borders.¹⁶ Similarly, agents of the state of refuge may, either willingly or mistakenly, surrender the alleged criminal to the prosecuting state, in which case “there is no rule of International Law imposing ... any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power”.¹⁷

States will sometimes co-operate in circumventing the rendition of an alleged criminal, thus preventing individuals from challenging the legality of the extradition or deportation before a tribunal. Reference can be made to the surrender by the Sudanese authorities of the alleged terrorist Carlos “the Jackal” Illich Ramirez to France¹⁸ and to the rendition by the Yemeni government of one of his closest

might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations”.

- ⁹ See Michael J Glennon, ‘State-Sponsored Abduction: A Comment on *United States v Alvarez-Machain*’ (1992) 86 *AJIL* 746, 747-748; Hernan de J Ruiz-Bravo, ‘Monstrous Decision: Kidnapping is Legal’ (1993) 20 *Hastings Const L Q* 833, 851-852; Betsy Baker and Volker Röben, ‘To Abduct or to Extradite: Does a Treaty Beg the Question? The *Alvarez-Machain* Decision in U.S. Domestic Law and International Law’ (1993) 53 *ZaöRV* 655, 672-673.
- ¹⁰ It is accepted that a breach of an international obligation gives rise to a duty to make reparation: see *Spanish Zones of Morocco Claims (Spain v United Kingdom)* (1925) 2 *RIAA* 615, 641; *Chorzow Factory (Indemnity) Case (Merits) (Germany v Poland)* [1928] *PCIJ* (Series A) No 17, 47-48.
- ¹¹ See Restatement Third, above n 2, comment *c* to s 432. See also the *Jacob* case, discussed in Lawrence Preuss, ‘Settlement of the Jacob Kidnapping Case (Switzerland-Germany)’ (1936) 30 *AJIL* 123, 123-124, where a journalist abducted under false pretences from Switzerland by German agents was later returned after the German government admitted its responsibility. In the *Mantovani* case, Swiss authorities sought and obtained the release of an Italian national arrested in Lugano and forcibly taken to Italy: see Charles Rousseau, ‘Chronique des faits internationaux’ (1965) 69 *Revue Générale de Droit International Public* 761, 834-835.
- ¹² See Harvard Research, above n 6, 624; Mann, above n 5, 344.
- ¹³ United Nations Security Council Resolution 138, 15 UN SCOR Res and Decl 4, UN Doc S/4349 (23 June 1960).
- ¹⁴ See the joint statement of 3 August 1960 which closed the diplomatic incident officially, mentioned in James Fawcett, ‘The *Eichmann* Case’ (1962) 38 *BYIL* 181, 199. Eichmann was consequently prosecuted in Israel and convicted. Argentina was not concerned with the condition of the abducted Eichmann, but with the violation of its sovereignty.
- ¹⁵ See *Kear v Hilton*, 699 F 2d 181 (4th Cir, 1983) where a bounty hunter was extradited from the US at the request of the Canadian authorities for forcefully abducting a Canadian citizen in Toronto.
- ¹⁶ See Harvard Research, above n 6, 631. In one of its judgments, the German Federal Constitutional Court held that public international law does not prohibit co-operation between states and that it, therefore, tolerates acts of sovereignty exercised by other states within the borders of a consenting state: 63 BVerfGE 343, 361 (22 March 1983).
- ¹⁷ See the award of the Permanent Court of Arbitration in *Savarkar Case (France v United Kingdom)* (1911) 11 *RIAA* 243, 254.
- ¹⁸ See Riding, ‘Carlos’s Run of Terror Is Ended; He Faces Murder Trial in France’, *International Herald Tribune*, 16 August 1994, 1.

collaborators, Johannes Weinrich, to the German police.¹⁹ Both men were handed over in the absence of a formal extradition procedure. Another pertinent case relates to the arrest of Abdullah Öcalan by Turkish agents in Kenya, where the Kenyan authorities were at least aware of the presence of these foreign agents and probably helped the latter succeed in their operation.²⁰

There is also abundant practice and legal opinion differentiating between forcible abduction and the luring of an individual from the state of refuge. Luring is found to be less objectionable since it involves no use of force or flagrant violation of the territorial sovereignty of the state of refuge.²¹ Although this argument contradicts past practice,²² it does, however, find some comfort in the practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY).²³ Slavko Dokmanovic was indicted in 1996 on charges of complicity in the execution of 260 patients taken forcibly from a hospital in Vukovar in Eastern Croatia.²⁴ Instructions to the UN peacekeeping forces in Croatia to arrest him did not prevent his escape to the then Federal Republic of Yugoslavia (FRY). The government of FRY being unwilling at the time to execute arrest warrants, the ICTY sent one of its investigators to meet with him in Belgrade. On the false belief that the administrator of Eastern Slavonia (Croatia) wanted to meet with him to discuss compensation for the property he had been forced to abandon, and with the guarantee of a safe conduct, Dokmanovic travelled to Croatia where he was arrested and advised of his rights and the charges against him. He was then flown to The Hague and handed over to the ICTY. Dokmanovic lodged a pre-trial motion in which he alleged that the arrest was illegal as the method used amounted to kidnapping. His arrest, he argued, “violated the sovereignty of FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent state authorities”.²⁵ The motion was rejected. The ICTY acknowledged that it might dismiss a case against someone brought before it in violation of international law. It did find, however, that there was no forcible abduction here. After a lengthy review of national and international practice, the ICTY came to the conclusion that the means used to perform the arrest warrant neither “violated principles of international law nor the sovereignty of the FRY”.²⁶

The practices of international tribunals and the fight against terrorism could well bring to the surface a number of other exceptions to the basic rule. In the past, commentators from time to time have defended the use of extra-legal means to acquire jurisdiction over a criminal. One argument has been that the use of force is not aimed against the political independence and territorial integrity of the

¹⁹ AP, ‘Auslieferung des Terroristen Weinrich? Bemühungen der Staatsanwaltschaft in Berlin’, *Neue Zürcher Zeitung*, 3-4 June 1995, 3.

²⁰ “Turks Jubilant Over Ocalan's Capture” <<http://www.cnn.com/WORLD/europe/9902/16/ocalan.turkey.reax/>> (last accessed 1 June 2003).

²¹ See Michael P Scharf, ‘*The Prosecutor v Slavko Dokmanovic: Irregular Rendition and the ICTY*’ (1998) 11 *Leiden J of Int'l L* 369, 374.

²² In the *Colunje* claim, a man accused of fraudulent use of the United States mail advertising a love charm in the Panama Canal Zone was enticed into the Zone from Panama by a Zone policeman who arrested him there. Despite an argument that the actions of the policeman were of a personal nature as he was unauthorised to act outside the Zone, the United States were held liable as the false pretences amounted to an exercise of authority within Panama: *Guillermo Colunje v United States of America (Panama v United States)* (1933) 6 RIAA 342, 343-344.

²³ The formation of the ICTY in 1993 marked the first attempt of the international community since the end of the Second World War to prosecute international criminals in an international judicial setting. Established through Security Council Resolution 827, the ICTY represents a subsidiary organ of the Security Council with delegated enforcement powers within the terms of Art 29 of the UN Charter. The ICTY has powers to issue arrest warrants and all members of the UN should comply with these warrants without undue delay (Art 29 ICTY Statute). The Dayton Peace Agreements further highlighted the duty of Bosnia, Croatia and Yugoslavia to “cooperate fully with all entities involved in implementation of this peace settlement ... including the International Tribunal for the former Yugoslavia”. This provision was part of Annex 1-A of the Peace Agreement. IFOR’s mandate set forth in Security Council Resolution 1031 provided IFOR with the authority to “take such actions as required, including the use of necessary force, to ensure compliance with Annex 1-A of the Peace Agreement”.

²⁴ See *Prosecutor v Slavko Dokmanovic*, Decision on the Motion for Release by the Accused Slavko Dokmanovic, Case No IT-95-13a-PT, Trial Chamber, 22 October 1997, reproduced in 111 ILR 459.

²⁵ Ibid para 16-18.

²⁶ Ibid para 88.

asylum state and, therefore, no violation of the UN Charter occurs.²⁷ It has also been argued that the apprehension of international criminals such as Saddam Hussein or other unsavoury characters is consistent with a major purpose of the UN Charter, that is, the promotion of human rights, and should be permitted in specific circumstances.²⁸

Abductions have also been defended as a means of deterring future attacks against the state or its nationals abroad, as an application of the principle of protection of nationals abroad²⁹ or as an act of self-defence.³⁰ These arguments either show a poor understanding of the basic principles of international law or attempt to build on practice that could hardly, at this stage, modify well-established rules of international law. For example, the *Lotus* case clearly distinguished between the territorial character of enforcement jurisdiction and the extraterritorial assertion of prescriptive jurisdiction.³¹ Moreover, claims by Israel that the interception of a number of aircraft as a measure of self-defence were rejected by the Security Council.³² The arrest in the territory of another state constitutes interference in the internal affairs of that state and, irrespective of the actual use of force, represents a sovereign act illegally performed in the absence of consent.³³ It is reassuring that the majority of United States commentators who ask the question whether abduction is a proper alternative to a failed attempt to extradite a fugitive generally conclude in favour of the respect for international law and extradition procedures.³⁴

What remains subject to argument is whether an extraterritorial abduction carried out by private individuals may be imputed to the prosecuting state. The International Court of Justice held in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, that the adoption or approval of private acts by state authorities translates these "into acts of that State".³⁵ The state thereby assumes responsibility for the acts as its own. The International Law Commission in its draft articles on state responsibility reaches the same conclusion.³⁶ Thus, while the responsibility of the state is not *prima facie* engaged following a private kidnapping,³⁷ continued custody of the abducted individual and the ensuing prosecution does in fact entail ratification of the abduction by the state and the latter assumes responsibility for the violation of the sovereignty and integrity of the state of refuge.³⁸ The International

²⁷ See Jimmy Gurulé, 'Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad' (1994) 17 *Hastings Int'l & Comp. LR* 457, 486.

²⁸ See Beverly Izes, 'Drawing Lines in the Sand: When State-sanctioned Abductions of War Criminals Should Be Permitted' (1997) 32 *Col JL & Soc Probl* 1, 14-15.

²⁹ See Kash, above n 5, 65.

³⁰ See Abraham D Sofaer, 'Terrorism, the Law and the National Defense' (1989) 126 *Military L Rev* 95; Mary Ellen O'Connell, 'Lawful Self-Defense to Terrorism' (2002) 63 *U Pitt L Rev* 889.

³¹ *The Case of the SS Lotus (France v Turkey)* [1928] PCIJ (Series A) No 10, 19.

³² See UN SCOR, 28th Sess, 1738th Meeting, UN Doc S/PV.1738 (1973). In 1986, following the interception of a Libyan aircraft by Israel, the United States Representative on the Security Council did argue that there might be circumstances that justify a state "whose territory or citizens are subject to continuing terrorist attacks ... to defend itself against further attacks" (UN SCOR, 41st Sess, 2655th Meeting, UN Doc S/PV.2655/Corr.1).

³³ See United Nations Security Council Resolution 638, UN Doc S/RES/638 (31 July 1989), condemning all acts of hostage-taking and abduction as "offences of grave concern to all States and serious violations of international law".

³⁴ See Quigley, above n 5, 208.

³⁵ *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Judgment) (United States/Iran) [1980] ICJ Reports 3, 34-35 para 73-74.

³⁶ International Law Commission, Draft articles on the Responsibility of States for Internationally Wrongful Acts, Art 11, in *Report of the International Law Commission on the work of its 53rd Session*, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), chp IV.E.1.

³⁷ See Morgenstern, above n 5, 267; Paul O'Higgins, 'Unlawful Seizure and Irregular Extradition' (1960) 36 *BYIL* 279, 305.

³⁸ See O'Higgins, above n 37, 297; de Schutter, above n 5, 99-100; Mann, above n 5, 340. The problem is particularly acute in the US, where bounty hunters and bail bondsmen travel across state lines or abroad to abduct criminals who have fled or jumped bail and return them to the relevant court for trial. Despite some debate in the United States literature, bounty hunters ought to be considered *de facto* state agents. First, they render a service to the courts. Secondly, the prosecution of the abducted criminal by the courts of the state transforms the seizure of the criminal into a state abduction: see Perry John Seaman, 'International Bounty hunting: A Question of State Responsibility' (1985) 15 *Cal W Int'l L J* 397. But see *Jaffe v Smith*, 825 F 2d 304, 307 (11th Cir, 1987), where the Court of Appeals held that the conduct of bounty hunters was not attributable to the state.

Criminal Tribunal for Yugoslavia, however, recently found that an abduction performed by bounty hunters did not violate the sovereignty of any state and the abducted criminal could be prosecuted.³⁹

Abduction as a violation of human rights standards

No international treaty explicitly recognises an individual human right against forcible abduction or irregular rendition. Yet, such a right has been read into the provisions of regional and international human rights instruments relating to the right to liberty and security of the person and to protection against torture or other degrading treatment.

1966 International Covenant on Civil and Political Rights⁴⁰

Articles 7 and 9 of the 1966 Covenant may be invoked in support of a claim that an abduction in the territory of another state may violate the human rights of the fugitive offender. Article 7 provides that no one is to be “subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Article 9(1) relates to arbitrary arrest and detention and provides that such deprivation of liberty may only take place in accordance with a procedure prescribed by law, while Article 9(2) imposes an obligation upon the arresting authorities to inform the individual of the charges laid against him “at the time of his arrest”. Both provisions have been used by the Human Rights Committee to find that extraterritorial abductions performed with or without the connivance of the local authorities amount to a breach of the rights of the abducted individual.⁴¹

Article 13 has also been used by the Human Rights Committee to protect the rights of an individual extradited outside the terms of a formal extradition arrangement.⁴² In *Giry v Dominican Republic*,⁴³ a French citizen prevented by the Dominican authorities from boarding a flight to the Antilles was instead flown to the United States to stand trial on drug charges, despite the existence of an extradition treaty in force between the United States and the Dominican Republic. The Committee remarked that in the absence of recourse to the proper extradition procedure, the victim's expulsion did not fulfil the legal requirements and that the Dominican Republic acted in violation of Article 13 of the 1966 Covenant.

1950 European Convention on Human Rights⁴⁴

Article 3 of the European Convention provides protection against torture and inhuman treatment. An argument based on that provision could be raised if the abducting agents subject the individual to inhuman or degrading treatment. Article 5 guarantees the right to liberty and security of the person⁴⁵

³⁹ *Prosecutor v Dragan Nikolic*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para 97-105.

⁴⁰ 999 UNTS 171 (entered into force 23 March 1976).

⁴¹ See *Celiberti de Casariego v Uruguay* Communication No R13/56, Decision of 29 July 1981 reproduced in 68 ILR 41 (person arrested in Brazil by Uruguayan agents with the connivance of Brazilian police officials and later forcibly taken to Uruguay is the victim of an arbitrary arrest and detention and is entitled to compensation and permission to leave the country); *Lopez v Uruguay*, Communication No R12/52, Decision of 29 July 1981 reproduced in 68 ILR 29 (abduction of a Uruguayan refugee from Argentina and his treatment by Uruguayan security officers amounting to torture under Article 7 and to an arrest and detention in violation of Article 9(1) of the Covenant). See also *Canon Garcia v Ecuador* UN Doc CCPR/C/43/D/319/1988, Decision of 5 November 1988 (Ecuadorian government's participation in the kidnapping of a Colombian citizen on holiday in Ecuador and transfer to the United States to stand trial amounting to a violation of the freedom from arbitrary arrest and deprivation of liberty under Art 9 of the 1966 Covenant).

⁴² Art 13 reads as follows: “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall ... be allowed to submit the reasons against his expulsion and to have his case reviewed by ... the competent authority”.

⁴³ UN Doc CCPR/C/39/D/193/1990, Decision of 20 July 1990.

⁴⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 223 (entered into force 3 September 1953).

⁴⁵ Geoff Gilbert, *Aspects of Extradition Law* (1991) 188-189 argues that Art 5 embraces both abductions and irregular methods of rendition. James Fawcett, *The Application of the European Convention on Human Rights* (2nd ed, 1987) 87, has defended the view that the continued detention of a person seized abroad, even

and enumerates the only occasions when deprivation of liberty is permitted, the procedure underlying such exceptions requiring a legal basis. In addition to those two provisions, mention should be made of the right to life (Article 2) and the right to a fair trial (Article 6).

Although Article 5 does not protect a person against extradition or deportation,⁴⁶ this provision guarantees that the only procedures that may deprive an individual from liberty must be prescribed by law.⁴⁷ The European Court of Human Rights (ECHR) has not hesitated to condemn states failing to abide by the legal prescriptions of Article 5⁴⁸ and has acknowledged that state-sponsored abduction and luring someone from another country may breach the individual's right to liberty insofar as state authorities have participated in the preparation and perpetration of the abduction.⁴⁹

In relation to the arrest and detention of terrorists, two cases deserve to be mentioned here. The European Commission of Human Rights entertained an application by Carlos Illich Ramirez following his conviction by a French court on charges of murder and several other terrorist acts.⁵⁰ Carlos claimed that he was abducted in August 1994 by several men from a villa in Khartoum (Sudan) where he was recovering from surgery. He was then placed on a plane that took him to France,⁵¹ thus depriving him of his right to liberty and security under Article 5(1) of the Convention through what he termed an "unlawful arrest".⁵² The Commission rejected the application. In its view, French and Sudanese authorities cooperated in the arrest. Accordingly, the arrest could not be viewed as unlawful.⁵³ The Commission hinted that an apprehension without the consent of the state of refuge might violate Article 5(1). This case appears to contradict earlier authority and to open the door to informal methods of cooperation between states with a view to bringing alleged terrorists to justice.

The treatment of Abdullah Öcalan following his abduction by Turkish agents in Kenya in 1999 has provided another opportunity to the ECHR to clarify the law on the subject. For years, Turkey had attempted to obtain extradition of the prominent leader of the Kurdistan Workers' Party, a terrorist accused of killing thousands of Turks in the past twenty years and of promoting the secession of part of the Turkish territory.⁵⁴ The precise circumstances of his arrest are not clear. Nevertheless, images in the media of Öcalan being taken blind-folded in a private jet by Turkish agents and the proud announcement by the government of this snatch operation make it clear that Öcalan was not taken to Turkey through traditional extradition channels.⁵⁵ After his conviction by a Turkish special tribunal, he lodged an application against Turkey with the ECHR in which he alleged a violation, *inter alia*, of Articles 3 and 5 of the European Convention. A Chamber of seven judges from the First Section of the ECHR declared the application partly admissible, rejecting for instance the complaint based on a violation of Article 5(2).⁵⁶ The Chamber found that Öcalan was aware of the reasons for which Turkey wanted him. Accordingly, the failure to disclose the reasons for the arrest did not deprive him of any rights. Acknowledging a right for the authorities to not divulge the reasons of the arrest to the accused represents a dangerous precedent. The accused might genuinely ignore the specific charges made against him. Moreover, he might make comments that could be taken against him.

if found unlawful and therefore contrary to Art 5, was not illegal if it was in accordance with its relevant paragraphs. He accepts, however, that the continued detention could be invalidated where the arrest outside the jurisdiction rendered "the detention unlawful under domestic law" (ibid 87).

⁴⁶ See *X v The Netherlands*, Application No 1983/63, Decision of 13 December 1965, (1965) 8 Yearbook 228, 260; *Becker v Denmark*, Application No 7011/75, Decision of 3 October 1975, 4 Dec & Rep 215, 233.

⁴⁷ See *Lynas v Switzerland*, Application No 7317/75, Decision of 6 October 1976, 6 Dec & Rep 141, 167; *Caprino v United Kingdom*, Application No 6871/75, Decision of 3 March 1978, 12 Dec & Rep 14, 20.

⁴⁸ See *Bozano Case* (1986) ECHR (Series A) Vol 111, 25-27, where the European Court of Human Rights held that the forcible deportation of an Italian citizen from France to Switzerland with the connivance of the local police forces then followed by his extradition to Italy represented a disguised extradition designed to circumvent the otherwise unsuccessful extradition request presented by the Italian government to the French authorities.

⁴⁹ *Stocké v. Federal Republic of Germany* (1991) ECHR (Series A) Vol 199, 18-19.

⁵⁰ Cour d'appel de Paris (Chambre d'accusation) (1994-11-07) Bulletin Criminel (1995) 74, 174.

⁵¹ *Illich Ramirez Sanchez v France* Appl No 28780/95, Decision of 24 June 1996, Dec & Rep 86, 2.

⁵² Ibid 6.

⁵³ Ibid 11.

⁵⁴ *Öcalan v Turkey* (2000) (Decision as to Admissibility), 46221/99.

⁵⁵ Ibid para I A.

⁵⁶ Ibid para IV B.

Before the ECHR, Öcalan argued again that he had been victim of an extraterritorial abduction by Turkish agents. The court expressed the view that “an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person’s individual rights to security under Article 5(1) of the Convention”.⁵⁷ In this case, however, the cooperation of Kenya with Turkey for handing over the accused in the absence of an extradition treaty did not result in a violation of Article 5(1). The ECHR also found that the arrest by Turkish officials in Kenya did not interfere with Kenya’s territorial sovereignty under international law. The Court did, however, find that Articles 5(3) and 5(4) had been violated as Öcalan had not been brought promptly before a judge and the lawfulness of his detention had not been decided upon speedily by a court, despite the fact that the detention was lawful under Turkish law.⁵⁸ Furthermore, the Court observed a number of infringements in the right to a fair trial, proper legal assistance and impartiality under Article 6. The ECHR finally held that Öcalan suffered inhuman treatment under Article 3 by being sentenced to death following an unfair trial.⁵⁹

In these cases, it seems obvious the organs of the ECHR erred in implying that the intervention of the abducting state or the lack of consent of the state of refuge is necessary for a claim to be considered. As noted earlier, by prosecuting the individual, the state ratifies the act of the abductors.⁶⁰ The ECHR has failed to take the opportunity to explicitly condemn all de facto and de jure state action designed to forcibly and illegally obtain custody of any alleged criminal, no matter how serious the crime might be. The role of the ECHR is to secure the human rights of all individuals, including those who have perpetrated very serious crimes. Its observations on Articles 3 and 6, nevertheless, are to be welcome in the context of the arrest and detention of an alleged terrorist as perpetrators of even the most atrocious acts of terrorism should be treated humanely and be subject to a fair trial.

Concluding remarks on human rights and abductions

The foregoing developments suggest that a government should not be allowed to take advantage of its own unlawful conduct by exercising jurisdiction over the abducted offender. This position is echoed in the literature and encapsulated in the maxim *ex injuria non oritur actio*.⁶¹ Extraterritorial abductions and other irregular methods of rendition violate the object and purpose of human rights treaties. It is equally evident that the provisions of international human rights instruments and customary principles of international law regarding physical abuse and personal integrity protect the abducted criminal. Unfortunately, the existence of a right at the international level does not necessarily mean that the individual can enforce it. The intervention of the national state is still required for a case to proceed before the ICJ⁶² and the state’s accession to petition mechanisms, in international or regional conventions, is usually a prerequisite to confer to the individual a right to bring a claim against a state before an international body.⁶³ The above considerations, however, highlight the need to work towards a more positive development: an individual right against prosecution following an illegal removal from another state.

Practice of national courts

One of the major reasons why states are not deterred from illegally apprehending alleged offenders is that in most legal systems the mere presence of the accused before the court is sufficient to give the

⁵⁷ *Öcalan v Turkey* (2003) Judgment (Merits and just satisfaction) 00046221/99 Series A No 135, 26.

⁵⁸ *Ibid* para 256.

⁵⁹ *Ibid* para 256.

⁶⁰ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, above n 35, 34-35 para 73-74.

⁶¹ See Morgenstern, above n 5, 279; de Schutter, above n 5, 123; Mann, above n 5, 347.

⁶² Statute of the International Court of Justice, in *Documents of the United Nations Conference on International Organisation* (1945) Vol 15, Art 34 (entered into force 24 October 1945).

⁶³ See Art 1 of the First Optional Protocol to the 1966 Covenant, 999 UNTS 302 (entered into force 23 March 1976), which provides that a state becoming a party to that Protocol “recognises the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”.

latter the necessary personal jurisdiction to hear the case.⁶⁴ Most national courts have traditionally applied the maxim *mala captus bene detentus* and prosecuted the accused notwithstanding the circumstances leading to the arrest.⁶⁵ Even if this position is not unanimous, and indeed in a number of cases judges have divested themselves of their jurisdiction and refused to condone the irregular method of rendition used by the state to secure custody of the accused, courts might well be tempted to yield to the very important state objective of bringing to justice international criminals and terrorists.

The traditional position of the courts: *mala captus bene detentus*

Municipal judges have overwhelmingly held that they acquire jurisdiction *ratione personae* at the moment the accused appears before the court, no matter how custody was secured. Most national courts have consistently held that a person kidnapped in violation of general principles of international law may still be submitted to the process of the courts of the abducting state.⁶⁶ Courts have refused to hold the state responsible for an abduction carried out by private individuals or where custody was obtained through the informal cooperation of the state of refuge.⁶⁷ The arrest of Carlos in 1994 gave an opportunity to the French Court of Appeal to reiterate the principle that the irregular or informal removal of the accused to France does not *per se* affect the proceedings before the French courts.⁶⁸ Furthermore, courts have generally refused to consider the alleged violation of either international law or human rights, and they have preferred to defer the matter to the Executive, considering that the manner in which custody was obtained affected “the relations between the two countries concerned alone”.⁶⁹ Attempts by the state of refuge to intervene in favour of the accused before the national courts of the prosecuting state have been unsuccessful.⁷⁰ When the accused has tried to raise the existence of an extradition treaty in defence, courts have held that the sovereign rights of the state, not the individual rights of the alleged offender, are affected by an irregular rendition.⁷¹ Moreover, courts in the abducting state have refused to consider the validity of the measures taken by the state of refuge,⁷² claiming that this amounts to interference in a foreign domestic process.⁷³

Overall, judges have closed their eyes on events occurring prior to the official arrest.⁷⁴ In return, they have stressed the need to give the abducted criminal a fair trial. The domestic court sets forth the rights available to the accused, and the latter can only rely on the protection afforded by the local legal system. Consequently, civil remedies open to the accused against his abductors or against the state

⁶⁴ See *R v Lee Kun* (1916) 11 Cr App R 293, 300; Morgenstern, above n 5, 267; Restatement Third, above n 1, s 422(2).

⁶⁵ See Louis Henkin, ‘International Law: Politics, Values and Functions. General Course on Public International Law’ (1989) 216 *Recueil des Cours* 9, 305; Ian Brownlie *Principles of Public International Law* (5th ed, 1998) 320.

⁶⁶ See *R v Walton* (1905) 10 Can Crim Cas 269, 275 (Ontario CA); *Afouneh v Attorney General of Palestine* (1941-1942) 10 Annual Digest 327, 328; *Attorney-General v Eichmann* (1961) 36 ILR 5 68-71 (DC), (1962) 305-306 (Supreme Court); *R v O/C Dépôt Battalion, RASC, Colchester, Ex parte Elliott* [1949] 1 All ER 373, 377-378 (Lord Goddard CJ held that once the accused is in lawful custody in Britain, courts have no power to question the circumstances leading to his arrest abroad); *Abrahams v Minister of Justice and Others* [1963] 4 SA 452, 545-546 (Prov Div) (where there is a lawful detention, the circumstances of the arrest and capture are irrelevant).

⁶⁷ *Re Argoud* 45 ILR 90, 95-97 (French Cassation Court 1964).

⁶⁸ Cour d’appel de Paris (Chambre d’accusation) (1994-11-07) Bulletin Criminel (1995) 74, 174.

⁶⁹ *Attorney-General v Eichmann* 36 ILR 5, 70. See also *Re Argoud*, above n 67, 96.

⁷⁰ See *Ex parte Lopez* (1934) 6 F Supp 342, 344 (SD Texas).

⁷¹ See *Deltit*, Recueil Sirey 1887 (Part I) 188; *State v Brewster* 7 Vt 118, 122 (1835); *Re Argoud*, above n 67, 96; *United States v Valot* (1980) 625 F 2d 308, 310 (9th Cir); *United States v Cordero* (1981) 668 F 2d 32, 37-38 (1st Cir); *Joint Customs Post Case* 86 ILR 525, 530-531.

⁷² Cour d’appel de Paris (Chambre d’accusation) (1994-11-07) Bulletin Criminel (1995) 74, 174.

⁷³ See *Geldof v de Meulemeester et Steffen*, Pasicrisie belge 1961 (Part I) 674, 676 (Belgian Cassation Court); *Extradition (Jurisdiction) Case*, (1935-1937) 8 Annual Digest 348, 349 (German Supreme Court). In the *Pohle* case, the German Federal Constitutional Court held that the decision regarding the extradition by the Greek authorities to Germany of an alleged terrorist “was solely within the sphere of Greek domestic jurisdiction and as such it is, in accordance with the general rules of international law, not subject to re-examination by the German courts”: translated (extracts) in Leslie C Green, *International Law Through the Cases* (4th ed, 1978) 383.

⁷⁴ See M G Cowling, ‘Unmasking “Disguised Extradition” – Some Glimmer of hope’ (1992) 106 *South African Law Review* 241, 244.

have been regarded as adequate reparation for the damage suffered.⁷⁵ This determination to try the accused at almost any cost derives from the following proposition: the discharge of the accused represents a too important price to pay simply because illegal means were used to bring him to trial. The social need for crime repression should not be frustrated by the illegalities surrounding the seizure.⁷⁶

Often, the landmark decision referred to is *Ker v Illinois*.⁷⁷ In that case, the defendant escaped to Peru after being indicted in Illinois for larceny and embezzlement. An agent was dispatched by the United States State Department to obtain his extradition pursuant to the extradition treaty in force between the two countries. As Chilean forces were occupying Peru's territory at the time, the agent was unable to produce the said warrant to the Peruvian authorities, which had fled the capital. With the assistance of the occupying forces, the United States agent forcibly embarked Ker on the ship bound for the United States without first seeking the opinion of the authorities in Washington. The Supreme Court rejected the argument that the accused was denied due process of law, insisting that due process "is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled".⁷⁸ It further held that no violation of the extradition treaty occurred as the kidnapping took place outside the terms of the said treaty and was carried out without the permission of the United States government.⁷⁹ Finally, the Court did not accept that mere irregularities in obtaining custody of the accused were sufficient to prevent prosecution.⁸⁰

Ker stands for the view that any malfeasance prior to trial is not within the scope of the court's decision and it has been expanded to suggest that a forcible abduction does not preclude a court from trying the abducted accused.⁸¹ It has been followed emphatically in the United States.⁸² For instance, in the *Yunis* case,⁸³ an alleged Palestinian terrorist, Fawaz Yunis, was lured from Lebanon to Cyprus. There, he was invited onto a motorboat under the false pretence that he would meet drug traffickers and enter into an important narcotics deal. Once the boat reached the international waters, he was taken to a United States military vessel and flown to the United States where he was indicted and eventually convicted on terrorism-related crimes. Before United States courts, counsel for Yunis argued that the government's stratagem to lure his client to international waters precluded the courts from exercising their jurisdiction over his client.⁸⁴ The District Court did not object to the means employed to secure personal jurisdiction over him. The court held that once the individual had been brought within the jurisdiction of the court, he could be charged under the statute, but that the government "cannot act beyond the jurisdictional parameters set forth by principles of international law and domestic statute".⁸⁵ It appears that underlying the decision of the court was the fact the capture took place in international waters, so that the United States were actually acting within the constraints imposed by international law.

⁷⁵ See *Ex parte Elliott*, above n 66, 376; *Re Argoud*, above n 67, 97; *The Queen (Quinn) v Ryan* [1965] IR 70, 121-122; *Sami v United States*, 617 F 2d 755, 772-774 (DC Cir, 1979).

⁷⁶ See Paul B Stephan, 'Constitutional Limits on International Rendition of Criminal Suspects' (1980) 20 *Va J Int'l L* 777, 797-799.

⁷⁷ (1886) 119 US 436. Earlier cases had already reached the same conclusion: see *Ex parte Susannah Scott* (1829) 9 B. & C. 446, 448 (Lord Tenterden CJ); *States v Brewster* (1835) 7 Vt 118, 121-122.

⁷⁸ *Ker v Illinois*, above n 77, 440.

⁷⁹ *Ibid* 443.

⁸⁰ *Ibid* 444.

⁸¹ See *Frisbie v Collins* 342 US 519, 522 (1952).

⁸² See *Mahon v Justice* 127 US 700, 714-715 (1888); *United States v Insull* 8 F Supp 310, 311-312 (ND Ill, 1934); *Frisbie v Collins*, above n 81, 522; *Gerstein v Pugh* 420 US 103, 119 (1975); *United States v Crews* 445 US 463, 474 (1980).

⁸³ *United States v Yunis* (1988) 681 F Supp 896 (DDC).

⁸⁴ *Ibid* 899.

⁸⁵ *Ibid* 906. Upholding his conviction in 1991, the United States Court of Appeals for the District of Columbia ruled that the circumstances of his seizure did not void the trial court's jurisdiction over him. The court stated that "while the government's conduct was neither picture perfect nor a model for law enforcement behavior", it had not reached the level of outrageousness necessary to sustain the defendant's jurisdictional argument: *United States v Fawaz Yunis*, 924 F 2d 1086, 1094 (DC Cir, 1991).

A majority of the United States Supreme Court in 1992 reaffirmed the traditional approach in the infamous case of *Alvarez-Machain*.⁸⁶ Dr Alvarez-Machain was taken forcibly from Mexico to the United States to stand trial without the co-operation of the Mexican police,⁸⁷ an abduction to which the Mexican government immediately protested as an act “in violation of the procedure established in the extradition treaty in force”.⁸⁸ Chief Justice Rehnquist, on behalf of the majority, upheld the *Ker* doctrine in *Alvarez-Machain*. After stating that the only factual difference with *Ker* concerned the involvement of the government in the *Alvarez-Machain* case,⁸⁹ he went on to interpret the terms of the extradition treaty between the United States and Mexico as not specifying “the only way in which one country may gain custody of a national of the other country for the purposes of prosecution”,⁹⁰ a position echoed in the practice and history of the treaty. He inferred this reasoning from the fact that the Mexican government had always been aware of the *Ker* doctrine, but that the “current version of the Treaty ... does not attempt to establish a rule that would in any way curtail the effect of *Ker*”.⁹¹ The treaty contained no express prohibition of abductions and the general principles of international law provided no basis for interpreting the treaty as including an implied term prohibiting international abductions as they are too vague to be applied to the specific context of an extradition treaty.⁹²

This Supreme Court judgment has far-reaching effects. The rule *mala captus bene detentus* exposed in *Ker* has been extended to official conduct by United States organs and their representatives. By refusing to read the provisions of the extradition treaty in the light of the general principles of customary international law underlying the issues relating to abductions, it is expected that the Supreme Court will turn a blind eye to the use of extraterritorial abductions to bring terrorists to justice. The majority did, however, point out that any possible violation of international law could be addressed at the executive level.⁹³

The judgment was criticised in the legal literature,⁹⁴ condemned by most states⁹⁵ and denounced by international human rights organisations.⁹⁶ The case, once remanded to the District Court, was dismissed since the evidence presented by the prosecution failed to support the charges against Alvarez-Machain.⁹⁷ He was allowed to return to Mexico and filed a civil suit in California against his abductors and the United States government. The Ninth Circuit held, by a narrow majority (6-5),⁹⁸ that his arrest and detention was arbitrary and in violation of the law of nations. The majority held that he could seek a civil remedy in federal courts pursuant to the Alien Tort Claims Act and the Federal Tort Claims Act for violations of the law of nations.⁹⁹ It is important to note, however, that the majority at the outset sought to limit the reach of this case to the narrow question as to whether Alvarez-Machain

⁸⁶ *United States v Alvarez-Machain* (1992) 112 S Ct 2188.

⁸⁷ *United States v Caro-Quintero* (1990) 745 F Supp 599, 603-604 (CD Cal). This case is the trial court level where Alvarez was initially tried with other defendants in the murder case of a DEA agent.

⁸⁸ Ibid 604 (quoting a diplomatic note issued by the Embassy of Mexico in Washington).

⁸⁹ *United States v Alvarez-Machain* (1992) 112 US 2188, 2193.

⁹⁰ Ibid 2194.

⁹¹ Ibid 2194.

⁹² Ibid 2196. Justice Stevens, for the minority, vehemently criticised the express authorisation of the abduction as a serious violation of treaty obligations as well as of general principles of international law, insisting that neither case law nor doctrine supported the “Court’s admittedly ‘shocking’ disdain for customary and conventional international law principles” (ibid 2205) and asserting the view that the interest of the Executive Branch in punishing the respondent in the United States, notwithstanding the gravity of the committed crime, “provides no justification for disregarding the Rule of Law” (ibid 2205).

⁹³ Ibid 2196.

⁹⁴ See, eg, Andrew L Strauss, ‘A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court’s Abduction Decision in *Alvarez-Machain*’ (1994) 67 *Temple L Rev* 1209; William J Aceves, ‘The Legality of Transborder Abductions: A Study of *United States v Alvarez-Machain*’ (1996) 3 *Southwestern J L & Trade Am* 101.

⁹⁵ For a good overview of the reactions outside the United States, see Mark S Zaid, ‘Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout’ (1997) 19 *Hous J Int’l L* 829.

⁹⁶ Amnesty International, ‘USA: Kidnapping of criminal suspects sanctioned by United States Supreme Court’, AI Index: NWS 11/32/92, 12 August 1992.

⁹⁷ See Jonathan E Katz, Note, ‘Should Government Sponsored Forcible Abduction Render Jurisdiction Invalid? *United States v Alvarez-Machain*’ (1993) 23 *Case Western Int’l LJ* 395, 414.

⁹⁸ *Alvarez-Machain v United States* (3 June 2003) (9th Cir) 99-56762.

⁹⁹ Ibid 7261-7280.

had a remedy at law and that its holding “does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests”.¹⁰⁰

Violation of the judicial process

The traditional approach has been challenged but it must be stressed that none of the relevant cases involve persons sought for international crimes or terrorist offences. In cases where the traditional position has been challenged, courts have mainly set aside proceedings on the basis of an abuse of process resulting in an infringement of the individual's rights.¹⁰¹ An official protest by the state of refuge has sometimes been deemed a condition *sine qua non* before the court could stay the proceedings to enable the governments to reach a political settlement or allow the individual to raise the violation of an extradition treaty.¹⁰²

South African and British courts have weakened the traditional approach in two relatively recent cases. In *Ebrahim*, the Appellate Division of the Supreme Court unanimously reversed a conviction secured by the forcible abduction of the appellant, a member of the African National Congress, from his home in Swaziland by two individuals claiming to be police officers.¹⁰³ Steyn J, for the court, held that the prosecution of a person abducted by or with the approval of a state agency contravened applicable rules of common law.¹⁰⁴ The case shows that the repression of crime does not grant unlimited powers to government agencies in bringing to justice alleged criminals, even in the absence of a protest by the authorities of the state of refuge. The real motivation behind Steyn J's judgment was his concern for the respect of the domestic rule of law and the danger of an abuse of power by the authorities. Moreover, he implied that the involvement of the public authorities was necessary for staying the proceedings.¹⁰⁵

In the United Kingdom, the House of Lords has revised prior practice in *Bennett*.¹⁰⁶ The case involved the disguised extradition of an individual accused of fraud-related offences from South Africa to Great Britain in the absence of a legal process. A majority of the House of Lords ruled that British courts might take cognizance of the circumstances surrounding the return of an alleged criminal to England in disregard of the extradition process and in breach of international law and foreign domestic laws and refuse to act where a serious abuse of power had been committed.¹⁰⁷ Only Lord Oliver dissented. Relying upon the traditional view that a civil remedy is available to the abducted accused and that the interest of society in the prosecution of the case outweighs that of the individual, he concluded that the abducted individual should not escape just punishment for his crimes.¹⁰⁸

¹⁰⁰ Ibid 7219. On 1 October 2003, the Solicitor General has just filed a petition for certiorari seeking review by the U.S. Supreme Court challenging the Ninth Circuit's en banc (*United States v. Alvarez-Machain*, Docket Number 03-485).

¹⁰¹ See *United States v. Toscanino*, 500 F 2d 267, 275 (2nd Cir, 1974) (due process requires a court to divest itself from jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights); *R v Hartley* [1978] 2 NZLR 199, 216 CA (Woodhouse J) (judge is entitled to enquire into the methods used to secure the presence of the accused to see if there has been a misuse of powers by the authorities, and that the judge possesses an inherent jurisdiction "to prevent anything which savours of abuse of process"); *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546; (1987) 89 FLR 133; (1987) 27 A Crim R 163 (an Australian court declined jurisdiction over an accused criminal whose custody was obtained irregularly, noting, however, that it was vested with undoubted jurisdiction over such cases, subject to discretion).

¹⁰² See a German Decision of 19 December 1986 [1987] 2 NJW 3087; *United States v Zabaneh*, 837 F 2d 1249, 1261 (5th Cir, 1988).

¹⁰³ *State v Ebrahim* [1991] 2 SA 553 (App Div) translated and annotated in (1991) 31 ILM 888, 890.

¹⁰⁴ Ibid 899: "It follows that according to our common law, the trial court had no jurisdiction to hear the case against the appellant. Consequently, his conviction and sentence cannot stand".

¹⁰⁵ In *S v Mabena* [1993] 2 SACR 295 (Bophutswana Gen Div), *Ebrahim* was interpreted as requiring official involvement, use of force or deception and lack of knowledge or consent on the part of the state of refuge.

¹⁰⁶ *Bennett v Horseferry Road Magistrates' Court and another* [1993] 3 All ER 138 (HL).

¹⁰⁷ Ibid 150-151 (Lord Griffiths); 155-156 (Lord Bridge); 163 (Lord Lowry); 169 (Lord Slynn).

¹⁰⁸ Ibid 156. Furthermore, he believed that an assessment of the handling of the case by the executive authorities was outside the role of the courts unless this affected the fairness of the trial process (above, 158) and that

The House of Lords pronounced a stay of proceedings on the basis of a misuse of powers by the competent authorities, with only a very timid – and vague – reference to the principles of international law and to the potential violation of the laws of the state of refuge. It further ordered the release of the accused as the only remedy against the abuse of the legal process by government authorities. The judgment emphasises the participation of the executive and the use of force as key factors in a decision to stay the proceedings.¹⁰⁹

Differing constitutional arrangements

Municipal courts have stressed the supervisory role of the judiciary in maintaining the rule of law. Unfortunately, the important criteria set out by the courts open the door to a plethora of exceptions. First, the courts will require a degree of official involvement.¹¹⁰ Second, the act must involve coercion, thus setting aside the case where the individual is lured to the jurisdiction.¹¹¹ Third, custody must be obtained through the circumvention of the extradition arrangements in place.¹¹² Finally, courts must be satisfied that domestic proceedings could not have originated otherwise.¹¹³

Another problem relates to differing concepts of abuse of process. A number of domestic legal systems enable members of the public to arrest an individual on “reasonable grounds”¹¹⁴ or provide that an unlawful arrest does not by itself vitiate a subsequent prosecution if the sole purpose of the arrest is to bring the defendant into custody.¹¹⁵ Furthermore, in the wake of the events of 11 September 2001, there has been a shift towards the prevention of terrorism. This has translated in tougher laws that further empower state authorities while limiting the rights of individuals. Such developments could restrict the notion of abuse of process.¹¹⁶ The notion of due process will also be informed by the constitutional protections in force in the state.¹¹⁷ Finally, as it has been mentioned before, a number of jurisdictions have also been satisfied that a fair trial with due process adequately protects the rights of the accused while preserving the court's immaculate image of fairness and justice.

It must be borne in mind that the extent to which international law permeates a domestic legal system is governed by the state's constitutional arrangements. Accordingly, any critical assessment of the municipal judge requires an evaluation of the relationship between international law and municipal law. It is beyond the scope of this paper to conduct such a study.¹¹⁸ Suffice it to say that discrepancies exist as to the extent to which international norms are integrated in the domestic legal order. The

the courts were not concerned with the violation of foreign laws, nor were any of the rights of the accused in English law infringed by the events taking place abroad (ibid 160).

¹⁰⁹ Soon after, the House of Lords refused to extend *Bennett* to extradition proceedings in *Re Schmidt* [1995] 1 AC 339 (HL), where it was decided that the supervisory jurisdiction of the High Court represented the only protection against abuse of process and executive misconduct, the procedure surrounding extradition proceedings contained other protections while the argument of abuse of process should be heard by the courts in the requesting state (ibid 378-379).

¹¹⁰ *State v Ebrahim*, above n 103, 890, 892.

¹¹¹ *United States v Yunis*, above n 83, 899.

¹¹² *Bennett v Horseferry Road Magistrates' Court and another*, above n 106, 151 (Lord Griffiths).

¹¹³ Ibid 156 (Lord Bridge).

¹¹⁴ See, eg, Police and Criminal Evidence Act 1984 (UK), s 24(5). In New Zealand, for instance, the Crimes Act 1961, s 315, provides a power of arrest without warrant where "there is good cause to suspect" that someone has or is about to commit an offence, whereas generally, the criterion for issue of a warrant is "reasonable grounds for believing" that an offence is about to be committed.

¹¹⁵ See *Wong Sun v United States* (1963) 371 US 471, 491.

¹¹⁶ A good example is the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (USA PATRIOT) Act of 2001, Pub L No 107-56, 115 Stat. 272 (codified as amendments to various sections of US Code). For an analysis of the potential infringements of the USA Patriot Act on human rights, see Emanuel Gross, 'The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001' (2002) 28 *N C J Int'l L & Com Reg* 1.

¹¹⁷ See Frank Tuerkheimer, 'Globalization of US Law Enforcement: Does the Constitution Come Along?' (2002) 39 *Houston L R* 307 for a good review of the application of the constitutional guarantees in the Fourth, Fifth and Sixth Amendments to executive conduct outside the United States. The Supreme Court of Canada has hinted in *Regina v Terry* [1996] 135 SCC 214 (4th DLR) that the Canadian Charter on Rights and Freedoms may apply to the acts of Canadian agents abroad.

¹¹⁸ See Lassa H Oppenheim, *International Law. A Treatise* (9th ed, Sir Robert Jennings and Sir Arthur Watt, 1992) Vol I, 54-81 for a good overview of the position around the world.

potential impact on the abducted criminal is great, as his rights might not be protected equally depending on the legal system in force in the prosecuting state. Municipal judges tend to hesitate to apply international law, even where they are explicitly entitled to do so. This arises partly from their aversion to tackling issues traditionally left to the discretion of the Executive, and to some extent, from a limited understanding of the principles underlying the international legal system.

The question then is whether a judge should refuse to proceed where custody of the accused has been obtained by illegal methods. An abduction represents *per se* an illegal act under the municipal law of both the prosecuting state and the state of refuge and abuse of executive power if not of process. The difficult question is whether such conduct should bear fruit and whether the judge should legitimise government behaviour that fails to respect the most basic procedural guarantees. The judge must keep in mind the international obligations of the state.¹¹⁹ By ignoring the infringement of another state's sovereignty and then prosecuting the individual, the judge engages the international responsibility of the state. The evolution of the concept of human rights and the recognition that protection against irregular methods of rendition is contained in many human rights instruments make it even more difficult today for a judge to refuse to look into apparent irregularities surrounding the arrest of the fugitive. The political underpinnings of the decision to abduct an individual should not render such conduct immune from the legal scrutiny of the courts. While the judges must not enter the political arena, they should not abdicate their functions to the detriment of the individual's fundamental rights and to the obvious benefit of the government.¹²⁰

Thinking outside the box through the lenses of international relations

Defining the problem: the issues at stake

Extraterritorial abductions raise legal, policy and moral issues. Since these issues are intertwined, any proper analysis of the problems caused by the practice of state to abduct alleged criminals in foreign territory should take all these issues under consideration.

Legal issues

Legally speaking, the main issues raised by extraterritorial abductions relate to state sovereignty and territorial integrity and to the protection of individual rights. The frequency with which state practice and national courts ignore prescribed principles of classical international law and human rights law condemning in most cases state-sponsored abductions brings the current debate at a standstill. This is where international relations theories may prove useful to the international lawyer. Realist, Institutionalist and Liberal interpretations of the issues raised by extraterritorial abductions can help us understand why the law is not applied. In turn, understanding the motives for the non-application of the law and finding common denominators in the explanations provided by the different schools of international relations theory can assist international lawyers in finding effective ways to address the legal challenges arising from extraterritorial abductions.

Policy issues

Nature and gravity of the crimes involved

A review of the cases examined in this paper indicates that in all instances where an extraterritorial abduction occurs, the offence for which the individual is abducted poses a direct or indirect threat to the abducting state's structure, integrity or authority. In sum, the offence threatens the stability of the political, economic or social foundation of the state, prompting action on the part of the abducting state. For instance, a terrorist activity undermines state authority, disrupts the functioning of the state and threatens citizens. Incidentally, these threats are also of a nature to expose the weakness of the state.

¹¹⁹ See *Murray v Schooner Charming Betsy* (1804) 2 Cranch 64, 118 where the United States Supreme Court held that a statute should be construed, if possible, so as not to conflict with international law. Should this be the wish of the legislative body, however, the courts could be obliged to apply domestic law in contravention of the State's international obligations.

¹²⁰ Morgenstern, above n 5, 280; Edwin D Dickinson, 'Jurisdiction Following Seizure or Arrest in Violation of International Law' (1934) 28 *AJIL* 231, 237.

This explains why the capture of the alleged offender is most often surrounded by secrecy and why there might be some hesitation in seeking the support of other states in arraigning the individual.

In fact, the offence must have a potentially destructive element to warrant the recourse of a method of seizure that is costly in many respects. As illustrated by state practice, extraterritorial abductions involve the mobilisation of considerable state resources. Moreover, state-sponsored kidnappings in foreign territory also present potentially a high cost in terms of the risks involved: injury or loss of life by exposing both agents and abducted individual to dangerous situations; disclosure of the identity of secret agents involved in covert operations potentially exposing the state to future threats or harm. Finally, the unlawfulness and immorality of the abduction might draw heavy critique both internationally and at home with the possibility of damaging the state's image and reputation in inter-state relations.

Goals sought in abducting the alleged offender

In abducting the alleged offender, the state seeks to preserve its very foundations, its sovereignty, its territorial integrity and protect its citizens. National security goals are common to all states, although there might be different interpretation among states of what constitutes national security and how those goals are determined and achieved. The actions of the alleged offender might even threaten more than one state.

The need to fight terrorism and other international crimes preoccupies the international community. In the name of state security interests, governments are willing to take extreme measures to protect their institutions and their citizens. This is a comprehensible objective. The problem may arise when this objective translates into the abduction of alleged criminals from other states. Such conduct threatens international peace and security. It also potentially collides with basic notions of human rights to which one would expect to apply to every human being.

Moral issues

As mentioned at the beginning of this paper, the problem encountered by the recognition of an international protection of the rights of an alleged criminal involves a difficult ethical or philosophical choice. In effect, granting rights to individuals who commit horrendous crimes might be perceived as acting against the interests of the international community and as being morally wrong. On the other hand, not recognising that the alleged criminal too has a right to be protected against degrading and inhuman treatment and failure to guarantee due process appears equally wrong. Not granting the same human rights protection to alleged criminals would imply their life has an inferior value compared to that of other humans. This is especially wrong under the assumption that an alleged offender should be presumed innocent before proven guilty.

For a state to act in breach of its legal obligations and then to be permitted to reap the benefits of its unlawful conduct is also morally wrong. Besides, it implies that the state is above the law, begging the question whether in a state where the rule of law prevails, it is better to let a criminal walk free than legitimising a wrongful exercise of jurisdiction.

Analysis of the driving motives of the principal actors in extraterritorial abductions

Little has been written on extraterritorial abductions from the viewpoint of international relations theories. Several factors may explain the apparent lack of interest of international relations for the subject. While state-sponsored abductions in foreign territory can indeed jeopardise relations among states, their potential infringement on the sovereignty and territorial integrity of the state of refuge is often relatively minimal compared to other instances of interest, such as humanitarian intervention. The most striking and profound violation occurs towards the individual and the latter is not perceived as a relevant actor in international relations in most cases. Also, extraterritorial abductions are relatively uncommon practice although their discovery by the media is sometimes given wide publicity.

Nevertheless, I argue here that international relations theories provide a helpful analytical tool in explaining some practical developments and legal interpretations in relation to state-sponsored abductions. They help explain (i) why states resort to abductions in spite of the demonstrated illegality of the practice; (ii) why the aggrieved state of refuge will sometimes be reluctant to protest against the violation of its sovereignty and territorial integrity; (iii) and finally why national courts traditionally hesitate to apply international law principles and to see in the illegal capture of the alleged offender sufficient grounds to stay the proceedings.

The sections below apply the views of Realists, Institutionalists and Liberals as applying to the context of extraterritorial abductions.

Realists¹²¹

Structural Realists assume that a state can never be certain about the intentions of other states. It can never be sure whether the other state will cooperate to bring the individual to justice. Thus the prosecuting state cannot rely with any certainty on an assumption that in cases for example where there are extradition treaties in place, the state of refuge will comply.

They also contend that the overriding motive of states is their survival and hence their sovereignty.¹²² This explains why states do not take lightly any terrorist act that threatens its stability and territorial integrity. Sovereignty and national security issues are of vital importance.

Last but not least, Structural Realism assumes that states reason in a strategic way as to how to ensure their survival in the international system.¹²³ This would translate here as implying that all states would understand that when a vital state interest is at stake, it is of interest to the state to take action. In other words, an abducting state could be led to believe that the state of refuge would also resort to abduction if placed in the same circumstances. This might explain why the state of refuge sometimes would not protest to the abduction within its borders: because it wants to preserve the right to act in the same way if and when facing a similarly challenging situation. The state of refuge will tend to take this view especially if it does not consider the abduction as impinging too severely on its sovereignty.

To recapitulate according to the Realist logic, a state will not tolerate impunity for crimes committed against its vital interests or threatening its stability or its very foundation. Furthermore, it will act in a manner to clearly demonstrate that it is in full control of the situation. If it can be assisted by the state of refuge to extradite or hand over the alleged offender, that is good but it will not count on cooperation. It will probably always have a contingency plan at hand just in case the state of refuge is unwilling to cooperate. Naturally, abductions cannot occur for every offence or at all times. The state will inevitably make a cost-benefit analysis of the decision to determine how far it will be ready to go to capture the wanted individual. In that sense, states will only resort to abduction in cases of sufficient gravity. It will send agents to kidnap the alleged offender only when the physical and political costs of the operation are low compared to the benefit of capturing and bringing the offender to justice.

Institutionalists¹²⁴

States constitute the main actors involved in the international system and often share colluding interests in many areas of concern.¹²⁵ Although power is considered as an important mean for a state to define itself vis-à-vis the other states and the international community, states do not permanently engage in a power struggle amongst them. The underlying reason is precisely because, besides competing interests, they also share some common interests. Here, for instance, states are most likely to have a common interest to fight terrorism and international crimes. Thus, when confronted to dangerous and notorious

¹²¹ For a good overview of structural realism, see Anthony Clark Arend, 'Do Legal Rules Matter? International Law and International Politics' (1998) 38 *Va J Int'l L* 107, 110-114.

¹²² See John Mearsheimer, 'The False Promise of International Institutions' (1994-1995) 19 *Int'l Security* 5, 10.

¹²³ *Ibid* 11.

¹²⁴ For an overview of institutionalism, see Robert O Keohane, 'International Institutions: Two Approaches' (1988) 32 *Int'l Studies Quarterly* 379.

¹²⁵ See Arend, above n 121, 118-122.

criminals, who might also pose a threat to other states, they will cooperate actively, or at least passively, to ensure that offenders are brought to justice. Institutionalists will assume that in all likelihood, most states will be interested in bringing to justice offenders who commit crimes against the state and who undermine state sovereignty in any meaningful way. Institutionalists also believe that institutions, defined broadly, reduce anarchy and allow states to cooperate whenever it is in their long-term interests when facing common challenges.¹²⁶

In the present case, when analysing state interests in the face of the challenges brought by extraterritorial abductions, states might have sufficiently colluding goals and motives to negotiate and sign extradition treaties. Norms, therefore, can be created to enhance assurances that an offender, wherever located, is prosecuted. In turn, these norms or institutions are sufficiently important for states involved in their creation to motivate state behaviour. In other words, if extradition arrangements are in force, they should be used first and whenever possible. Only in extreme cases will a state be permitted to perpetrate an abduction. Norms and institutions *inter alia* impact on state behaviour because they reduce the uncertainty in the conduct of other parties. Cooperation among states is thus more likely when institutions are clearer, more precise and transparent.

In the cost-benefit analysis of the various possible ways to ensure the capture of an alleged offender abroad, Institutionalists will favour cooperation as it can reduce significantly the costs involved, especially if the certainty of the outcome is increased under a cooperation regime.¹²⁷ Using the legal channels and institutions also generates goodwill on behalf of other states involved. This goodwill in turn could be beneficially used in other areas of common interest or even perhaps to resolve conflicts in unrelated issues. It should be remembered, though, that instruments are an expression of a balance between competing interests of states weighted by their relative power. If there is not sufficient will in the international community to translate those instruments into state action, then any critique against the means of capturing the individual will be tested in terms of competing power.

Liberals¹²⁸

Liberal views will diverge from most of the above assumptions. For Liberals, the primary actors to be considered are the societal actors,¹²⁹ i.e. interests groups comprising of citizens, corporate entities brought together to defend the interests of a particular industry, international or global networks, and generally other similar groups of individuals who team up to defend common goals or interests. International relations and politics, in the logic of Liberals, emanate from, and represent the competing expression of interests by these different groups at the national and global level. At the national level, negotiations between these groups ultimately define state preferences. Thus in the face of the same challenging issues, the position of a state for instance will be different from that of another simply because the power struggle between the groups of individuals within the state will inevitably lead to different outcomes.

The Liberal approach to international relations assumes that the domestic and international spheres are intricately linked. Without overriding the importance of states, Liberals do not view the state as an undifferentiated and monolithic entity. They take great interest in the relations between the state and individuals. The state thus loses its opacity; it becomes more transparent.¹³⁰ Domestic courts could therefore be viewed as representing the views of judges as they themselves understand legal preferences, as they interpret their own role of providers of justice. In all likelihood, national courts will be interested in examining the manner in which the alleged offender has been brought to trial.¹³¹ In their decisions, judges might take into account the possibility afforded to the aggrieved individual to

¹²⁶ Ibid 121; Anne-Marie Slaughter, 'International Law and International Relations' (2000) 285 *Recueil des Cours* 9, 37.

¹²⁷ See Slaughter, above n 126, 38-39.

¹²⁸ See Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *Int'l Org* 513.

¹²⁹ See Slaughter, above n 126, 40.

¹³⁰ Ibid 41.

¹³¹ While courts believe in the capture of an alleged offender by all legal – and even illegal – means, they will ensure that the accused is entitled to a fair and unbiased trial with sufficient guarantees of due process. This would ensure a just outcome insofar as it would protect each and everyone's interest equitably.

sue in a civil suit the agents who abducted him. Domestic courts might also be motivated by their own preferences. In a state where they might perceive the Executive branch as abusive, they could take the opportunity of a judgment involving an extraterritorial abduction to condemn the Executive for its abuse of process in general by pointing out to the unlawful conduct of state agents in the abduction case and order the release of the abducted offender on those grounds. It will be a way for courts to exercise their power to indirectly reprimand abusive authorities in an unrelated but significant matter of concern.

Liberals will evaluate cost and benefits of a decision whether to abduct an offender from the viewpoint of all concerned groups or sub-groups. For example, it can be argued under this logic that the state of refuge is likely to protest against the unlawful capture of an alleged terrorist on its territory if the latter is part of an underground organisation that is sufficiently influential to define, or have an impact on the state's preferences.

While Liberals might favour in principle a human rights approach to extraterritorial abductions, problems arise when the interest in ensuring the application of international human rights standards has to be balanced with the need to bring individuals to justice or when it comes to protecting a significant group or sub-group from threats. The cost-benefit analysis will amount to a balancing act in weighing the threat of violation of individual rights with that of protection of citizens from terrorist acts or international crimes. This apparent dichotomy of interests could be resolved by improving extradition channels.

Political and legal solutions to the problem of extraterritorial abductions

The above analysis from the perspective of international relations theory offers a good understanding of state behaviour in the context of extraterritorial abductions and provides some interesting clues as to why national courts do not always refer to the applicable principles of international law and human rights in their decisions. However, the contribution of international relations theory does not stop here. The Realist, Institutionalist and Liberal views can also help international law scholars to warrant adherence to legal principles and due consideration for international human rights standards. This assistance is best provided by finding first a common ground, i.e. the smallest common denominator to all three perspectives, and by then exploiting these findings in terms of policy and legal recommendations. This method will maximise the potential for designing rules and guidelines that are compelling and effective in realising pre-determined and generally acceptable objectives.

A review of the different viewpoints offered by theories of international relations points to the following common denominators in the motives underlying state behaviour:

- All states have a compelling interest in prosecuting an alleged offender for crimes undermining its sovereignty and stability;
- All states will, in extreme circumstances, tend to resort to extraterritorial abductions when that is the only way of ensuring custody of an alleged offender accused of having committed such a crime;
- When faced with the dilemma of protecting the human rights of the accused or the rights of the collectivity or any of its significant sub-groups, all states will tend to protect the former;
- States in general do not rely on the expected behaviour of other states – they are in essence suspicious vis-à-vis other actors of the international community;
- In deciding how to bring an alleged offender to justice, all states will use a cost-benefit analysis to reach their decision.

The goal of the exercise should be to ensure offenders are lawfully held accountable for their offences while simultaneously:

- (i) Eliminating if possibly – otherwise reducing considerably – any state motivation to resort to extraterritorial abductions;
- (ii) Maximising the protection of the abducted individual especially in the rare instances where states will still engage in abductions; and
- (iii) Ensuring that national courts translate uniformly the principles of international law and human rights protection into their judgements.

These findings lend themselves to the following conclusions:

- (i) To achieve the first goal defined as possibly eliminating, or considerably reducing state-sponsored abductions on a foreign territory, it is necessary to maximise the certainty of lawfully bringing the alleged offender to justice. This calls for a substantial strengthening of the provisions of current extradition treaties or the formulation of a specific obligation in multilateral treaties in order to force the rendition of a person guilty of an international crime or of a terrorist act. In general, the more stringent the obligation to surrender the offender, the more predictable the expected behaviour of the state of refuge. The more precise and clear the provisions of extradition treaties and similarly binding obligations for surrendering the alleged criminal, the less discretionary power is left to interpretation by the state of refuge and the more certain the outcome. Even under Realist logic, the state will be tempted to abide by the lawful extradition channels if extradition arrangements are streamlined so as not set aside the political offence exception. The wide participation of states to extradition arrangements is also important.
- (ii) Unfortunately, no legal instrument could ever completely eliminate all elements of uncertainty. It is therefore also necessary to reinforce the principles of individual protection and international human rights standards against state abuse. If extradition obligations are strengthened and their efficient application is improved, there will be no real motive for not protecting the human rights of the alleged offender and for not applying a broader definition of due process. The underlying moral argument here is that all individuals, including alleged criminals, should be guaranteed the same fundamental individual rights and protection. Together, improved surrender obligations and improved human rights protection will ensure that the interests of all parties concerned are equitably preserved.
- (iii) The alleged offender will not be afforded the same level of protection across the globe if national courts do not interpret the applicable norms in a homogeneous and consistent manner. The evolution of the concept of human rights and the recognition that a protection against irregular methods of rendition is contained in many human rights instruments make it even more difficult today for a judge to refuse to look into apparent irregularities surrounding the arrest of the fugitive. The political underpinnings of the decision to abduct an individual should not render such conduct immune from the legal scrutiny of the courts. While the judges must not enter the political arena, they should not abdicate their functions to the detriment of the individual's fundamental rights and to the obvious benefit of the government. The elaboration of a convention on the subject of extraterritorial abductions would certainly clarify the situation and would resolve most of the difficulties engendered by the other solutions. In the absence of a unanimous will on the part of the executive authorities of all states to act solely according to legal methods of surrender, it is for the courts to assume a uniform interpretation of the law. Otherwise, the only relief is for the abducted criminal, once convicted, to challenge the conduct of the state and its organs before the international human rights bodies, a meagre consolation!

Multilateral Oceans Governance and the International Seabed Authority

Satya N. Nandan*

An important part of international governance relates to the oceans. The norms governing the oceans are a substantial part of international law. The basis for the current international law of the sea is the 1982 United Nations Convention on the Law of the Sea, which provides the legal framework for ocean governance. This Convention has made an important contribution to the development of international law. It sets out principles and norms for the conduct of relations among states on maritime issues. As such it has made an enormous contribution to the maintenance of global peace and security.

It has been described as a Constitution for the oceans and is widely considered to be the most significant achievement of the international community, ranked together with the Charter of the United Nations. The Convention establishes a balance between the rights and duties of states on one hand and the need to ensure sustainable use of the resources of the oceans and to protect and preserve the marine environment on the other hand.

The achievements of the 1982 Convention are many. It resolves a number of critical issues, some of which had eluded agreement for centuries. It reflects a delicate balance between competing interests in the use of the ocean and its resources by taking a functional approach in establishing the various maritime zones and the rights and duties of states in those zones – this includes areas beyond national jurisdiction. It finally settles the breadth of the territorial sea at 12 nautical miles, with a guaranteed right of passage for international navigation in those waters; it ensures unhampered passage of vessels and aircraft through and over archipelagic waters and vital straits used for international navigation; it secures for coastal states resource jurisdiction in a 200 nautical mile exclusive economic zone without limiting other legitimate uses of that zone by the international community; it imposes a duty on all states to ensure, through proper conservation and management measures, the long-term sustainability of fish and other marine living resources.

In addition, it provides for an extended continental shelf jurisdiction, combining scientific and geological criteria with distance criteria for determining precisely its outer limit and makes provision for the sharing of revenues from the resources of the shelf outside the 200 nautical mile exclusive economic zone; it guarantees access to and from the sea for land-locked states; it provides for a regime for archipelagic states; it establishes an innovative regime for the development of the mineral resources of the deep seabed which is the common heritage of mankind, and from which eventually mankind as a whole is to benefit; it sets out rules for the conduct of marine scientific research; it contains the most comprehensive rules for the protection and preservation of the marine environment and imposes a duty on states to protect the oceans from all sources of pollution; and it promotes peaceful settlement of disputes by establishing mechanisms and procedures for compulsory settlement of disputes arising from the interpretation and application of the provisions of the Convention.

The 1982 Convention is not a static instrument. On many issues, it establishes principles which lend themselves to further development of the law of the sea in response to evolving circumstances. We have already seen this happen in two implementing agreements: the Agreement relating to the implementation of Part XI and the Agreement relating to the implementation of the provisions of the Convention relating to straddling fish stocks and highly migratory fish stocks (the UN Fish Stocks Agreement).

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While the Convention provides the basic framework, the norms for ocean governance go beyond the Convention and are contained in many instruments, declarations and decisions relating to the uses of the oceans and the development of their resources. These cover subjects as diverse as navigation and overflight, fisheries, scientific research and the ocean environment in general.

Such instruments may be categorised as those which pre-existed the entry into force of the 1982 Convention and those that have been adopted since in multilateral and regional or subregional arrangements. Among these must also be counted a growing body of soft law instruments that have been adopted.

There are also a large number of technical regulatory measures that have been established through global and regional organisations. Among these must be included the rules and guidelines adopted by the International Maritime Organisation in relation to maritime safety and prevention of pollution from ships, the rules, codes and conventions adopted by the UN Food and Agriculture Organisation in relation to responsible fishing practices, and the regional seas conventions adopted under the auspices of the United Nations Environment Programme. Other important instruments, such as the London Dumping Convention, those in the Antarctic Treaty System, the Convention on Biological Diversity, the Framework Convention on Climate Change and related protocols also impact upon the system of ocean governance.

To these must be added the influence of declarations such as the Stockholm Declaration on the Human Environment, from which the basic principles for protection and preservation of the marine environment were developed for inclusion in Part XII of the 1982 Convention, and the Rio Conference on Environment and Development, which produced Agenda 21, in particular Chapter 17 on the seas and oceans, as well as the Global Programme of Action on the Protection of the Marine Environment from Land-Based Activities and the outcomes of the World Summit on Sustainable Development recently held in Johannesburg. While not having the status of treaty law, these instruments contain important principles which apply to the oceans and make an important contribution to the overall system of ocean governance.

Some of the most discussed areas in ocean governance relate to fisheries, deep seabed mining and the delineation of the outer limits of the continental shelf.

Fisheries

In the area of fisheries, by the early 1990s it was widely recognised that the legal regime for the high seas set out in the Geneva Conventions of 1958, and largely incorporated in the 1982 Convention, was inadequate to safeguard the fisheries resources of the high seas, particularly those classed as straddling fish stocks and highly migratory fish stocks. It was therefore not surprising that the Rio Conference called for a conference to address the problems of high seas fisheries. Such a conference was convened by the United Nations in 1993 and completed its work in 1995 with the adoption of the UN Fish Stocks Agreement.

The Agreement recognises the importance of a cooperative approach to fisheries management and calls for compatible conservation and management measures. While the Agreement does not in any way affect the concept of sovereign rights of states as found in the Convention it nevertheless emphasises the interdependency of stocks and recognises that, in the final analysis, neither the coastal state nor the distant water fishing state, can manage the stocks in isolation. While addressing the problems of straddling fish stocks and highly migratory fish stocks, the Agreement establishes broad principles for management which are of general application. In this respect, the Agreement is a blueprint for fisheries conservation and management in general and the future of fisheries depends on how this very important Agreement will be applied and implemented by states.

The holistic approach to management cannot be left to coastal states or fishing states alone. There must be a

framework through which they can cooperate to establish management regimes and agree on problems of allocation and effort limitation. In this regard the provisions of the Convention have been elaborated upon. The roles and responsibilities of regional fisheries management organisations have been clarified and made more meaningful as a forum for management of shared resources. In particular, the requirements for flag state responsibility have been further developed and enumerated. They have also been supplemented by the measures that can be taken by members of regional organisations in cases where the flag state is unable or unwilling to take effective action itself.

Thus, through a combination of the mechanisms provided in the Agreement and the measures to be adopted through regional organisations, an important gap in the effective application of conservation and management measures has been filled. This is an important innovation and a major development in international law.

There remains, however, an urgent problem with respect to the management of high seas fisheries. The problem is that, despite the advances made by the Agreement and the various measures adopted through the FAO, not all flag states are able or willing to exercise effectively their responsibilities for fishing vessels flying their flags on the high seas. Urgent action is needed to address this problem. It is a matter of great concern that seven out of the 11 cases before the Tribunal related to the activities of fishing vessels flying flags of convenience. In this regard, attempts to redefine the genuine link will not be the most practical way of addressing fisheries problems.

A major part of the difficulty is that traditional notions of flag state responsibility do not work when applied in the fisheries context. Where illegal, unregulated or unreported fishing is concerned, it is usually the case that it is not the flag state that is in control of the operations of the vessel, but rather the state of nationality of the fishing master or owner of the vessel. These may have no connection at all with the flag state. It is imperative therefore that action is taken to ensure that states take full responsibility for the activities of their nationals, regardless of the flag of the fishing vessel concerned. Where states whose nationals fish in the region are members of the regional fisheries management organisation, the organisation should adopt measures to ensure that such states do not permit their nationals to undermine the conservation and management measures adopted by the organisation.

Already, the Fish Stocks Agreement has had a profound effect. It has become the reference point for the review of fisheries management organisations worldwide. It has been used as the basis for the establishment of at least two important regional fisheries management organisations; in the Western and Central Pacific Ocean and in the South-East Atlantic Ocean. The new organisation for the Western and Central Pacific, established by a Convention adopted in Honolulu in September 2000, is of particular importance to Australia and New Zealand, as well as for the Pacific Island countries. It covers a very wide area of the Pacific Ocean starting from the northern boundary of CCAMLR area and extends all the way to the north of Japan and extends from Indonesia in the West to Pitcairn in the east.

The tuna fishery in the Western Central Pacific is one of the last major unregulated fisheries in the world, producing about one-third of the world's tuna. The adoption of the Western and Central Pacific Convention represented a milestone in relations between Pacific Island countries and distant water fishing nations. It brought to an end more than 20 years of tension over the principles for shared management of highly migratory tuna stocks. The new Convention aims to ensure the long-term conservation and sustainable use of this vast resource and is thus of vital importance to Pacific Island countries. I should mention that it is estimated that some \$2.5 million worth of fish is caught in the southwest Pacific region and less than 5% of the proceeds returns to the countries of the region. This is quite obviously, inequitable and can only be rectified if all the states in the region cooperate and act cohesively.

Simultaneously with the adoption of the Convention, a Preparatory Conference was launched, with the task of addressing necessary organisational issues prior to entry into force of the Convention and the subsequent

establishment of the Western and Central Pacific Fisheries Commission created by the Convention. It is apparent from the status of discussions in the Preparatory Conference, for example on excess capacity and illegal, unregulated and unreported (IUU) fishing, that participants wish to move forward as early as possible to substantive discussion of interim conservation and management measures. It is equally clear from the scientific debate that the status of the fishery is such that discussion of substantive conservation measures ought not to be delayed. It is therefore very important that the Convention enters into force as soon as possible.

Deep Seabed Mining

The most controversial aspect of the 1982 Convention was the regime for deep seabed mining contained in Part XI and Annex III. It was the difficulties with some of the important details in the regime that led to the non-acceptance of the Convention as a whole by certain important industrialised states, including the United States of America, the United Kingdom and Germany. These problems, however, were eventually resolved in the consultations and negotiations that took place between 1990 and 1994, resulting in the adoption, by consensus, of an implementing Agreement relating to Part XI. This opened the door to universal participation in the Convention.

Upon entry into force of the Convention in 1994, the International Seabed Authority was established. All states parties to the Convention are members of the Authority, which also has a 36-member Executive Council, a Legal and Technical Commission and a Finance Committee. The present membership of the Authority is 142.

The Authority's mandate under the Convention is to administer the mineral resources of the deep seabed as well as to ensure effective protection of the marine environment from harmful effects which may arise both from exploration of the international area and, subsequently, from exploitation of the resources. In addition, the Authority has a general responsibility to promote and encourage the conduct of marine scientific research in the international area, and to coordinate and disseminate the results of such research and analysis.

With these parallel objectives in mind, the Authority has already developed regulations to govern prospecting and exploration for polymetallic nodules and is in the process of developing a regulatory regime for exploration for new types of resources, including polymetallic sulphides and cobalt-rich crusts. It has so far issued seven licences for exploration for polymetallic nodules, in the northeastern Pacific and in the Indian Ocean.

The Authority has also begun to implement its responsibilities under the Convention with respect to marine scientific research under Article 143. Under Article 256, all states and competent international organisations have the right to conduct marine scientific research in the Area. However, unlike the situation in other jurisdictional zones (including the high seas), marine scientific research in the Area is to be carried out "for the benefit of mankind as a whole." In pursuance of this objective, the Authority has, since 1998, established a pattern of workshops and seminars on specific issues related to deep seabed mining, with participation by internationally-recognised scientists, experts, researchers and members of the Legal and Technical Commission as well as representatives of contractors, the offshore mining industry and member states. The proceedings of these workshops are published and disseminated widely. The Authority has also established a database on current marine scientific research which is accessible through its website. In addition, the Authority has sponsored and assists in the coordination of two scientific projects. The first is to study the gene flow of some of the organisms found in the Clipperton Clarion Fracture Zone, an area where the Authority has issued six exploration licenses for polymetallic nodules. The purpose of this study is to observe how widely the various species of organisms are distributed and to ascertain that the impact of mining in one area would not threaten the entire species. The second study deals with the development of a geologic model of the Clipperton Clarion Fracture Zone based on the available data in order to gain a

better knowledge and understanding of the geophysical conditions and the distribution of nodule resources in the area. Both these projects will provide better knowledge of the marine environment which the Authority is charged to administer.

Continental shelf

One of the most important developments in the Convention is the establishment of the precise limits of the continental shelf. The definition of Continental Shelf in the 1958 Convention on Continental Shelf, which is based on the exploitability criteria, was imprecise and gave rise to controversy as to the limits of national jurisdiction. States are required to submit information on the limits of the continental shelf beyond 200 nautical miles to the Commission for the Limits of the Continental Shelf established under Article 76 and Annex II of the Convention. The limits of the continental shelf established by the coastal state on the basis of the recommendations of the Commission shall be final and binding. Under Article 4 of Annex II to the Convention, a coastal state intending to establish the outer limits to its continental shelf beyond 200 nautical miles is obliged to submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of the Convention for that state. However, the Meeting of States Parties, concerned at the delay in the establishment of the Commission and its guidelines for the submission of claims decided that, for all those states who were already parties to the Convention as at the date of adoption of the guidelines in May 1999, the ten-year time period shall be taken to have commenced on 13 May 1999. This was necessary because most states have not undertaken the necessary surveys of the shelves in order to make their submission to the Commission.

The Russian Federation was the first state to submit the necessary data and information for the consideration of the Commission. All other states parties have been urged to take the necessary measures and to make their submissions to the Commission by the due date. In this regard, I am pleased to note that both Australia and New Zealand, who are among the states having the most extensive continental shelf jurisdictions, have already begun their preparatory work concerning the outer limits of their continental shelf as required by the Convention. Other states in the Pacific whose continental shelves extend beyond 200 nautical miles have yet to undertake such work. This would be a formidable task for them since their capacity to meet the requirements of the Convention is limited and they will most certainly need help from more developed states.

Peaceful settlement of disputes

No system of law would be complete without a mechanism for settling disputes. In most international treaties, it is difficult to get states to agree to such a system. Even in the case of the Charter of the United Nations, which establishes the Statute of the International Court of Justice, there is no compulsory and binding dispute settlement mechanism. One of the most important contributions of the 1982 Convention, therefore, is the establishment of mechanisms and procedures for compulsory settlement of disputes arising from the interpretation and application of the provisions of the Convention.

This ensures that the rights and duties of states are implemented in the true spirit of the Convention provisions and conflicts arising from the interpretation and application of the Convention are resolved peacefully. It is therefore important that any further instruments relating to developments in the law of the sea should incorporate, as a minimum, the compulsory dispute settlement mechanisms of the Convention. The importance of this was underlined in the recent dispute relating to Southern Bluefin Tuna.

For this purpose, the Convention established a new international institution, the International Tribunal for the Law of the Sea. This is in addition to existing mechanisms for settlement of disputes, such as arbitration, conciliation and the International Court of Justice itself. The Tribunal is a new institution which

is still in the process establishing itself. However, one has to note that in its short life it has already had 11 cases, most of which dealt with the prompt release of fishing vessels for violating fisheries regulations. Australia and New Zealand have been parties to at least three of these cases. There is an important innovation in regard to the Tribunal in that it is not only accessible to states, but also the contractors, whether corporation or consortia, have direct access to the Tribunal with respect to disputes relating to seabed mining contracts.

Implementation of the Convention by states

As a matter of general observation it would be fair to say that the major problem today is not so much with respect to the legal framework at the international level but effective discharge of duties or responsibilities for ocean governance in areas under national jurisdiction for which international law has provided states with extensive competence. The extent of maritime jurisdiction over the territorial sea, the exclusive economic zone and the continental shelf claimed by states is relatively uniform in state practice and consistent with the Convention. However, the exercise of the responsibilities imposed by the Convention in these zones is sorely lacking.

There are many provisions in the Convention which require states to take certain positive management actions in the zones claimed. Examples of these are to be found in the provisions on marine pollution which require states to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, seabed activities, dumping at sea, vessels and the atmosphere (Articles 207 to 222). Similarly, the sovereign rights over the resources in the 200 nautical mile exclusive economic zone is conditioned by responsibilities for proper management of that zone.

The Convention requires certain action by the coastal states. For example, coastal states must determine the total allowable catch in the zone and taking into account the best scientific evidence available to it, ensure through proper conservation and management measures that the maintenance of the living resources in the zones is not endangered by over exploitation. It is also required to determine its own catch capacity and to give access to others to the surplus.

Clearly these and other provisions of the Convention require active management of the zones and the development of national marine policies in order to discharge the responsibilities of the coastal states. A review of the activities of states will reveal that a majority of them have assumed jurisdiction over maritime zones but have not developed national policies to administer these zones in a manner consistent with the sustainable use of the oceans and their resources as envisaged by the Convention. The problem with ocean governance today is not in the inadequacy of international law governing the oceans but in the lack of laws and policies at national levels. Where such laws and policies exist more often than not, they are either inadequate or the states lack the capacity or the political will to enforce them.

Conclusion

To conclude, as far as the legal framework is concerned, the 1982 Convention on the Law of the Sea is clearly recognised as the pre-eminent source of the current international law of the sea. The Convention establishes a basis for equity and responsibility in the use of the oceans and their resources. Together with related instruments it provides the framework for ocean governance.

International Fisheries Commissions - Taiwan Comes in from the Cold

Andrew Serdy*

Those of you who know me only from ANZSIL meetings must think I have a permanent yet ever-changing identity crisis – two years ago I was from both Australia and New Zealand; now, it being a Saturday which is not covered in Stuart’s neat time-sharing scheme, I am unsure whether I speak in my official or student capacity and need to make the standard disclaimer. As an each-way bet let me make a claimer: what I am about to say is not necessarily *not* the view of the Australian government.

Taiwan has one of the world’s largest distant water fishing fleets – around 600 longliners.¹ Given the increasing fishing pressure on the world’s high seas stocks, it is in the interests of all states that exploit them to ensure that Taiwan’s fleet is subject to the same international catch limiting mechanisms as their own. Until recently, though, Taiwan’s unique international status has been an obstacle to this. Since 1971 it has been the People’s Republic of China (PRC) that occupies the Chinese seat in the United Nations and maintains diplomatic relations with most other states. Reluctance to offend the PRC, whose claim to sovereignty over the island of Taiwan most states recognise, has made states slow to seek ways of bringing Taiwan into the international fisheries management system.

The adoption in 1995 of the UN Fish Stocks Agreement² was an important first step towards bringing Taiwan into the international fisheries fold. Article 1(2)(b) lists, by cross-reference to Article 305 and Annex IX of the United Nations Convention on the Law of the Sea³ (UNCLOS), a number of entities that are eligible, in addition to all states under Articles 37-39, to become party to that Agreement, and then defines “States Parties” to include all such entities that do become party. Paragraph 3 of the same Article then goes on to say that: “This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.”

Articles 8 to 13 put regional fisheries commissions firmly at the core of management of straddling and highly migratory stocks; states with a real interest in a fishery must join or cooperate with the relevant organisation’s management measures, and the organisation must be open to their participation.⁴ By

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¹ In “Annual Review of Taiwan SBT Fisheries, 1998” (Attachment 17 to Report of the Fifth Annual Meeting, First Part, 22-26 February 1999, Tokyo, Japan) in: Commission for the Conservation of Southern Bluefin Tuna, *Reports of the Meetings for the Fifth Year of the Commission (including Financial Statements)* 43, the Taiwanese delegation reported that there were around 600 Taiwanese longliners in all the world’s oceans in 1994-97. Not long afterwards, Haward and Bergin wrote that Taiwan had 1579 distant water fishing vessels operating worldwide (trawlers, tuna longliners, purse-seiners, and squid jiggers), a decline of 104 vessels since 1991, reflecting the loss of the squid driftnet vessels following the closure of that fishery; of these 334 were longliners using ultra-low temperature freezers for the sashimi market: M. Haward and A. Bergin, “Taiwan’s distant water tuna fisheries” (2000) 24 *Marine Policy* 33 at 34-36.

² Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, UN doc A/CONF.164/37 (8 September 1995). Text available at <www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm>.

³ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), 1833 United Nations Treaty Series (hereinafter UNTS) 3; (1982) 21 *International Legal Materials* (hereinafter ILM) 1261.

⁴ Notably Article 8(3) provides that “Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures

Article 17(3), its members must seek the cooperation of Article 1(3) “fishing entities...which have...vessels in the relevant area...with a view to having such measures applied *de facto* as extensively as possible...Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.” So how do the various Commissions perform against this test?

What I plan to do is survey a number of international fisheries treaties to show how these have built, to varying degrees, on the possibilities opened by Article 1 for including Taiwan in the regulation of the stocks concerned, culminating in the adoption in 2001 by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) of the most innovative device yet: the creation of an “Extended Commission” in which Taiwan has a truly equal voice.⁵ At the end I will also show how Taiwan’s recent joining of the World Trade Organisation (WTO) potentially solves this problem – and possibly some wider ones too – for good.

The Indian Ocean Tuna Commission (IOTC)

This Commission provides the most striking example of how Taiwan’s absence can affect the work of a fishery commission, with albacore in the Indian Ocean targeted almost exclusively by Taiwanese vessels⁶ and numerous laments by the Scientific Committee on scientists’ inability to come to grips with the status of stocks for lack of data from Taiwan.⁷

By Article IV(1), the IOTC Agreement⁸ is open for acceptance by members and associate members of FAO that are (i) coastal states situated wholly or partly within the area covered by the Agreement; (ii) states responsible for the international relations of territories so situated; (iii) states whose vessels fish in the area for stocks covered by the Agreement; and (iv) regional economic integration organisations to which any state has transferred competence over matters covered by the Agreement. By paragraph 2 of the same Article, the Commission may, by two-thirds majority, admit other states which are members of the United Nations or of any of its Specialised Agencies that are coastal states within the area or states whose vessels fish in the area for the relevant stocks. This leaves no avenue for Taiwan’s participation. But the PRC has accepted the Agreement and by process of elimination must have done so in category (iii), presumably on the basis that by Chinese law all vessels flying a Taiwanese flag have Chinese nationality.⁹

established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.”

⁵ Resolution to Establish an Extended Commission and an Extended Scientific Committee (Attachment I to Report of the Seventh Meeting of the Commission for the Conservation of Southern Bluefin Tuna) in: CCSBT, *Reports of the Meetings for the Seventh and Eighth Year of the Commission (including Financial Statements)* 54. The text is reproduced in full in the Annex to this paper. Also available at www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_7/report_of_ccsbt7.pdf.

⁶ IOTC doc IOTC/99/04, *Report of the Second Session of the Scientific Committee*, paragraph 70 (reproduced as Appendix VII to IOTC doc IOTC/S/04/99/R[E], *Report of the Fourth Session of the Indian Ocean Tuna Commission, Kyoto, Japan, 13-16 December 1999* (Victoria: IOTC, 2000; hereinafter IOTC4 Report)), 22 at 29.

⁷ IOTC doc IOTC-01-04, *Report of the Fourth Session of the Scientific Committee* (reproduced as Appendix XI to IOTC doc IOTC-S-06-01-R[E], *Report of the Sixth Session of the Indian Ocean Tuna Commission, Victoria, Seychelles, 10-14 December 2001* (Victoria: IOTC, 2002; hereinafter IOTC6 Report)), 55 at 57 (tunas), 60 (billfish).

⁸ Agreement for the Establishment of the Indian Ocean Tuna Commission, adopted by the Council of the FAO at its Hundred and Fifth Session in Rome on 25 November 1993; available online (though without Annexes) at www.iotc.org/English/info/basictext.php. The full text including Annexes is available in the Australian Treaty Series (hereinafter ATS) 1996 No 20 or online at: www.austlii.edu.au/au/other/dfat/treaties/1996/20.html.

⁹ By UNCLOS Article 91(1), “Every State shall fix the conditions for the grant of its nationality to ships, for

While at the IOTC's Fourth Session China accepted that a private body representing Taiwan's fishing interests could be invited to participate in meetings,¹⁰ by the Fifth Session there had been "no significant progress" on this.¹¹ Although the matter is not mentioned at all in the Report of the Sixth and Seventh Sessions, all but one of the representatives of the Organisation for the Promotion of Responsible Tuna Fisheries at both sessions were from the Taiwan Deep Sea Tuna Boatowners and Exporters Association.¹²

The International Commission for the Conservation of Atlantic Tunas (ICCAT)

ICCAT, under its 1966 Convention,¹³ has competence over tuna and tuna-like fishes in the Atlantic Ocean and its adjacent seas. Although ICCAT is not usually thought of as being an FAO body,¹⁴ FAO played a significant role in the negotiation of the Convention and in the early administration of ICCAT, and continues to act as depositary.¹⁵ Thus, Article XIV(1) limits signature or later adherence to "any...Member of the United Nations or of any Specialized Agency of the United Nations", so Taiwan is unable to become party.¹⁶ For some years Taiwan attended ICCAT as an observer,¹⁷ although the

the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and its ship." It is submitted that, given the PRC's claim to sovereignty over the island of Taiwan and the recognition of that claim by a substantial majority of states, it is not possible to doubt the existence of a genuine link between the PRC and a fishing vessel based in and controlled from that island, hence the legitimacy of China's membership of the Commission is beyond question. If China were to assert against another state its flag state rights in respect of a Taiwanese vessel, however, that other state may be able to argue that the vessel's Chinese nationality is not opposable to it if China has not complied with paragraph 2 of the same article: "Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect."

¹⁰ IOTC doc IOTC/99/Inf.09, List of Participants (reproduced as Appendix I to IOTC4 Report, above n 6), paragraph 33.

¹¹ IOTC doc IOTC/S/05/00/R[E], *Report of the Fifth Session of the Indian Ocean Tuna Commission, Victoria, Seychelles, 11-15 December 2000* (Victoria: IOTC, 2001), paragraph 29.

¹² See Appendix I – List of Participants, IOTC6 Report, above n 7, 12 at 18; Appendix I (List of Participants) to IOTC doc IOTC-S-07-02R[E], *Report of the Seventh Session of the Indian Ocean Tuna Commission, Victoria, Seychelles, 2-6 December 2002* (Victoria: IOTC, 2003), 11 at 18.

¹³ International Convention on the Conservation of Atlantic Tunas (Rio de Janeiro, 14 May 1966); 673 UNTS 63. The full list of members comprises Algeria, Angola, Barbados, Brazil, Cape Verde, Canada, China, Côte d'Ivoire, Croatia, European Community, Equatorial Guinea, France (St. Pierre et Miquelon), Gabon, Ghana, Guinea-Conakry, Honduras, Japan, Korea (Republic of), Libya, Mexico, Morocco, Namibia, Panama, Russia, São Tomé and Príncipe, South Africa, Trinidad & Tobago, Tunisia, United Kingdom (Anguilla, Bermuda, St. Helena, Turks and Caicos), United States, Uruguay, Venezuela. Other members of the Commission in the past have been Senegal (1971 to 1988), Cuba (1975 to 1991) and Benin (1978 to 1994). In addition, France, Spain, Portugal, the United Kingdom and Italy withdrew from the Commission following the accession of the European Community in 1997, though France and the United Kingdom shortly afterwards rejoined it on behalf of their overseas territories not covered by the Treaty of Rome, listed above: see <www.iccat.es/About.html> (visited on 20 June 2003).

¹⁴ It was not formed under either Article VI(1) or Article XIV of the FAO Constitution, the usual ways in which FAO creates regional fisheries bodies. The practical difference between these is that Article XIV contemplates a treaty to which interested states must become party in order to become members of the body, whereas Article VI(1) bodies have an FAO Council resolution as their constitutive instrument with no treaty action required. See also W.M. Chapman, "The Theory and Practice of International Fishery Development-Management" (1970) 7 *San Diego Law Review* 408 at 432-433.

¹⁵ Articles XII-XVI. See, also, Article XI(1), which envisages an "agreement pursuant to Article XIII of the Organization's Constitution...for the Director-General of the Food and Agriculture Organization of the United Nations to appoint a Representative who would participate in all meetings of the Commission and its subsidiary bodies, but without the right to vote." The Convention was negotiated at two sessions of the FAO Working Party for Rational Utilization of Tuna Resources in the Atlantic Ocean in 1963 and 1965 on the basis of a draft presented to the first session by the United States. See J.E. Carroz and A.G. Roche, "The Proposed International Commission for the Conservation of Atlantic Tunas" (1967) 61 *American Journal of International Law* 673.

¹⁶ But the Republic of China, while it held the Chinese seat at the United Nations, could have become party. Had it done so, displacement by the PRC of the Republic of China from membership of ICCAT might have followed as an automatic consequence when the former took over the Chinese seat.

Rules of Procedure have never permitted this.¹⁸ Then in 1996 China joined and immediately challenged Taiwan's presence, leading to a tense exchange with Taiwan which is recorded at length in the meeting report.¹⁹

After several other parties had spoken,²⁰

[t]he Chairman explained that the Commission had felt the need to cooperate with Taiwan, as it has existed as a "fishing reality" for many years. It was agreed that the delegates...would take note of [China's] objections...and that the issue would be addressed at the next meeting...

How it was addressed may be gleaned from the report of the next meeting, where "Chinese Taipei" is listed as an observer,²¹ and a resolution was passed in the following terms:²²

RECOGNIZING the continuing need to encourage all non-contracting parties, entities or fishing entities with vessels fishing for ICCAT species to implement ICCAT conservation measures, the COMMISSION RESOLVES THAT:

1. Each year, the Executive Secretary shall contact all non-contracting parties, entities or fishing entities known to be fishing in the Convention area for species under ICCAT competence to urge them to become a Contracting Party...or attain status as a Cooperating Party, Entity or Fishing Entity....
2. Any non-contracting party, entity or fishing entity which seeks to be accorded Cooperating Party, Entity or Fishing Entity status shall apply to the Executive Secretary. At the time such a request is made (and annually thereafter), the applicant shall inform ICCAT of its firm commitment to respect the Commission's conservation and management measures. The applicant shall commit itself to transmit all the data to ICCAT that the Contracting Parties have to submit to ICCAT based on the recommendations adopted by the Commission. Requests must be received by the ICCAT Secretariat no later than ninety (90) days in advance of an ICCAT annual meeting, to be considered at that meeting.
3. The Commission's Permanent Working Group for the Improvement of ICCAT Statistical and Conservation Measures (PWG) shall be responsible for reviewing requests for Cooperating Party, Entity or Fishing Entity status and for recommending to the Commission whether or not an applicant should be considered a Cooperating Party, Entity or Fishing Entity. The PWG shall also be responsible for the annual evaluation of those applicants that receive Cooperating Party, Entity or Fishing Entity status with a view towards determining whether that status should be continued.

[paragraph 4 not reproduced]

Taiwan subsequently succeeded in gaining admission as a cooperating fishing entity and has maintained

¹⁷ For example four representatives of Taiwan (and two of the PRC) are listed under Observers in "List of Commission Participants", Annex 2 to Proceedings of the Ninth Special Meeting of the Commission, Madrid, November 28 – December 2, 1994 (hereinafter ICCATSM9 Report), in ICCAT, *Report for Biennial period 1994-95 Part I (1994)* - Vol.1, 31 at 69; three representatives grouped under Taiwan – but none from the PRC – are listed under "Observers" in the Report of the Meeting of the Standing Committee on Research and Statistics: "List of SCRS Participants" (Appendix 2 to Annex 25 to ICCATSM9 Report), *ibid* (Vol. 2) at 244.

¹⁸ Rule 5 permits only member states of the UN or its Specialised Agencies and international organisations to be observers: <www.iccat.es/Documents/BasicTexts.pdf> (visited on 26 June 2003).

¹⁹ "Statement by the People's Republic of China" (Annex 6-3 to Report of Tenth Special Meeting of the Commission, San Sebastian, November 2-29, 1996) (hereinafter ICCATSM10 Report), in ICCAT, *Report for Biennial period 1996-97 Part I (1996)* - Vol.1, at 101; "Statement by the Observer from Taiwan" (Annex 6-4 to ICCATSM10 Report), *ibid* 102.

²⁰ *Ibid* 42-43; see, also, at 52 a further testy exchange between China and the Chairman.

²¹ Report of the Fifteenth Regular Meeting of the Commission, Madrid, Spain - November 14 to 21, 1997 (hereinafter ICCAT15 Report), in ICCAT, *Report for Biennial period 1996-97 Part II (1997)* - Vol.1, at 29 and Annex 2.

²² Annex 5-17 to ICCAT15 Report, *ibid* 79.

that status to the present day.²³

This resolution is also notable for its illusory distinction between entities and fishing entities that offends against both logic and a proper reading of Article 1 of the Fish Stocks Agreement. Both “fishing entities” and (if they exist) “non-fishing entities” are simply subsets of “entities”. It is true that the *raison d’être* of Article 1(3) is Taiwan,²⁴ but the word “other” before “fishing entities” negatives any supposed intention of the drafters to create a *sui generis* concept of “fishing entity”. Paragraph 3 simply applies to “other” entities not among those in paragraph 2, which are just as much “fishing” entities as Taiwan, being of interest to states fishing for straddling and highly migratory stocks only because, and to the extent that, their vessels also engage in such fishing.

The Western and Central Pacific Fisheries Commission

This Commission will be created once its constitutive Convention²⁵ enters into force. At its adoption in September 2000, it was a new benchmark for Taiwan’s participation, if not as a complete equal then very nearly so.

By Article 9(2), “A fishing entity referred to in [the Fish Stocks Agreement], which has agreed to be bound by the regime established by this Convention in accordance with the provisions of Annex I, may participate in the work, including decision-making, of the Commission in accordance with the provisions of this Article and Annex I”.

Annex I provides in paragraph 1 that “After the [Convention’s] entry into force..., any fishing entity whose vessels fish for highly migratory...stocks in the Convention Area, may, by a written instrument delivered to the depositary, agree to be bound by the regime established by this Convention...” Paragraph 2 states that “[s]uch fishing entity shall participate in the work of the Commission, including decision-making, and shall comply with the obligations under this Convention. References thereto by the Commission or members of the Commission include, for the purposes of this Convention, such fishing entity as well as Contracting Parties”.²⁶ Paragraph 3 provides for submission of disputes concerning the Convention involving a fishing entity to binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration.²⁷ By way of reassurance to the PRC that the Resolution is not intended to have precedential value, paragraph 4 provides that “[t]he provisions of this Annex relating to participation by fishing entities are solely for the purposes of this Convention”.²⁸

The result is far-reaching: Taiwan cannot formally become party, nor count towards entry into force requirements, but that it has at least a scintilla of international legal personality is recognised by use of “bound”, and thereafter it is treated as though it were a party, including having its vote counted in decision-making and its presence count towards a quorum.

²³ See <www.iccat.es/About.html> (visited on 11 July 2003).

²⁴ T. Treves, “The Settlement of Disputes According to the Straddling Stocks Agreement of 1995” in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, Oxford and New York, 1999), 253 at 261; L. Juda, “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique” (1997) 28 *Ocean Development and International Law* 147 at 156.

²⁵ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Honolulu, 5 September 2000); text reproduced in (2001) 40 *ILM* 277 and available online at <www.austlii.edu.au/au/other/dfat/treaties/notinforce/2000/11.html>.

²⁶ It is difficult to make any sense of the second sentence unless “thereto by” is taken to mean “to”.

²⁷ Presumably these are the Optional Rules for Disputes relating to Natural Resources and/or the Environment <www.pca-cpa.org/PDF/ENRrules.pdf>, whose introduction states that they are suitable for use in disputes both under treaties and under instruments “between parties one or more of which is not a State.”

²⁸ Surely, however, one must regard with extreme scepticism the efficacy of any statement in a document to the effect that “this is not to be used a precedent”. Presumably whatever special circumstances led to the adoption of the provision in question in the first place would make the same solution equally acceptable to all concerned if they arose again.

The Inter-American Tropical Tuna Commission

This Commission has for some years been rewriting its constitutive agreement from top to bottom. In the text adopted at the Commission's 70th Meeting in Antigua, Guatemala on 27 June 2003²⁹ "Members of the Commission" is defined³⁰ to include "any fishing entity which has expressed in accordance with the provisions of Article XXVIII of this Convention its formal commitment to abide by the terms of this Convention and comply with any conservation and management measures adopted pursuant thereto". Article XXVIII prescribes in paragraph 1 for "[a]ny fishing entity whose vessels have fished for fish stocks covered by this Convention at any time during the four years preceding [its] adoption" a means of expressing that commitment: while the Convention is open for signature, by "(a) signing...an instrument ...to this effect in accordance with a resolution to be adopted by the Commission under the 1949 Convention; and/or (b) during or after the above-mentioned period, providing a written communication to the depositary in accordance with a resolution to be adopted by the Commission under the 1949 Convention", of which the Depositary is then obliged to provide a copy to all signatories and parties. What the Antigua Convention denies Taiwan by comparison with the Western and Central Pacific Fisheries Convention, through not following the latter's use of "bound", it more than compensates for by this elaboration of a quasi-ratification procedure over and above signature, supplemented moreover by a parallel procedure in paragraph 3 for updating the "commitment" to embrace any subsequent amendment to the Convention, which may be proposed by any member of the Commission.³¹ Also worthy of note is that the articles headed "Implementation, Compliance and Enforcement by Parties" and "Duties of Flag States"³² are both followed immediately by two-line articles³³ applying them *mutatis mutandis* to "fishing entities that are members of the Commission".

The South-East Atlantic Fisheries Commission

The Commission came into being in April 2003 with Namibia, Norway and the EC as members.³⁴ Perhaps because the FAO Director-General is depositary,³⁵ the Convention takes a conservative, even timid approach to Taiwan, simply repeating³⁶ the relevant words of UN Fish Stocks Agreement Article 17(3).³⁷ Having taken such an unforthcoming attitude to Taiwan, despite the contemporary precedents on which they could have drawn, the parties should not be surprised if this Commission strikes more difficulty than its tuna cousins in securing Taiwan's cooperation.

The Commission for the Conservation of Southern Bluefin Tuna (CCSBT)

The SBT Convention³⁸ entered into force in 1994 with Australia, Japan and New Zealand as parties. It

²⁹ Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, text at: <www.iattc.org/PDFFiles2/Antigua%20Convention%20ENG%20SPN%20FRA%20adopted%20text%2023%20JUL%202003.pdf>.

³⁰ In Article I(7).

³¹ Article XXXIV(1). By the combined effect of Articles XXXIV(2) and (3) and IX(2), however, only "Parties" participate in the decision to adopt an amendment and count towards its entry into force.

³² Articles XVIII and XX respectively.

³³ Articles XIX and XXI respectively.

³⁴ Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (Windhoek, 20 April 2001); text reproduced in (2002) 41 *ILM* 257 and available online at <www.fao.org/Legal/treaties/032s-e.htm> (visited on 24 June 2003), where the other signatories listed are Angola, Iceland, South Korea, South Africa, the United Kingdom (on behalf of its South Atlantic dependencies) and the United States.

³⁵ Article 25(2).

³⁶ In Article 23(4).

³⁷ See text following n 4 above.

³⁸ Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993), 1819 UNTS 360; ATS 1994 No 16. Text at: <www.austlii.edu.au/au/other/dfat/treaties/1994/16.html>.

establishes a Commission³⁹ but, oddly, does not provide for the parties to be members. This is left to the Rules of Procedure.⁴⁰

Anticipating Article 8(3) of the Fish Stocks Agreement,⁴¹ the Commission is not a closed shop. New parties may accede to the Convention, as South Korea did in 2001,⁴² under Article 18:

18. After the entry into force of this Convention, any other State, whose vessels engage in fishing for southern bluefin tuna, or any other coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, may accede to it.

That only states can accede to the Convention need not in theory be an obstacle for Taiwan, though in practice it can hardly avoid being so. The Commission has international legal personality⁴³ and could itself in turn recognise Taiwan as a state if it wished. Yet in reality the Commission will not so wish as it has no will independent of its members – and all of them recognised the PRC and terminated their diplomatic relations with the Republic of China in the early 1970s, though they maintain economic and trade ties with Taiwan.

Given that the concept of member of the Commission is rooted not in the Convention itself but only in the Rules of Procedure, it might have been possible to amend the definition of “Member” in those Rules. Yet this would be only a partial solution at best, for the Rules must be subject to the Convention itself, and though Taiwan would be a member of the Commission, it would still not be party to the Convention. Hence any right or obligation the Convention assigns to a “Party” could not apply to Taiwan, even if the Rules of Procedure assign it to a “Member”. That is, Taiwan would not be on equal footing with the other members on at least three matters: voting, quorum and financial contribution.⁴⁴ This would leave Taiwan a second-class member, which would have been unacceptable to it.⁴⁵

³⁹ Article 6(1).

⁴⁰ Rule 1(1) provides in its first sentence that “Each Party to the [Convention] shall be a member (Member) of the [Commission] and shall be represented in the Commission by not more than three delegates who may be accompanied by experts and advisers.” The Rules of Procedure as since amended may be seen at www.ccsbt.org/docs/pdf/about_the_commission/rules_of_procedure_of_the_commission.pdf.

⁴¹ Above n 4.

⁴² See the status list maintained by Australia as depositary of the Convention at www.austlii.edu.au/au/other/dfat/treaty_list/depositary/sbtuna.html (visited on 11 July 2003).

⁴³ Article 6(9), first sentence: “The Commission shall have legal personality and shall enjoy in its relations with other international organisations and in the territories of the parties such legal capacity as may be necessary to perform its functions and achieve its ends.” The better view is that this relates to personality on the international rather than the domestic plane, since no purpose is served by the Commission having as many separate domestic law personalities as the Convention has parties; this is supported by the reference to relations with other international organisations, most of which are likely to be endowed with similar international legal personality.

⁴⁴ On voting, Rule 7 of the Rules of Procedure give each member one vote, but by Article 7 of the Convention only parties have the right to vote. By Article 6(7), two thirds of the parties constitute a quorum. The corresponding provision in the Rules of Procedure, Rule 2(4), substitutes “Members” for “Parties”. Thus on both points, the Rules are thus consistent with the Convention only if all members are also parties. As to financial contribution, by Article 11(2) of the Convention, 30% of the costs of the Commission is split equally among the parties and the remaining 70% is assessed in proportion to their catches of SBT. Were Taiwan to become a member without being party to the Convention, no annual contribution towards the Secretariat’s costs would be able to be assessed against it. Nor could Taiwan contribute in any other way, as there is no provision in Article 11 for the Commission to have any source of income other than the parties’ annual contributions. On a strict reading of the Convention there is a fourth such legal disability. Article 6(4) provides that the Chair and Vice-Chair of the Commission shall be from different parties, while Article 9(5) lays down the same rule for Chair and Vice-Chair of the Scientific Committee. Hence a non-party to the Convention cannot supply the holder of any of these four offices. Note that the position would be different if instead the rule were expressed as “[Chair and Vice-Chair] may not be from the same party”, which is how the parties have in practice chosen to interpret it with their appointment of a South African to chair the Scientific Committee.

⁴⁵ Report of the Special Meeting, 16-18 November 2000, Canberra, Australia in CCSBT, *Reports of the*

Let us now turn to a summary of the Resolution:

The preamble states that if the SBT stock is to be sustainably exploited then all those fishing it must cooperate through the Commission, then expresses the Commission's wish that all states that fish for SBT should accede to the Convention if eligible, while "entities or fishing entities with vessels fishing for SBT" are encouraged to implement the Commission's conservation and management measures.

One matter of regret is that in the Preamble, and again in some of the operative paragraphs, the Commission has followed the 1997 ICCAT resolution's distinction between "entities" and "fishing entities" and perpetuated the error into which ICCAT fell. Moreover, the SBT Convention itself refers to "entities" *simpliciter*.⁴⁶ So if I am wrong and "fishing entities" are indeed creatures distinct from "entities", then the Commission has exceeded its powers in so far as it purports to make provision for cooperation with the former.

Paragraph 1 establishes an Extended Commission for the Conservation of Southern Bluefin Tuna and an Extended Scientific Committee and provides that, as well as the Convention parties, the members of the Extended Commission include "any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years", once admitted by the Extended Commission under later paragraphs. Three years seems arbitrary but is more than enough to capture Taiwan.

Paragraph 2 directs the Extended Commission and Scientific Committee to perform the same tasks as their original counterparts, in particular deciding on total allowable catch and its allocation among the members, who, crucially for Taiwan, all have equal voting rights. All Convention provisions relating to the Commission and Scientific Committee proper⁴⁷ apply *mutatis mutandis* to their Extended versions, with two exceptions that do not affect the equality principle.⁴⁸ There is a non-binding mechanism for settling disputes concerning the interpretation or implementation of the Resolution or the Exchange of Letters which I will mention shortly.⁴⁹

In order to include Taiwan, paragraph 4 all but hives off to the Extended Commission the decision-making functions of the Commission. But since it would be contrary to Article 8(3) of the Convention for the Commission to abdicate completely its decision-making powers, it is necessary to preserve its controlling role, though in such a way as to give Taiwan comfort that Extended Commission decisions, by which it is bound under paragraph 6, will virtually automatically be confirmed by the Commission proper, so binding the Convention parties to the same decision. This is done by requiring the Extended Commission to report its decisions to the Commission. Once reported, those decisions are deemed adopted by the Commission proper unless overturned by it⁵⁰ by the end of the meeting session. Of course, it would be equally *ultra vires* for the Commission to put it out of its power to rescind the Resolution. So an additional sentence, in non-binding language, urges "prior due deliberation" by the Extended Commission of any Commission decision "that affects the operation of the Extended

Meetings for the Sixth Year of the Commission (including Financial Statements) (hereinafter CCSBT6 Reports) 107 at 109: Taiwan said it was "looking forward to working on an equal footing with the Members of the Commission."

⁴⁶ Article 14(1) allows the Commission to "invite any State or entity not party to this Convention, whose nationals, residents or fishing vessels harvest southern bluefin tuna... to send observers to meetings of the Commission" and its Scientific Committee, while by Article 15(1) "[t]he Parties agree to invite the attention of any State or entity not party to this Convention to any matter relating to the fishing activities of its nationals, residents or vessels which could affect the attainment of the objective of this Convention." Paragraph 4 of the same article provides for cooperation among the parties "to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of any State or entity not party to this Convention" where such activity could adversely affect the attainment of that objective.

⁴⁷ Articles 6 to 9.

⁴⁸ Article 6(9) and (10). These paragraphs respectively give the Commission's legal personality and privileges and immunities and allow it to choose its headquarters.

⁴⁹ Although this is not quite what the fourth sentence says, it does, with some sacrifice of clarity for brevity, appear to be its intent.

⁵⁰ It will be recalled that the Commission operates by consensus: Article 7 of the Convention.

Commission or the rights, obligations or status of any individual Member within [it]”.

By paragraph 6, “[a]ny entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, may express its willingness to the Executive Secretary of the Commission to become a member of the Extended Commission... In so doing, the applicant shall give...its firm commitment to respect the terms of the Convention and comply with such decisions of the Extended Commission as become decisions of the Commission [by] paragraph 4”. This last sentence ensures that the parties proper cannot use the Extended Commission to impose a binding decision on national catch limits on the other members and then sanctify by a Commission decision higher limits for themselves only; as an added safeguard paragraph 8 allows any member of the Extended Commission that is not a member of the Commission to be present and speak at meetings of the Commission and its subsidiary bodies.

Paragraph 7 states that if the Extended Commission decides to admit the applicant, it negotiates a catch level of SBT by the applicant pending the next decision of the Commission setting a total allowable catch and its allocation among the members. This is formalised in an exchange of letters with the Executive Secretary by which the applicant assumes the status of member of the Extended Commission.

By paragraph 9 the contributions to the Extended Commission’s annual budget of a member not party to the Convention are determined by application *mutatis mutandis* of Article 11 of the Convention.⁵¹ This is actually mathematically impossible except in one improbable circumstance, although there is no time to prove this today.⁵² In practice the contributions to the Commission proper of those members that are Convention parties are taken as satisfying at the same time their obligation in respect of the Extended Commission.

I am pleased to report that the “Fishing Entity of Taiwan” did apply successfully and, with a negotiated quota of 1140 tonnes, took its place within the Extended Commission in 2002. Readers of the report of the Commission proper’s meeting will find that it is very short, but with a very long attachment that is the report of the First Meeting of the Extended Commission.⁵³

⁵¹ Article 11(2) provides that:

2. The contributions to the annual budget from each Party shall be calculated on the following basis:

- (a) 30% of the budget shall be divided equally among all the Parties; and
- (b) 70% of the budget shall be divided in proportion to the nominal catches of southern bluefin tuna among all the Parties.

⁵² This arises from the division into the budget into 30% split equally among members and 70% according to catch, since there is a greater number of members in the Extended Commission than in the Commission proper. The exceptional circumstance is where the Extended Commission has n members and each member that is not party to the Convention has exactly one n th of members’ total catch. This is not likely to occur because under the current membership it would require Taiwan to take a fifth of the total catch of Extended Commission Members of around 14000 tonnes, i.e. 2800 tonnes, nearly two and a half times its current quota of 1140 tonnes.

⁵³ *Report of the Extended Commission of the Ninth Annual Meeting of the Commission, 15-18 October 2002, Canberra, Australia* (Appendix 3 to Report of the Ninth Annual Meeting of the Commission, 15-18 October 2002, Canberra, Australia, available on the Commission’s website at www.ccsbt.org/jp_docs/pdf/meeting_reports/ccsbt_9/report_of_ccsbt9.pdf).

Meeting of the parties to the Albatrosses and Petrels Agreement⁵⁴

The relevance of this treaty to tuna is that albatrosses and petrels, many species of which are endangered, are attracted by the baits and frequently caught and killed on longline hooks.⁵⁵

Article VIII(1) provides that “The Meeting of the Parties shall be the decision-making body of this Agreement”. Paragraph 15 of this Article reads:

The Meeting of the Parties may adopt by consensus provisions for the relationship to this Agreement by any member economy of the Asia Pacific Economic Co-operation forum whose vessels fish within the range of albatrosses and petrels. Those provisions, once adopted, shall enable the member economy to participate in the work of the Meeting of the Parties and its subsidiary bodies, including decision-making, and to comply with all obligations under this Agreement. For this purpose, references...to those participating in the Meeting of the Parties or its subsidiary bodies shall include such a member economy...

Thus, once the Agreement enters into force, perhaps later this year, the parties can decide to include within their number a “member economy” of APEC such that it takes on “obligations” under the Agreement with which it must comply. Having done so, that economy then has a veto along with each of the parties proper over matters needing consensus, such as the budget and scale of contributions. Despite the conceptual difficulty of vessels being flagged to an “economy”, perhaps it no longer matters – contrary to my reaction of consternation when I first saw the text – that this formulation undermines the deliberate choice of the term “economy” when APEC was set up to avoid any suggestion of recognition of Taiwan’s international legal personality.

Note that the Agreement provides for the Depositary to have its usual tasks,⁵⁶ but is silent on how an APEC member economy choosing to make use of Article VIII(15) can communicate its choice to the parties. The effect of this may be to make the Secretariat the default channel of communication, as in the SBT Extended Commission.

Taiwan’s WTO membership – a panacea?

Article XII(1) of the WTO Agreement⁵⁷ provides that:

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement...may accede...on terms to be agreed between it and the WTO.

After twelve years of negotiations, the terms of Taiwan’s accession to the Agreement as the Separate

⁵⁴ Agreement on the Conservation of Albatrosses and Petrels (Canberra, 19 June 2001), [2001] Australian Treaties Not Yet in Force 8; text available online at www.austlii.edu.au/au/other/dfat/treaties/notinforce/2001/8.html.

⁵⁵ The Preamble records that the sixth meeting of the Conference of Parties to the 1979 Convention on the Conservation of Migratory Species of Wild Animals, held in South Africa in November 1999, noted the threats posed by fisheries by-catch in general to a wide range of species, and in particular to albatrosses and petrels, and requested relevant parties to develop an Agreement, under the Convention, for the conservation of Southern Hemisphere albatrosses; Article I(5) confirms that this is such an agreement. See also the Food and Agriculture Organization of the United Nations International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, adopted by the Committee on Fisheries in 1999: *Report of the Twenty-third Session of the Committee on Fisheries, Rome, Italy, 15-19 February 1999*, FAO Fisheries Report No. 595 (Rome: FAO, 1999), para 32(a); the Plan of Action is available online at www.fao.org/fi/ipa/incide.asp.

⁵⁶ By Article XIX(3).

⁵⁷ Agreement Establishing the World Trade Organisation (Marrakesh, 15 April 1994), 1867 UNTS 3, (1994) 33 ILM 1125, ATS 1995 No 8.

Customs Territory of Taiwan, Penghu, Kinmen and Matsu were settled in September 2001 and it became a WTO member on 1 January 2002.⁵⁸ Now that this is so, the whole question of the standing of fishing entities can be left aside because what Taiwan has here is clearly much more than just a spark of personality – as the Separate Customs Territory of Taiwan etc, it has international legal relations with every other member of the WTO. All that drafters of future fisheries treaties now need do is make them open to accession by WTO members. While the concept of a “customs territory” having a place in fisheries commissions may at first appear odd, in fact it is a natural consequence of the adoption by many such commissions in recent years, including ICCAT, CCSBT and the Commission for the Conservation of Antarctic Marine Living Resources, of measures to monitor and restrict trade in the species for which they are competent.⁵⁹

Finally, a word on wider consequences. Taiwan appears to have latched on to the concept of “fishing entity” as a precedent in its campaign for entry to other international organisations, e.g. its recent attempt to join the World Health Organisation as a “health entity”.⁶⁰ We may be witnessing the first steps in the development of a fragmentary international legal personality for Taiwan. If a separate customs territory can join WTO and acquire rights and obligations *erga* other members, then why should the Fishing Entity of Taiwan not have competence to become party to fisheries treaties as Article 1(3) of the Fish Stocks Agreement appears to allow? The capacity to control imports of tuna is now essential to discharging obligations as a member of the SBT Extended Commission, e.g. under the 2000 Action Plan.⁶¹ A separate customs territory can do that, but how can the Fishing Entity of Taiwan, except by having a common set of internal authorities take the measures, for which each fragment of legal personality is potentially liable in its own sphere? If the fragmentation is not to lead to immunity for Taiwan in a WTO dispute over such a measure, then the panel will need to find the existence of an organic link between these fragments, such that a trade restriction imposed by the Fishing Entity of Taiwan can be attributed to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. Secondly, nothing in principle confines this personality to capacity to enter into multilateral treaties only – so might we yet see double taxation treaties between Australia or New Zealand and the “Fiscal Entity of Taiwan”, or extradition treaties with the “Penal Entity of Taiwan”? That must remain a topic for another day and, if discretion is the better part of valour, another speaker.

Annex

Resolution to Establish an Extended Commission and an Extended Scientific Committee

The Commission for the Conservation of Southern Bluefin Tuna (the Commission):

RECOGNISING that ensuring the sustainability of the Southern Bluefin Tuna (SBT) stock requires that all those States and entities or fishing entities fishing this species work together through the Commission;

⁵⁸ See the WTO’s press release of 18 September 2001 “WTO successfully concludes negotiations on entry of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” (WTO doc Press/244)

<www.wto.org/english/news_e/pres01_e/pr244_e.htm> and

<www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm> (visited on 24 June 2003).

⁵⁹ Information on these measures is usefully set out by the WTO Secretariat in “Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements”, WTO Doc WT/CTE/W/160/Rev.2 (25 April 2003), prepared for the Committee on Trade and Environment.

⁶⁰ The provisional agenda for the 56th meeting of the World Health Assembly included, at item 5, “Admission of new Members and Associate Members [if any]”: WHO doc A56/1 (27 February 2003)

<www.who.int/gb/EB_WHA/PDF/WHA56/ea561.pdf>; this item is missing from the agenda as adopted:

WHO doc A56/1/Rev.1 (19 May 2003) <www.who.int/gb/EB_WHA/PDF/WHA56/ea561r1.pdf>. See also

“WHA Rules of Procedure, WHO Constitution and precedents for Taiwan’s participation”, an electronic publication of the Taipei Economic and Cultural Office in Canberra, attributing Australia’s reluctance to support Taiwan’s admission in part to advice from the WHO’s Legal Counsel that there was no provision in the World Health Assembly’s Rules of Procedure for the “health entity” concept:

<www.teco.org.au/whatnew/may2003/wharules.htm> (visited on 24 June 2003).

⁶¹ Attachment I to *Report of the Sixth Annual Meeting, Second Part, 21-23 March 2000, Canberra, Australia*, in CCSBT6 Reports, above n 45, 49 at 76.

CONSIDERING that continued fishing for SBT by States and entities or fishing entities not adhering to the Commission's conservation and management measures substantially diminishes the effectiveness of those measures;

RECOGNISING the continuing need to encourage all States eligible to accede to the Convention for the Conservation of Southern Bluefin Tuna (the Convention) to do so, and to encourage entities or fishing entities with vessels fishing for SBT to implement the Commission's conservation and management measures;

Decides as follows:

1. Acting under Articles 8.3(b) and 15.4 of the Convention, the Commission hereby establishes an Extended Commission for the Conservation of Southern Bluefin Tuna (the Extended Commission) and an Extended Scientific Committee, whose Members shall be comprised of the Parties to the Convention and any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, that is admitted to membership by the Extended Commission pursuant to this Resolution.
2. The Extended Commission and the Extended Scientific Committee shall perform the same tasks as the Commission and the Scientific Committee including, but not limited to, deciding upon a total allowable catch and its allocation among the Members. All Members shall have equal voting rights. The provisions of the Convention relating to the Commission and the Scientific Committee (Articles 6 to 9, except for 6.9 and 6.10) shall apply *mutatis mutandis* with regard to the Extended Commission and the Extended Scientific Committee. Any dispute concerning the interpretation or implementation of this Resolution, including the articles of the Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.
3. The Secretariat of the Commission shall function as the Secretariat of the Extended Commission.
4. The Extended Commission shall report forthwith to the Commission if the latter is in session, and in any other case before the latter's next meeting or session of a meeting, all decisions it adopts. Decisions so reported shall become decisions of the Commission at the end of the session of the meeting to which they were reported, unless the Commission decides to the contrary. Any decision of the Commission that affects the operation of the Extended Commission or the rights, obligations or status of any individual Member within the Extended Commission should not be taken without prior due deliberation of that issue by the Extended Commission.
5. The Rules of Procedure for the Extended Commission shall be as annexed to this Resolution. Any revision to the Rules shall be made by the Extended Commission.
6. Any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, may express its willingness to the Executive Secretary of the Commission to become a member of the Extended Commission. The Executive Secretary of the Commission, on behalf of the Commission, will conduct an Exchange of Letters with the representative of such entity or fishing entity to this effect. In so doing, the applicant shall give the Commission its firm commitment to respect the terms of the Convention and comply with such decisions of the Extended Commission as become decisions of the Commission pursuant to paragraph 4.
7. If the Extended Commission decides to admit the applicant, it shall negotiate with the applicant a formula to govern the level of catch of SBT by the applicant pending the next decision of the Commission setting a total allowable catch and its allocation among the Members. Upon the successful completion of the negotiations referred to in the previous sentence, the Executive Secretary will exchange letters with the applicant as referred to in paragraph 6; the applicant shall thereupon assume the status of Member of the Extended Commission.
8. Any Member of the Extended Commission that is not a Member of the Commission shall be entitled to appoint one representative, to be accompanied by experts and advisers, as an Observer to meetings of the Commission and its subsidiary bodies, including the Scientific Committee. Such representative shall be entitled to be present and speak as an Observer at meetings of the Commission and its subsidiary bodies.
9. The Extended Commission shall decide upon an annual budget. The contributions to the budget of an applicant that is admitted as its Member shall be determined by application *mutatis mutandis* of Article 11 of the Convention.
10. The provisions of this Resolution relating to participation by entities or fishing entities in the operations of the Extended Commission are solely for the purposes of the Convention.
11. The Rules of Procedure are amended by omitting paragraph 3 of Rule 5 and substituting the following:

“3. A provisional agenda for each annual meeting shall be prepared by the Executive Secretary in consultation with the Chair. The provisional agenda shall be despatched by the Executive Secretary to all the Members not less than 60 days before the date for the opening of the meeting. The provisional agenda shall include:

- (a) approval of decisions taken by the Extended Commission;
- (b) all items which the Commission has previously decided to include in the provisional agenda; and
- (c) all supplementary items the inclusion of which have been requested by any Member of the Commission.”

Rules of Procedure of the Extended Commission for the Conservation of Southern Bluefin Tuna

Rule 1

Representation

1. Each Member shall be represented on the Extended Commission by not more than three delegates who may be accompanied by experts and advisers. Each Member shall inform the Executive Secretary of the Extended Commission of the names of its delegates to the Extended Commission including identification of the head of the delegation and experts and advisers accompanying such delegates, and of any change thereof, as far in advance as possible before the commencement of each meeting of the Extended Commission.
2. Each Member shall designate a correspondent who shall have primary responsibility for liaison with the Executive Secretary during the periods between meetings and shall promptly inform the Executive Secretary of the name and address of such a correspondent and of any change thereof.

Rule 2

Other matters

Except for Rule 4(3) and Rule 9, the Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna apply *mutatis mutandis* to the Extended Commission on other matters.

The International Criminal Court: Politics, Justice and Impunity

Steven Freeland and Michael Blissenden*

Introduction

The International Criminal Court (ICC) was formally established on 1 July 2002. In one sense, this represents the 'high point' of over 130 years of debate as to the political and legal possibilities of enabling for the prosecution, at the international level, of senior figures who have committed grave violations of human rights. Yet, it cannot be doubted that the ICC represents merely an important step in the process towards an effective legal system of international justice. The powers and competence of the Court were developed within an intensely political process involving years of sometimes bitter negotiations. Its constituent document, the Rome Statute for an International Criminal Court (Rome Statute),¹ is the product of much compromise – particularly concessions to state sovereignty – though it must be conceded that, without these compromises, it would never have been concluded.

Yet, despite this, the ICC is an extremely important institution – not just symbolically but in reality. Many regard it as the second most important international institution behind only the United Nations itself. By its very existence, it has the capacity to influence the actions of current and future leaders and further contribute to a real movement towards the end of the culture of impunity that largely prevailed during the period of the Cold War. Moreover, current events demonstrate all too well the need for a court equipped to prosecute those who will not be prosecuted by their own countries. It is therefore important that, despite some of the problems presently inherent in the initial framework of the Rome Statute, the ICC receive universal support from those states that are in a position to influence the behaviour of the next generation of leaders. Such universality of support will allow the ICC to eventually act as an important tool in the quest to properly eradicate the commission of grave international crimes. By establishing its credibility in this way, it will be easier for those supporting this movement to argue for stronger and more effective powers for the Court, perhaps to be implemented at the Review Conference of the Rome Statute, which will take place in 2009.

Sadly this is not the case at the moment. At the time of writing, the Rome Statute has been ratified by 91 states (with a total of 139 signatories); however, notable omissions include China, Russia, India and, of course, the United States. It is extremely disappointing that the ICC does not yet enjoy universal support. Even more worrying is the fact that the world's only current superpower, the United States, is taking extraordinary steps to limit further, and even undermine, the effectiveness of the Court. This paper will provide an overview of the reaction of the United States to the establishment of the ICC and describe the steps it is taking in an effort to ensure that its own nationals are not likely to be prosecuted by the court.

Towards the establishment of the ICC

The notion of a permanent international court with competence to try perpetrators of the most serious international crimes is not new. The idea was first raised in 1872 by Gustave Moynier of the International Committee of the Red Cross, who was horrified by atrocities he had witnessed in the Franco-Prussian War. Following the conclusion of the First World War, a commission of jurists specified a long list of violations

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¹ (1998) 37 I.L.M. 999 (in force 1 July 2002).

of the laws and customs of war committed by Germany and Italy during the war. The framers of the Treaty of Versailles went so far as to include provision for the prosecution of leading figures responsible for war crimes, with Article 227 specifying the responsibility of the German Emperor Wilhelm II.²

Just prior to the Second World War, the League of Nations adopted The Convention for the Creation of an International Criminal Court, but this was not followed up due to the outbreak of hostilities. Indeed, it was only after the horrors of the Second World War that tribunals were established - the Nuremberg and Tokyo Tribunals - which focused on the serious crimes committed by the Axis and Japanese leaders and senior military officials during the conflict. Even then, the British and Russian leaders were not in favour of establishing a 'fair' trial procedure for senior German and Japanese officials, but the Americans prevailed in convincing them of the need to put those persons on trial before the world. Despite their shortcomings, these Tribunals were very significant in demonstrating the possibilities of a globalisation of justice. They also introduced fundamental legal principles that continue to play a key part in the structure of the ICC, that went further than dealing simply with war crimes *per se*, by also examining the commission of *inter alia* crimes against humanity. They also confirmed the individual criminal responsibility of those perpetrating such crimes and the absence of a legal defence based on Head of State immunity.

The tangible steps made by these Tribunals towards a more systematic pursuit of justice were then largely sacrificed to the *realpolitik* of the Cold War. In the period 1945-1990 there was virtually no accountability for the commission of serious violations of human rights, even though over 100 million people were killed in international and domestic conflicts. However, with the fall of the Berlin Wall in 1989-1990 and the subsequent dismantling of the USSR, the politics of ideological conflict between the two prevailing superpowers dissipated, at least on the surface. The United Nations Security Council, largely impotent during the Cold War period, became more active and was in a position to react to significant events deemed to be a threat to international peace and security.

This new lease of life of the Security Council, coupled with increasing NGO pressure, meant that over time, there was less political resistance to international accountability for serious crimes, as long as the system established was 'controllable' and did not represent a threat to the interests - either real or perceived - of the five permanent members. The horrific breakdown of order in the Balkans and subsequently in Rwanda saw the establishment - albeit too late to stop much of the killing - of the two *ad hoc* Tribunals, which continue to operate in The Hague and Arusha respectively.³ Despite some significant problems, these *ad hoc* Tribunals have developed a momentum of their own and have further aided the movement towards international accountability for serious crimes. This trend has seen its most recent hiatus in the establishment of the ICC.

A permanent court at last

It was in this context, following years of negotiations, that a draft statute for a permanent international criminal court was eventually presented to the United Nations. At the end of a five-week conference, the Rome Statute was concluded on 17 July 1998, with 120 participants of the Conference approving, 7 states

² This proposal did not proceed, primarily due to the fact that The Netherlands, where the Emperor had sought refuge, refused to extradite him because the crimes of which he was accused were not crimes within the scope of Dutch law at the time: Antonio Cassese *International Criminal Law* (2003, Oxford University Press, Oxford) at 328.

³ These are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The United Nations has also agreed with the governments of Sierra Leone and Cambodia to establish special 'mixed' courts to prosecute leading perpetrators of serious crimes in those countries.

voting against and 21 abstentions. The 60th state ratification of the Statute took place in a special ceremony in April 2002, meaning that the operative date of the court was 1 July 2002.⁴

The current parties to the Rome Statute include every Baltic state, European Union member state and all but one European Union accession member state (Czech Republic). It has strong support from United Nations Secretary-General Kofi Annan and the late United Nations High Commissioner for Human Rights Sergio Vieira de Mello. As a counterbalance, there is presently a very low level of support from Asian and Middle Eastern countries, as well as those major powers referred to above. Nevertheless, in the relatively short time since its establishment, the ICC has made important strides forward and is now at the point where it has moved into an operational stage and can begin to deal with the almost 500 submissions that have been made to it.⁵ In March 2003, the Court's 18 judges were elected after 33 highly contested ballots. The 11 men and 7 women, representing a cross section of the world, are widely regarded as comprising a very distinguished bench, with several already having had experience in the *ad hoc* Tribunals. The Canadian nominee, Philippe Kirsch, who had been the Chairman of the Preparatory Commission for the court, has been elected as President.

All senior officials of the Court are now in place. The Registrar, Frenchman Bruno Cathala, a former Deputy Registrar of the ICTY, was appointed in June 2003. Of even greater significance, in April 2003 Argentinian Lluís Moreno-Ocampo was appointed as the Chief Prosecutor of the Court. He is highly regarded and has extensive experience in dealing with human rights issues in his native country. He was a Visiting Professor at Harvard and was thought to have been the United States' favoured choice for the position of initial Chief Prosecutor of the ICTY when that Tribunal was first established. Indeed, he is well respected in Washington foreign policy circles and is, therefore, not someone with whom the United States should have any major concerns. Following his appointment, additional staff are being sought – the position of Deputy Prosecutor is currently being advertised – and it is anticipated that the Court will have its required level of professionals within twelve months.

Having been created by way of a multilateral treaty, rather than by United Nations Security Council resolution, the ICC will operate as an independent body from the United Nations. Its success will be determined by the level of cooperation it receives from states. This level of cooperation will, to a large extent, reflect the real (as opposed to stated) desire of member states to ensure a culture of accountability rather than impunity. Yet the treaty negotiation process has, as is often the case in multilateral negotiations, meant that there are many compromises in the final structure of the Court. Most of these represent concessions to staunchly held (but perhaps outdated) views of sovereignty predominant in many states. At the forefront of this is the United States, which participated in the drafting process and was a leading force in the following compromises:

- 1) The principle of complementarity upon which the Rome Statute is largely founded, which allows for the national jurisdiction to have primacy in respect of any possible crime over which it has jurisdiction, unless it is unwilling or unable genuinely to carry out the investigation or prosecution;⁶
- 2) The fact that the court does not exercise true universal jurisdiction;
- 3) The jurisdiction of the court applying only to *future* crimes – ie. after the establishment of the court – even though the crimes had already existed at international law and there were, therefore, no problems with the *nullum crimen sine lege* principle;

⁴ Article 126 Rome Statute.

⁵ As at 8 July 2003, the Prosecutor's Department had received 499 communications from individuals and NGOs from 66 different countries. Two-thirds of communications came from just 6 countries – Germany (93), United States (70), France (58), United Kingdom (33), The Netherlands (29) and Spain (23). There were no referrals from Security Council and no communications from a state (either party or non-party).

⁶ Article 17(1)(a) Rome Statute.

- 4) The power given to the Security Council to suspend investigations and/or prosecutions;⁷
- 5) The ability of member states to declare a 7-year 'grace period' in relation to war crimes;⁸
- 6) The right of withdrawal from the Rome Statute,⁹ which although not an unusual provision in a multilateral treaty, does not sit well with basic goal of ending impunity.¹⁰

Despite these concessions, the United States ultimately voted against the adoption of the Rome Statute at the 1998 Conference. More recently, it has undertaken a number of strategies in an attempt to ensure that American nationals will not be the subject of an investigation and/or prosecution by the ICC Prosecutor.

United States' opposition

Historically, the United States has been a strong supporter, both politically and financially, of the *ad hoc* Tribunals and the broader pursuit of international justice.¹¹ However, that support appears to be directed very much to the situation of a 'broken-down' state (for example Rwanda) or where the prosecution of a perpetrator is not perceived to be contrary to United States own national interests. In addition, it has traditionally regarded the ultimate right to judge actions and policies of United States officials to rest with American courts. Indeed, it is strongly argued by some American commentators that ratification of the Rome Statute would breach the American Constitution by vesting federal judicial power over American nationals in a court not established by Congress.¹²

Nevertheless, in one of his last acts as President, Bill Clinton authorised signature of the Rome Statute in the final hours of 2000, even as he acknowledged that it would not be approved by Congress. However, by committing the United States as a signatory, he was seeking to allow it to remain engaged in the ongoing process leading up to the establishment of the Court. This was a short-lived hope, however, since within 5 months the newly appointed Bush Administration took the unprecedented step of 'unsigning' the Rome Statute.¹³ By embarking on this action, the United States sought to ensure that any further actions it was planning to take in relation to the Rome Statute would not constitute a breach of its obligations as a signatory under the customary law provision also codified in Article 18 of the Vienna Convention on the Law of Treaties (VCLT).¹⁴

Since then, the Bush Administration has vehemently expressed its opposition to the existing structure of the ICC and has engaged in actions that quite clearly do strike at the very heart of the Court and are designed to undermine its effectiveness. The United States has frequently justified its position by criticising what it sees as the unchecked power of the Prosecutor to initiate politically motivated prosecutions of United States

⁷ Article 16 Rome Statute. This has been utilised in relation to Security Council Resolutions 1422 and 1487 discussed below.

⁸ Article 124 Rome Statute. Already France has made a formal declaration under this provision and Columbia is reported to be considering it.

⁹ Article 127 Rome Statute.

¹⁰ Preambular paragraph 5 Rome Statute.

¹¹ For example, the United States supported the indictment in the Spanish courts of Auguste Pinochet.

¹² See, eg, Lee A Casey 'The Case Against the International Criminal Court' 25:3 *Fordham International Law Journal* 840.

¹³ At the time, President Bush referred to the Rome Statute as a 'flawed' document. This was a similar criticism to the one he used just one month earlier when declaring that the United States would not ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change (issued as part of the 1997 Conference of Parties (COP 3) report, document FCCC/CP/1997/7/Add.1).

¹⁴ (1969) 8 I.L.M. 679 (in force 27 January 1980). Article 18 of the VCLT specifies an obligation of good faith on the part of signatories to a treaty to refrain from acts calculated to frustrate the object and purpose of a treaty.

nationals and service personnel engaged in peacekeeping and other operations around the world.¹⁵ The concerns of the United States might also stem from a conflicting philosophy with that of the European civil legal systems as to the role and powers of court officials in the administration of justice. Irrespective of the reasons for these concerns, it appears that there are sufficient checks and balances contained within the Rome Statute to reasonably allay fears of a politically motivated prosecution.¹⁶

The various actions instigated by the United States in this regard have been the following:

Immunity for United Nations Peacekeeping and Stabilisation Forces

In early 2002, as it became apparent that the ICC would soon become a reality, the United States sought to obtain blanket immunity for its personnel engaged in peacekeeping activities. To indicate how seriously it viewed this issue, it threatened to withdraw its forces from United Nations authorised operations in the Balkans (where American forces had been engaged since 1995) and East Timor, unless they were granted immunity. The United Nations Security Council eventually agreed and, acting under Chapter VII, unanimously passed Resolution 1422 on 12 July 2002. This gave immunity from ICC investigation and prosecution to personnel of a non-party state engaged in United Nations established or authorised missions for a period of one year, with the possibility of renewal for further 12-month periods ‘for as long as may be necessary’.¹⁷

Indeed, this broad immunity has recently been renewed by Resolution 1487, with effect from 1 July 2003, due primarily to further US pressure. In the aftermath of the very public disagreements between members of the Security Council in the period leading to the actions undertaken by the so-called ‘Coalition of the Willing’ in Iraq in March 2003, it was clear that the members of the Security Council were in no mood to have further high-profile disagreements. Nevertheless, in a more ‘polite’ form of opposition, three members, France, Germany and Syria, abstained in the final vote.

Resolutions 1422/1487 raise a number of issues. Even though they specify that they are ‘consistent’ with Article 16 of the Rome Statute, it is not clear whether that provision was intended to provide for ‘blanket’ immunity for a particular group, irrespective of the specific circumstances. Indeed Article 27 indicates that the Rome Statute is to apply notwithstanding the ‘official capacity’ of a person. Moreover, even though the Security Council passed the Resolutions acting under Chapter VII, it is not clear what constituted the threat to international peace and security that gave rise to the use of these powers. This once again raises the possibility of the Security Council acting *ultra vires*, though whether this is a matter that would be judicially reviewed and determined is another question.¹⁸

In any event, these Resolutions have the effect of rewriting the Rome Statute and challenge the movement towards universality of international justice and human rights. It may well be that the ICC will itself be called upon to determine the legal effect of the Resolutions at some future point in time.

¹⁵ It has been estimated that since 1945 United States forces have been deployed overseas, often at the request of host state and/or the international community, at least 217 times. Apart from Iraq, United States military forces are currently deployed in some way in over 140 countries.

¹⁶ Apart from the application of the principle of complementarity, if the Prosecutor wishes to proceed, he would need the approval of a three-judge Pre-Trial Chamber before embarking on a formal investigation (Article 15(3) Rome Statute). In addition an investigation or prosecution by the Prosecutor is subject to the possibility of suspension by the Security Council (Article 16 Rome Statute) and the Prosecutor can be removed by an absolute majority of state parties to the Rome Statute (Article 46(2)(b) Rome Statute).

¹⁷ Paragraph 2 Security Council Resolution 1422, S/Res/1422 (2002), 12 July 2002.

¹⁸ See the differing approaches taken by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia in *Questions of Interpretation and Application of the 1971 Montreal convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom), 27 February 1998 and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, 2 October 1995 respectively.

At the time of writing this paper, the Security Council has just passed Resolution 1497, authorising the establishment of a multinational force and a subsequent United Nations stabilisation force to Liberia.¹⁹ This Resolution was sponsored by the United States. Article 7 of the Resolution also addresses the notion of immunity from ICC prosecution for members of those forces who are nationals of non-state parties to the Rome Statute. However, the provision goes significantly further than even Resolutions 1422/1487, by specifying that the relevant contributing state retains ‘exclusive jurisdiction ... for all acts or omissions arising out of or related to’ the activities of those forces, subject only to express waiver. This not only prevents investigation and/or prosecution by the ICC, but also by other states, irrespective of the circumstances. Once again three states, France, Germany and Mexico, abstained from the vote, although it was clear that they supported the establishment of the force. United Nations Secretary-General Kofi Annan was quoted as saying ‘... [f]rankly my sentiments are with those countries that abstained’.

American Service Members Protection Act (2002) (ASPA)²⁰

In August 2002, United States Congress passed ASPA, which was then signed off by President Bush as part of Supplemental Appropriations Act for fiscal year ending 30 September 2002. Among other things, ASPA prohibits co-operation by the United States with the ICC and even authorises the President to use ‘all means necessary’ to free American nationals who are subject to the court’s custody. For this reason it is often referred to as ‘Hague Invasion Act’. Section 2007 of ASPA specified that the United States could cut off particular military aid – for example International Military Training (2004: US\$92 million) and Foreign Military Financing (2004: US\$4.14 billion) - and other assistance to states which co-operate with the Court and which did not agree by 1 July 2003 to exempt the surrender of American nationals to the ICC (so called ‘Article 98 Bilateral Immunity Agreements’ - see below).

The provisions of ASPA allow the President to grant a waiver on the basis of American national security interests and the threats to withhold aid do not apply to NATO members, Taiwan and Israel and ‘major non-NATO allies’. For this reason Australia and New Zealand do not face the threat of withdrawn military assistance. Nonetheless, at the time of writing, reports are once again emerging that the Australian government is closely considering entering into such an agreement with the United States. This is unacceptable, the more so given the unfair trial process that may await Australian national David Hicks (and perhaps also Mamdouh Habib) before a military tribunal in Guantanamo Bay. If this is the approach of the United States to a court like the ICC, with all its safeguards to ensure a fair trial for an accused, one can only imagine what its reaction would be if another state were to attempt to try an American national in circumstances anywhere approaching those now facing Mr Hicks. New Zealand, on the other hand, has rejected the suggestion of such a Bilateral Immunity Agreement.

Article 98 Bilateral Immunity Agreements (BIAs)²¹

Since the passing of ASPA, the United States has undertaken a vigorous diplomatic campaign to convince/pressure many States, particularly those reliant on American military and financial aid, to sign ‘non-surrender’ agreements, by which they agree not to surrender any American national to the ICC. These BIAs are based on a deliberate misreading of a relatively obscure article of the Rome Statute. Most commentators, including many delegates at the Rome Conference in 1998, agree that the provision was included to take account of agreements such as Status of Forces Agreements (SOFAs) that were *existing* at the time the Rome Statute came into force.

¹⁹ Security Council Resolution 1497, S/Res/1497 (2003), 1 August 2003.

²⁰ 22 U.S.C. 7421 et seq.

²¹ Article 98(2) Rome Statute, upon which these agreements are purportedly based, provides: ‘The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender’.

At the beginning of July 2003, the United States confirmed that approximately 51 states²² had signed BIAs, including 27 parties to Rome Statute. Many of these are relatively weak and poor countries. Shortly afterwards, the United States announced that military aid and assistance to 35 states would be suspended as a result of their failure to sign a BIA by the 1 July deadline. Initially, the amount withheld was US\$47.6 million in military aid and US\$613,000 in military education, but there is much more at stake, both in terms of dollars and wider ramifications. Several close allies of the United States are among those directly impacted by the announcement. Not only might this have significant implications for the relationship between the United States and countries like Columbia, which is heavily dependent upon the United States to fight insurgencies and drug syndicates within its borders, but a longer term withholding of aid may also give rise to social and political instability in those states.

The practical effect of the BIAs is that American nationals are not subject to accountability before the ICC. Clearly the agreements undermine the force and application of the Rome Statute and serve to create a double standard of justice. Moreover, by signing these agreements, state parties to the Rome Statute are in breach of the co-operation provisions of that instrument,²³ as well as the VCLT and possibly also their own extradition treaties. It is with good reason that many states have come out with strong criticism of the American initiative, including the European Union, particularly given the expressed aim of the United States to conclude agreements 'with every country in the world'.²⁴

The future for the ICC

It is of course extremely disappointing (though perhaps not unexpected) that the United States does not support the ICC and has taken these rather extraordinary steps to ensure that its nationals will not be investigated or prosecuted by the Court. Whether they are ultimately successful remains to be seen. Having said this, it was not the intention of the Rome delegates that the ICC Prosecutor focus on United States nationals. Indeed, there are so many other important issues for the ICC to examine and no shortage of potential candidates for investigation. In mid-July 2003, for example, Chief Prosecutor Luis Moreno-Ocampo announced that, while the ICC was not yet opening a formal investigation into the situation in the Democratic Republic of the Congo (DRC), it would closely monitor events in the north-eastern Ituri region, where more than 5000 people have been killed since 1 July 2002.²⁵ As at 8 July 2003, his office had received six communications regarding the situation in Ituri, including two detailed reports from international NGOs.

When formal investigations start, a critical mass of highly qualified personnel have been hired and the Court becomes a more regular feature of our television news, then the ICC will develop a life and momentum of its own. This will provide an opportunity for many non-party states, including the United States, to see that the ICC provides an important avenue for international justice, rather than purely politically motivated action. The *ad hoc* Tribunals, particularly the ICTY, have quite clearly demonstrated the necessity of invoking a credible system of accountability; of a forum to help evolve, develop and clarify the international law of grave crimes; of an opportunity to give victims a 'voice'; and, most importantly, of a way of establishing the truth, so that people and countries can move on with their lives. The ICC, despite whatever opposition it currently faces and the weaknesses of its constituent powers, represents an important step forward in this approach.

Perhaps also the very existence of the Court, with all of its shortcomings and criticisms of 'selective' justice, will serve as a deterrent to future potential Pol Pots, Pinochets or Saddams. This is something that is

²² The identity of some states has been kept confidential.

²³ See Articles 86, 87, 89 and 90 Rome Statute.

²⁴ Comments recently attributed to John Bolton, United States Under Secretary for Arms Control and International Security.

²⁵ The DRC became a party to the Rome Statute on 11 April 2001.

owed to all future potential victims. Chief Prosecutor Moreno-Ocampo has already noted that the absence of trials before the ICC, as a consequence of the regular functioning of national systems, would represent a major success. Hopefully this will demonstrate to the United States and other countries that the ICC is not to be feared but represents a vital tool in the promotion of international justice.

So there is a mood of cautious optimism – the trend towards the internationalisation of justice is, it is hoped, irreversible despite the hiccups along the way. The establishment of the ICC is a further step down this path – best categorised at this juncture as ‘the end of the beginning’. It is only called upon to try the tip of the iceberg of serious crimes. It has limited powers and will disappoint some. However, it is hoped that this will only serve to demonstrate the need to further extend its powers in the future, as more and more people realise that this is necessary if we are to truly move towards the end of impunity.

The International Criminal Court and the Enforcement of Sentences

Stuart Beresford*

In 1999, the International Criminal Tribunal for the former Yugoslavia sentenced Goran Jelusic to 40 years imprisonment for murdering thirteen people in the Brcko area of north-eastern Bosnia and Herzegovina during the summer of 1992¹: a sentence that was subsequently affirmed by the Appeals Chamber in July 2001.² Six weeks ago, Jelusic was transferred to Italy to serve his sentence.³ As 23 months had passed since the sentence became final, the transfer was greeted with much relief by the Tribunal and, in particular, the ICTY Registry. The latter having spent most of this time trying to persuade states to imprison the accused: who gained the nickname “the Serb Adolf” for the brutal and sadistic manner in which he killed his victims.

Although this was an extreme case, the ICTY and its Rwandan counterpart have experienced numerous difficulties in the area of enforcement of sentences. These stem primarily from the fact that – although states are legally obliged to co-operate with the *ad hoc* Tribunals in the investigation, arrest and prosecution of suspected war criminals – they have no specific duty to enforce sentences of imprisonment. This has resulted in only nine countries agreeing to enforce sentences handed down by the ICTY,⁴ while only four have offered such assistance to the ICTR.⁵ More concerning is the fact that these states have only agreed to take, on average, four prisoners at any one time. You do not need to be a mathematician to work out that the *ad hoc* Tribunals will struggle to find enough prison cells for the 120 accused persons they collectively have in custody.

As many will know, a similar regime for the enforcement of sentences was adopted for the newly established International Criminal Court. As a former ICTY employee involved in the negotiation of enforcement of sentence agreements, I would like to use today’s presentation to offer some thoughts on the practical and theoretical issues that the ICC will face when it comes to enforcing its sentences. During this presentation, I intend to also highlight the various approaches that the drafters of the Rome Statute have taken to avoid some of the difficulties encountered by the *ad hoc* Tribunals.

It is true that the ICC has only just commenced operations and it will be several years before states will be called upon to enforce sentences handed down by the Court. However, in my opinion, it is not premature to discuss this topic, especially as the work of the ICC will be seriously endangered if states show a similar level of reluctance to enforce its sentences. Many will agree that without cells to imprison sentenced persons there is little point prosecuting them in the first place.

I would like to begin by giving a brief overview of the various provisions of the Rome Statute that relate to the punishment of convicted persons and the enforcement of sentences imposed upon them.

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¹ Prosecutor v Jelusic, *Judgement*, Case No IT-95-10-T (14 December 1999).

² Prosecutor v Jelusic, *Judgement*, Case No IT-95-10-A (5 July 2001).

³ ICTY Press Release, *Goran Jelusic Transferred to Italy to Serve Prison Sentence*, Doc No JL/PIS/758-e (29 May 2003).

⁴ Italy was the first state to enter into an enforcement of sentences agreement with the ICTY (signed on 6 February 1997), followed by Finland (signed on 7 May 1997), Norway (signed on 24 April 1998), Sweden (signed on 23 February 1999), Austria (signed on 23 July 1999), France (signed on 25 February), Spain (signed on 28 March 2000) and Denmark (signed on 19 June 2002). The ICTY reports that Germany has signed two *ad hoc* agreements with the ICTY with regards to Dusko Tadic and Dragoljub Kunarac. *Ibid.*

⁵ The ICTR has entered into an enforcement of sentence agreements with Mali (signed on 12 February 1999), the Republic of Benin (26 August 1999), Swaziland (31 August 2000) and France (14 March 2003). Information available on ICTR web-site located at <http://www.ictt.org>

The Rome Statute⁶ declares that the ICC may impose a term of imprisonment “for a specified number of years, which may not exceed a maximum of 30 years.”⁷ Furthermore, it may impose “a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”⁸ The Court may not impose the death sentence.⁹

Unlike a state, the ICC will not have a prison and, therefore, will need to rely on the co-operation of state parties for the enforcement of sentences.¹⁰ States are to offer their services, indicating their willingness to allow sentenced persons to serve the sentence within their own prison facilities.¹¹ The Rome Statute explicitly refers to “the principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution.”¹² Failing an offer from a state, the host state – the Netherlands – is tasked with this responsibility: although in such a case the costs associated with the enforcement shall be borne by the Court.¹³

After a sentence of imprisonment has been declared final, the Court will designate the state where the term is to be served,¹⁴ although it may change this determination at any time.¹⁵ When selecting the enforcing state, the Court must take into account the views of the sentenced person, their nationality, and “the application of widely accepted international treaty standards governing the treatment of prisoners.”¹⁶ Furthermore, the conditions of imprisonment must not be more or less favourable than those available to prisoners convicted of similar offences in the state of enforcement.¹⁷

The sentence of imprisonment is binding on the state of enforcement, which is without any discretion whatsoever to alter it.¹⁸ In particular, the enforcing state is prohibited from releasing the prisoner before their sentence has expired. The Court alone has the right to decide whether a sentence should be reduced. In this regard, the Court is required to review a sentence after two-thirds of the term has been served or, in the case of life imprisonment, after twenty-five years.¹⁹ When determining whether a sentence should be shortened, the Court is required to take into account a number of factors, including the prisoner’s willingness to co-operate with the Court in its investigations and prosecutions.²⁰ Once the sentence is completed, the prisoner must be transferred to a state obliged to receive them or another state that agrees to do so.²¹ However, if the prisoner is wanted elsewhere for committing other crimes, the prisoner may be extradited to the state concerned.²²

The approach taken to the enforcement of sentences is understandable given that it raises significant legal issues and has serious cost implications for the enforcing state. Nonetheless, relying on the goodwill of co-operating states to assist the ICC in the area of enforcement will place the Court in a difficult position. The language of the Rome Statute will force the Court to call on states to assist on enforcement of sentences solely on the basis of a general duty to assist and co-operate, but not on a

⁶ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) of 17 July 1998, UN Doc. A/CONF. 183/9 (hereinafter “Rome Statute”), reprinted in 37 ILM 999 (1998).

⁷ Ibid Article 77(1)(a).

⁸ Ibid Article 77(1)(b).

⁹ Schabas notes that a number of states favourable to the death penalty advocated for the inclusion of capital punishment, arguing that life imprisonment was too timid a penalty. Such views, however, were deeply opposed by European and Latin American states. William Schabas, *An Introduction to the International Criminal Court* (2001) at 141.

¹⁰ Antonio Marchesi, “The Enforcement of Sentences of the International Criminal Court” Flavia Lattanzi and William Schabas (eds) *Essays on the Rome Statute of the ICC* (2000) at 427.

¹¹ Schabas, above n 9 144.

¹² Rome Statute, above n 6, Article 103(3)(a).

¹³ Ibid Article 103(4).

¹⁴ Ibid Article 103(1)(a).

¹⁵ Ibid Article 104.

¹⁶ Ibid Article 103(3)(b).

¹⁷ Ibid Article 106(2).

¹⁸ Ibid Article 105.

¹⁹ Ibid Article 110(3).

²⁰ Ibid Article 110(4).

²¹ Ibid Article 107(1).

²² Schabas, above n 9 146.

specific legal obligation to do so.²³ This is an important distinction for many states and has explained why the existing *ad hoc* Tribunals have faced serious difficulties obtaining the agreement of states to enforce sentences.

From my experiences in The Hague, states will also be uncomfortable with the requirement that the ICC shall retain control over certain aspects of the enforcement and this may discourage many from entering into an enforcement of sentence agreement with the Court. Most states are familiar with bilateral treaties pertaining to the enforcement of overseas judgements: in which a domestic court converts the judgement of a foreign court so that it conforms with the domestic law, normally through a process known as an *executur* procedure. However, very few, if any, allow the foreign court to keep control over the enforcement of the sentence.

This is precisely what is required under the Rome Statute, which states that the enforcement of a sentence shall be subject to the supervision of the ICC.²⁴ This implies that the Court will have the “power to intervene in the event that the sentence is not being carried out in a manner consistent with the terms of [its] judgement”.²⁵ for example, if a prisoner is allowed to serve his sentence in an open prison (or through home detention). Furthermore, as an organisation promoting the rule of law, sentences imposed by the ICC must be carried out in accordance with the minimum principles of humanity and dignity. The Court must therefore be able “to ‘supervise’ the sentence in the sense that it retains the power to ensure that these [human rights] standards are being upheld”.²⁶

In order to ensure that these standards are appropriately implemented, the *ad hoc* Tribunals have enlisted the assistance of the International Committee of the Red Cross, who shall conduct inspections of the conditions of detention and treatment of prisoners on a periodic basis.²⁷ A similar inspection regime was rejected for the ICC, as certain states had difficulties agreeing to open the doors of its prisons to outside scrutiny. Instead, a judge of the Court (or an ICC staff member) will carry out the inspection, after the appropriate authorities of the enforcing state have been notified.²⁸

This notification requirement will prevent the ICC conducting surprise visits to ascertain whether the enforcing state is complying with internationally recognised standards regarding the treatment of prisoners. However, the principle that inspections must be initiated and performed without the control of the enforcing state will be preserved as any discussion between ICC officials and the sentenced person must take place in private.²⁹

While it should avoid some of the difficulties that the *ad hoc* Tribunals have experienced persuading states to assist them in this important aspect of their work, this approach is far from satisfactory. ICC staff members are not trained in the area of prison inspection and, thus, will not have the same level of skill and expertise as an independent inspection authority. More importantly, the suspicion of independent inspection regimes is misplaced given that such mechanisms have been adopted by a number of regional and international human rights treaties, including the International Convention for the Suppression of Terrorist Bombings and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²³ David Tolbert, *The International Tribunal for the former Yugoslavia and the Enforcement of Sentences* (1998) 11 *LJIL* 655 (1998) at 658.

²⁴ Rome Statute, above n 6, Article 106(1).

²⁵ Tolbert, above n 23 659.

²⁶ *Ibid.*

²⁷ See, eg, Article 3(5) of the Agreement Between the government of Norway and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (24 April 1998) UNTS Registration No 34525. For a description of the manner in which ICRC inspections take place see David Tolbert and Asa Rydberg, “Enforcement of Sentences”, Rich May & others (eds) *Essays on the ICTY Procedure and Evidence: In Honour of Gabriele Kirk McDonald* (2001) at 539.

²⁸ See Finalized draft text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000) (ICC Rules), available at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (hereinafter “ICC Rules”), Rule 211(1)(c).

²⁹ *Ibid.*

I should point out that, although the ICC must retain primacy over the enforcement of a sentence, this power of ‘supervision’ cannot be read as giving it the authority to intervene in the day-to-day management of a prisoner’s sentence. The Rome Statute places the principal responsibility for enforcement squarely on the state in which the sentence is being enforced and “the law of that state will apply to all aspects of the imprisonment except when some fundamental aspect of the sentence is affected.”³⁰ The state is, therefore, free to place the prisoner in its prison population and subject him or her to the same prison regime, including disciplinary rules and regulations, that applies to others in its penal system.³¹

As I have noted previously, the ICC will retain the power to grant early release to a sentenced person. It may also be called upon to pardon the sentenced person – for instance, if there has been a miscarriage of justice – or commute the sentence: which may occur if the original sentence was overly harsh or otherwise defective. The ICC Rules provide that sentence reviews shall be made by a three-member panel of the Appeals Chamber and enforcing states must give immediate effect to the panel’s decision.³² While this approach will be acceptable to some states, it may cause some difficulties for those states where the power of pardon and commutation is vested in the head of state by the state’s constitution or basic law. Some states could thus argue that this aspect of the ICC’s enforcement of sentence regime runs contrary to their constitution and use this as a reason to back out of assisting the Court in this area.³³

The *ad hoc* Tribunals have encountered this difficulty in their dealings with several states and have adopted novel approaches to address this problem. For instance, the agreement between the ICTY and Italy states that if a sentenced person becomes eligible for pardon or commutation under Italian law, but the Court does not find this appropriate, the convicted person will be transferred to the Tribunal or another state designated by the court.³⁴

Such a solution may prove a useful model to address the concerns of states that are reluctant to enter into an agreement with the ICC that potentially violates their constitutions. However, the need to resort to such mechanisms to address the underlying legal problems caused by trying to enforce the sentence of an international criminal court in the prisons of a sovereign state, highlights the fundamental difficulty of the ICC: namely, that its work is heavily dependent on the co-operation and assistance of states. To the extent that this assistance is forthcoming the Court will be effective. But without it the ICC will be impotent and will not be able to fulfil the high expectations of those that worked hard for its creation.

³⁰ Tolbert, above n 23 661.

³¹ Ibid.

³² ICC Rules, above n 28, Rule 224(1).

³³ Tolbert, above n 23 667.

³⁴ Section 3.2 of the Agreement Between the government of Italy and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia (24 April 1998) UNTS Registration No 36198.

'Transnational Criminal Law'?

Neil Boister*

Introduction

The term 'transnational crime' is in common use by criminologists, criminal justice officials and policymakers,¹ but its complementary term, 'transnational criminal law' (TCL), is unknown to international lawyers. International lawyers embrace the division of criminal law, based on the legal order of reference, into national and international. In this article it is suggested that a useful doctrinal match for transnational crime can be constructed by re-casting an existing sub-category of international criminal law as TCL.

The appropriate point of departure is the term describing the activity criminalised. According to Mueller, 'transnational crime' is a criminological rather than a juridical term, coined by the UN Crime Prevention and Criminal Justice Branch²

in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.

The term is primarily a functional rather than normative descriptor, and as such it has definitional problems. Fijnaut complains that the term is a general purpose concept that contains many different types of crime including organised, corporate, professional and political crime.³ He also attacks the use of the adjective 'transnational' when in fact not all transnational crime crosses state boundaries. In this regard he points to the dependency of illicit trans-boundary drug supply on national production and on the purely localised nature of much of transnational organised crime's control of local economies. Fijnaut concludes that the 'term "transnational crime" is misleading and does no justice to the multiplicity of this type of crime and to its local and/or national dimension'.⁴

'Transnational crime' is, however, in widespread use as a generic concept covering a multiplicity of different kinds of criminal activity. Moreover, while Fijnaut's point about the local impact of these crimes is well made, the harmful effects that these crimes have abroad means that they are hardly ever of entirely local interest.⁵

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¹ See, eg, N Passas (ed), *Transnational Crime* (Dartmouth, Aldershot, 1999); P Williams and E Savona (eds), *The United Nations and Transnational Crime* (Frank Cass, London, 1996).

² Mueller, 'Transnational crime: Definitions and Concepts', in P Williams and D Vlassis (eds), *Combating Transnational Crime* (ISPAC/Frank Cass, Milan/London, 2001) 13. Bassiouni cites Mueller as the author of the term. See Bassiouni and Vetere, 'Towards Understanding Organized Crime and its Transnational Manifestations' in MC Bassiouni and E Vetere (eds), *Organized Crime: A Compilation of UN Documents, 1975-1998* (Transnational, Ardsley-on-Hudson, 1998) 31.

³ C Fijnaut, 'Transnational Crime and the role of the United Nations' (2000) 8 *European Journal of Criminal Law and Criminal Justice* 119, 120.

⁴ Ibid.

⁵ In *Somchai Liangsiriprasert v United States Government* [1990] 2 All ER 866 the Privy Council, in an appeal from Hong Kong, held that Hong Kong's jurisdiction could be extended to conspiracies carried out entirely abroad. In a classic justification of such an extension Lord Griffiths, speaking for a unanimous Board stated: 'Unfortunately in

International society's concern with the upsurge in certain kinds of criminal activities within a state is considered legitimate because of the fear that these activities will have a knock-on effect in other states. At its simplest then, transnational crime describes conduct that has actual or potential trans-boundary effects that is of national and international concern. The issue explored here is whether a coherent 'juridical match' can be found to complement transnational crime.

'Transnational criminal law' conjoins transnational crime with Jessup's term 'transnational law'. Jessup used 'transnational law' to describe 'all law which regulates actions or events that transcend national frontiers'.⁶ The implication of his use of transnational was that cross-border relations of a legal kind involve international and national elements that do not fit within the traditional divisions. 'Transnational criminal law' has been used in Jessup's expansive sense, including within it all criminal law not completely confined to a single national entity.⁷ Focussing on the central element of Jessup's term, the trans-boundary dimension, I suggest a more restricted use of TCL: the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.

The 'suppression conventions', crime control treaties concluded with the purpose of suppressing harmful behaviour by non-state actors ranging from counterfeiting to corruption, drug prohibition to the financing of terrorism, can already, it is submitted, be said to establish a system of TCL. These conventions provide, through a range of complex provisions for the criminalisation by states parties in their domestic law of certain offences, for severe penalties, for extra-territorial jurisdiction, and for a variety of other procedural measures. The conventions serve as the legal frameworks for what Nadelmann terms 'prohibition regimes'.⁸ He explains:⁹

International prohibition regimes are intended to minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment. They provide an element of standardisation to co-operation among governments that have few other law enforcement concerns in common. And they create an expectation of co-operation that governments challenge at the cost of some international embarrassment.

The use of treaty law to establish these regimes is not a recent development.¹⁰ International society responded to the globalisation of harmful conduct by beginning to develop suppression conventions in the nineteenth century, and this approach has steadily become more significant. The offences these conventions establish are currently considered to fall within a broad system of international criminal law. The other part of this system is international criminal law *stricto sensu*, consisting of the crimes that provide for individual penal responsibility for violations of international law before an international penal tribunal. The offences established by the suppression conventions are, in contrast, classed by international lawyers as 'crimes of international concern' or 'common crimes against internationally protected interests',¹¹ because although the origin of the norm is international, penal proscription is national. But these are laborious and ambiguous labels. The term

this century crime has ceased to be largely of local origin and effect. Crime is now established on an international scale and the common law must face this new reality [at 878].'

⁶ See P Jessup, *Transnational Law* (Yale University Press, New Haven, 1956) 2. See, generally, O. Schacter, 'Phillip Jessup's Life and Ideas' (1986) 80 *AJIL* 878, 893-894.

⁷ A Eser and O Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law* (Max Planck Institute, Freiburg im Breisbau, 1992) v; Clark, "Countering Transnational and International Crime: Defining the Agenda" in Cullen and Gilmore (eds), *Crimes Sans Frontières: International and European Approaches: Hume Papers on Public Policy* Vol. 6, no's 1 and 2, (Edinburgh UP, Edinburgh, 1998) 20.

⁸ See Nadelmann, 'Global Prohibition Regimes: the Evolution of Norms in International Society' (1990) 44 *International Organisation* 479. Gregory refers to them as 'international policing regimes': see Gregory, 'Private Criminality as a Matter of International Concern' in Sheptycki (ed), *Issues in Transnational Policing* (Routledge, London, 2000) 100-134.

⁹ See Nadelmann, above n 8, 481.

¹⁰ For an early example see 'Convention between Her Majesty and the Republic of Hayti [sic] for the more Effectual Suppression of the Slave Trade', signed at Port-au-Prince, December 23, 1839.

¹¹ The phrases used generally in MC Bassiouni (ed), *1 International Criminal Law: Crimes* (2nd edn, Transnational, Ardsley-on-Hudson, 1999).

advocated here to describe the system that suppresses these ‘transnational crimes’ is TCL. Why engage in this re-labelling?

Focussing attention on TCL

Taxonomy must have a purpose. Identifying ‘TCL’ helps us to know how international law is used to suppress socially, economically and morally undesirable inter and intra-state conduct. Three points may be made.

First, TCL is a very powerful system. Transnational crime is a rapidly growing phenomenon,¹² and responding to this growth, TCL is probably the most significant existing mechanism for the globalisation of substantive criminal norms. The suppression conventions are codifying treaties. There are over two hundred such treaties,¹³ far more transnational than purely international offences, far more transnational offenders than purely international criminals and far greater scope for legal ambiguity and abuse of rights in TCL than in ICL *stricto sensu*.

Second, increasing our knowledge of this system of law is important because its study has been neglected. It is an area of law where sovereignty is still a dominant value but somewhat contradictorily, inter-state co-operation is often extensive although beyond the reach of the public eye. This contradiction is partly explained by the fact that this system of law is both the province of law enforcement specialists and the product of an international order dominated by a few powerful states that jealously guard their interests.

Third, it seems that scholars originally labelled the crimes in the suppression conventions as crimes against internationally protected interests under the general rubric of a broad international criminal law in order to reinforce the case for that law in the post-Nuremberg doldrums when that case was most doubted. Re-labelling these crimes as transnational within a system of TCL is designed to draw attention to the deficiencies of this increasingly important system.

These deficiencies result from the lack of attention, firstly to the development of the international components of TCL, the suppression conventions, and secondly to the impact of these conventions on the national components of TCL, the crimes themselves. These deficiencies are only outlined here as all require further investigation.

Transnational criminalisation

An important reason for systematising the study of TCL is to expose the relationship between TCL and transnational crime. More questions need to be asked about the social construction of transnational threats and the appropriateness of transnational penal responses. Rhetorical assertion of such a threat may presume a common interest in suppression where none exists, and may lead to legal overkill.¹⁴ TCL has developed in response to the pressing issues of the time. Thus, for example, when hijacking was a significant feature of the global landscape in the late 1960s and early 1970s, a number of hijacking conventions were adopted.¹⁵ This kind of rapid expansion of TCL’s material scope has not been complemented (or complicated) by general discussion of coherent principles justifying or constraining criminalisation like individual

¹² See, eg, Fijnaut, above n 3, 122.

¹³ See Bassiouni, ‘The Sources and Content of International Criminal Law: A Theoretical Framework’, in Bassiouni, above n 11, 32-33 and 62-69, for the full list.

¹⁴ Deflem suggests that international police co-operation was founded not in response to transnational crime but on the myth of that crime generated by a newly autonomous policing profession – see *Policing World Society* (Clarendon, Oxford, 2002) 143, 150. Perversely, as Fijnaut above n 3 points out at 123, the international suppression of drugs may actually have increased crime.

¹⁵ See Friedlander, ‘The Crime of Hijacking’ in MC Bassiouni, *1 International Criminal Law* (1st edn, Transnational, Ardsley-on-Hudson, 1986) 455 and 456.

autonomy, welfare, harm and minimalism.¹⁶ Transnational criminalisation today rests upon assumptions about the legitimate political, social and economic interests of states, and assertions about the harm caused to these interests by the conduct criminalised. Direct harms to individuals are relatively uncontroversial. There is a strong case for using TCL to reinforce general obligations on citizens such as driving a motor vehicle with a license.¹⁷ The role of TCL in criminalising the self-harming conduct of adults is more controversial, and more dependent on claims to consequential harm to society as a whole. In addition, the dangers of the use of TCL as a mechanism for disseminating transnational morality are many. Broadly held rational convictions may be defensible, yet narrowly held prejudices may also be disseminated through TCL. There is an obvious need to adopt a set of clear principles for transnational criminalisation.

Legitimacy in the development of the system

TCL must be produced by an authentic political process in order to justify the use of state and inter-state authority against individuals. Unfortunately, TCL's existing process of development exhibits a democratic deficit, which raises doubts about its legitimacy. Sheptycki¹⁸ notes that the assumption in a democratic society is that the elected control penal policy. Against this assumption he highlights the important role of the 'transnational law enforcement enterprise' – the complex global network of transnational law enforcement agencies – in the development of the suppression conventions and the resulting domestic law. Sheptycki's point is that law enforcement agents have been establishing legal standards rather than applying standards established by elected lawmakers.¹⁹ Sheptycki's work reflects Nadelmann's insight as to how the suppression conventions are used to develop a cosmopolitan international morality without the citizens of states parties having much to do with their adoption or application.²⁰ The *de jure* nature of international society – a democracy of states rather than individuals within states – makes it easy for the generation of global crime control treaties implementing contentious policies. The laws these treaties propagate do not threaten powerful constituencies or vested interests in the states invited to participate, ensuring willing participation in the prohibition regime.²¹ In order to ensure greater legitimacy, the development of transnational criminal policy and its transformation into criminal law is a process that should be more transparent and open to greater public participation.

Doctrinal weaknesses in the system

Analysis of the suppression conventions reveals the neglect of doctrinal coherency in the pursuit of multi-state application to widely varying forms of criminality. Little attention has been paid to the scope of criminal liability in the sense of degrees of participation, and to the conditions of criminal liability in the sense of the elements of conduct, fault, criminal capacity and so forth. The principle of legality demands that if someone engages in a transnational crime, the offence should be dealt with in any state that has jurisdiction using the same general principles, procedures and penalties, but this is not commonly the case. Little or no attempt is made to define the fault element of the crimes to be enacted,²² which can result in very different domestic offences. The conduct elements of these crimes also suffer from definitional incoherence or ambiguity, which

¹⁶ See, eg, A Ashworth, *Principles of Criminal Law* (3rd edn, OUP, Oxford, 1999) ch 2.

¹⁷ See, eg, Convention on International Road Traffic, dated at Geneva September 19, 1949.

¹⁸ Sheptycki, 'Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs' (1996) 24 *International Journal of the Sociology of Law* 61-75.

¹⁹ He gives as an example (above n 18, 67-8) the influence of the US Drug Enforcement Administration on the legalisation of controlled delivery in Europe and its globalisation through Article 11 of the 1988 Drug Trafficking Convention (United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, UN Doc. E/CONF.82.15, 28 ILM 493).

²⁰ Above n 8, 481.

²¹ Above n 8, 511.

²² Article 36(1) of the 1961 Single Convention on Narcotic Drugs, for example, adopts the rule that each of the proscribed acts must be 'committed intentionally'. How each party defines such intention and whether they extend it to concepts such as constructive intention (*dolus eventualis*), conscious recklessness or something approaching negligence, is a domestic issue.

also makes them questionable from the point of view of the principle of legality.²³ Finally, there is little in the way of punishment policy.

There are a variety of reasons for these weaknesses. TCL relies on domestic law to flesh out the skeletal provisions of the suppression conventions. It assumes the existence of fully developed domestic penal systems, when in reality these systems may be poorly developed. States have shown themselves to be unwilling to harmonise their penal systems to a greater degree than absolutely necessary due to domestic resistance to the application of unfamiliar penal principles. The signatories of the suppression conventions assume that a common understanding of criminal law and punishment exists among states parties, yet this general grammar of criminal and penal policy is difficult to identify. In its stead, resort is frequently made to ideas about criminal law and punishment held by influential states. Each convention tends to be a legal response to a specific threat, developed in relative isolation from conventions dealing with other threats. States have shown little interest in making a sustained effort to apply principles developed in respect of one offence to others. Altering the substantive penal norms of domestic law through international law, without paying attention to the other elements of a modern criminal justice system, is problematic because it leaves these norms in a vacuum. A suitable doctrinal basis for TCL must be developed or the reality of massive variation in its application, in violation of the principle of legality, will remain.

Human rights considerations²⁴

TCL is a system dominated by sovereignty, effective law enforcement and the objectification of individuals as criminals. There is little express protection of human rights within the suppression conventions. The conventions rely primarily on existing domestic protection of human rights and secondarily on general international human rights law. The problem is that the conventions are adopted at the international level, and then applied at the national level, but human rights only come into play, if at all, at the national level, reactively rather than proactively. Moreover, the conventions encourage a 'law and order' attitude from states parties which may cause them to go further than strictly obliged to, with negative consequences for individual rights. Attention needs to be paid to integrating the system of TCL with the general human rights framework, thus instilling the basic constitutional values of international law.²⁵

Legitimacy in the control of the system

The breadth and depth of the normative power of TCL has attracted the interest of powerful states that are sensitive and vulnerable to many of the activities it proscribes. These states play a conspicuous role in the control of TCL, and use it to extend their own domestic criminal jurisdiction while simultaneously influencing the penal laws of weaker states. Although weaker states find this erosion of their sovereignty difficult to swallow, they are often not in a position to resist.²⁶ The formal equality of treaty law provides some defence against this penal overreach. Indeed, TCL adheres in many respects to Heymann's²⁷ 'international law' model of international criminal co-operation because it provides for a normative structure that can be used to control co-operation between any states, to guarantee respect for sovereignty and for the principles of international co-operation, and to ensure judicial supervision. However, the systemic slack and ambiguity of TCL tends also to encourage the functioning of Heymann's alternative 'prosecutorial' model of

²³ See, eg, Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism, Annex to GA Res. 54/169, December 9, 1999. It penalises the financing of the use of violence used for a purpose which 'by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'.

²⁴ See Boister, "Human Rights Protections in the Suppression Conventions" (2002) 2 *Human Rights Law Review* 199-227.

²⁵ See, generally, White, 'The World Court, The WHO and the UN System' in NM Blokker and HG Schermers (eds), *Proliferation of International Organizations* (Kluwer, The Hague, 2001) 85-109.

²⁶ Consider, for example, the difficulties Central and South American states have in resisting the US in its war on drugs.

²⁷ Heymann, 'Two Models of National Attitudes Toward International Co-operation in Law Enforcement' (1990) 31 *Harvard International Law Journal* 99-107.

international criminal co-operation.²⁸ This highly informal goal driven model championed by law enforcement officials uses flexible means, regards co-operation as crucial, and bases controls on levels of reasonable demand and reciprocity rather than legal principle. While TCL serves both to formalise and to in-formalise the suppression of certain offences, because the primary aim of the system is the domestic social order of certain powerful states, law enforcement effectiveness tends to predominate over values like international legality, at the expense of legitimacy.

Enforcement of the system

TCL suffers from the fact that the treaty provisions for enforcement are weak and hardly ever used, and in result an informal gradient of inducement has taken the place of these provisions. Diplomacy and political influence are crucial first steps, with the UN criminal justice agencies playing key roles. In more difficult situations, influential states assume the role of international enforcer through economic sanctions,²⁹ powerful intergovernmental organisations may do the same,³⁰ and in extreme situations there has been recourse to the international machinery for maintaining peace and security.³¹ In order to avoid fuelling the suspicion that the system is policed by and thus serves the purposes of a few powerful states, more effective conventional methods for enforcement need to be developed. Such methods might formalise the existing gradient of inducement and place it under international supervision. They might also stipulate precisely in which circumstances, if at all, the international machinery for peace and security can be used to sanction the use of force in the enforcement of TCL.

There are good reasons for focussing attention on TCL, but is it possible to sustain a distinction between ICL, TCL and national criminal law?

Distinguishing TCL from international and national criminal law

Although, as noted above, what I refer to as TCL is considered by some to be part of international criminal law in the general sense of international laws concerned with penal measures,³² there are several ways of distinguishing it from 'ICL stricto sensu'³³ on the one hand, and from purely national criminal law on the other. The following distinguishing features are suggested rather than definitive, given that the demarcation of TCL is emergent rather than established.

²⁸ See Brown, 'Towards a Prosecutorial Model for Mutual Assistance in Criminal Matters' in Cullen and Gilmore (eds), *Crimes Sans Frontieres: International and European Approaches: Hume Papers on Public Policy* Vol.6, nos 1 and 2, (Edinburgh UP, Edinburgh, 1998) 50, for a similar view in respect of mutual assistance.

²⁹ For example, section 490 of the US Foreign Assistance Act of 1961 requires the US executive to consider the extent to which major drug producing and transit countries have met the goals and objectives of the 1988 Drug Trafficking Convention. If it decides they have not, the Act requires the executive to de-certify the country in question, which results in the suspension of most forms of assistance by the US together with the application of optional trade sanctions.

³⁰ The World Bank's Internal Guidelines debar the making of loans or payment of the balance of loans on the discovery of corruption (which is criminalised by treaties like the Inter-American Convention Against Corruption, 35 ILM 724). See Low, 'Transnational Corruption: New Rules for Old Temptations, New Players to Combat a Perennial Evil' [1998] *Proceedings of the American Society of International Law* 151-6.

³¹ See, eg, Security Council Resolutions 748 (1992), 883 (1993) and 1192 (1998) applying UN sanctions in the case of the Lockerbie bombers.

³² The approach, for example, adopted by Bassiouni, above n 11.

³³ An expression used by Wise, 'Terrorism and the Problems of an International Criminal Law' (1987) 19 *Connecticut Law Review* 799, 805. Schwarzenberger uses the expression 'International Criminal Law in the material sense of the word': see 'The Problem of an ICL' (1950) 3 *Current Legal Problems* 263. Kremnetzer uses 'International Criminal Law in the strong sense of the word': see 'The World Community as an International Legislator in Competition with National Legislators', in Eser and Lagodny, above n 7, 342. The XIV International Congress of the International Association of Penal Law held in Vienna in 1989 unanimously designated the subject 'International Criminal Law in the narrow sense': see Triffterer, 'Present Situation, Vision and Future Perspectives' in Eser and Lagodny, above n 7, 369-370.

Direct and indirect criminal liability in international law

Prior to the conclusion of the Rome Statute founding the International Criminal Court (ICC),³⁴ the distinction between an international criminal law with an international element and an international criminal law with a transnational element was not considered to be that significant.³⁵ Nevertheless, scholars did identify a core ICL. Wise explains that³⁶

[i]n its strictest possible sense, international criminal law would be the law applicable in an international criminal court having general jurisdiction to try those who commit acts which international law proscribes and which it provides should be punished.

The development of the ICC solidified the distinction between this ICL *stricto sensu* and TCL. While the International Law Commission (ILC) had included the crimes created by the suppression conventions, the so-called ‘treaty crimes’, in all the drafts of the Code of Crimes Against the Peace and Security of Mankind from 1991 up to and including the 1995 Draft Code,³⁷ because of opposition within the ILC they were excluded from the 1996 Draft Code, which was restricted to a catalogue of ‘core’ crimes.³⁸ That distinction was carried forward into the Rome Statute. The core international crimes, those over which Articles 5 to 9 of the Rome Statute give the ICC jurisdiction, are offences that are firmly established in customary international law.³⁹ Uniquely, however, these core offences provide for individual criminal liability for their violation even in the absence of a domestic prohibition⁴⁰ and are now subject to a direct enforcement scheme where the individual may be prosecuted before a permanent international criminal court.⁴¹

TCL is concerned with the treaty crimes excluded from the jurisdiction of the ICC. Unlike ICL, TCL does not create individual penal responsibility under international law. TCL is an indirect system of inter-state obligations generating national penal laws.⁴² The suppression conventions impose obligations on states parties

³⁴ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 37 ILM 999.

³⁵ See Bassiouni, ‘Policy Considerations on Inter-State Co-operation in Criminal Matters’ in Eser and Lagodny, above n 7, 807, n.1.

³⁶ Wise, ‘Codification: Perspectives and Approaches’, in Bassiouni, above n 11, 283 and 285.

³⁷ See ‘Report of the ILC, 47th Session’, UNGAOR 50th Sess., Supp. No.10 (A/50/10), paras 112-118.

³⁸ ‘Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes Against Peace and Security of Mankind Adopted by the International Law Commission at its Forty-eighth session (1996)’, UN GAOR 48th Sess., UN Doc A/CN.4/L.532. It includes only aggression, genocide, crimes against humanity, crimes against UN personnel, and war crimes (Articles 16-20).

³⁹ Genocide, aggression, serious violations of the laws and customs of armed conflict and crimes against humanity.

⁴⁰ The 1996 Draft Code used the term ‘crimes under international law’ to describe only those crimes which lead to individual penal responsibility in terms of international law. See Triffterer, above n 33, 370-371; Kremnetzer, above n 33, 337. Boss notes that the principle of individual responsibility has been spelled out in Article 25 of the Rome Statute and then fleshed out in the other provisions of the Statute. See Boss, ‘The International Criminal Court: Recent Developments’ in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press, The Hague, 1999) 43.

⁴¹ The Rome Statute may be reliant on state authority to enforce its orders and thus constitute only a partially direct enforcement scheme (see Bassiouni above n 13, 4 and 6), but it is undeniable that a permanent international criminal tribunal now exists to prosecute the core crimes. The establishment of the ICC does not preclude the establishment of ad-hoc international penal tribunals in response to a particularly egregious violation of what is currently a treaty crime, which may appear to undermine the thesis that a direct scheme is characteristic of ICL. However, the establishment of such a tribunal could reasonably be explained as an example of direct enforcement of a newly promoted core crime (see text below n 100).

⁴² See Bassiouni, ‘An Appraisal of the Growth and Developing Trends of ICL’ (1974) 45 *Revue Internationale de Droit Penal* 405, 429. Although the 1993 Draft Statute for an ICC distinguished between crimes under self-executing treaties and crimes under the suppression conventions - draft articles 22 and 26(2)(b) respectively: see ‘Report of the ILC, 45th Session’ UNGAOR 48th Sess., Supp. No. 10, UN Doc. A/48/10 (1993) at 255-335, that distinction was later done away with. Self-executing treaties still require state application and thus do not detract from the thesis that the suppression conventions are applied indirectly: see Bassiouni above n 13, 7, n 22. See, also, Triffterer, above n 33, 377.

to enact and enforce certain municipal offences.⁴³ A failure to comply with the prescribed international model results in an international tort or delict; the remedies for the failure of states parties to take action in their domestic law are the ordinary remedies of treaty law and the law of state responsibility. If a state fails to meet its obligations it cannot plead the insufficiency of its own criminal law or administration of justice. However, in contrast to the core crimes, the authority to penalise comes from national law and individual criminal liability is entirely in terms of national law.⁴⁴ States recognise this distinction explicitly. For example, while Article 1 of the Genocide Convention records that genocide is a ‘crime under international law’, the treaty crime of drug trafficking is considered in the preamble of the 1988 Drug Trafficking Convention only to be ‘an international criminal activity’. Although convenient, strictly speaking it is a misnomer to speak of a treaty ‘crime’. A treaty crime is a criminological phenomenon described in normative terms for the purpose of binding states. Unlike ICL, which is usually customary, a characteristic reinforced by the selection of crimes in the Rome Statute, TCL is usually treaty based, enabling groups of states to respond rapidly to new forms of criminality. In principle, however, ICL can be established solely by treaty and TCL solely by custom.⁴⁵ Moreover, TCL may have other sources.⁴⁶

Purely national crimes can in turn be distinguished from transnational crimes because they are criminalised solely at the election of the state and are not initiated through international treaty.

Extra-territorial jurisdiction

Differences in the scope of extra-territorial criminal jurisdiction over international, transnational and national crimes also reveal a basis for distinguishing international, transnational and national criminal law. In this regard, the nature of the jurisdictional connection required between the state establishing extra-territorial jurisdiction and the offence in question is important.

With regard to international crimes, the jurisdictional connection is said to be to the interests of international society as a whole. In addition to other less tenuous forms of extraterritorial jurisdiction, these crimes are subject to a permissive⁴⁷ ‘pure’ or ‘absolute’ universal jurisdiction established by general international law

⁴³ Thus, for example, the Hague Hijacking Convention (Convention for the Suppression of Unlawful Seizure to Aircraft, signed at the Hague, 16 December 1970, in force 14 October 1971, 860 UNTS 12325, (1971) 10 ILM 133) has been transformed into penal obligations through legislation like the UK’s Aviation Security Act, 1982 (as amended).

⁴⁴ Compare Article 6(c) of the Nuremberg Charter (‘Charter of the International Military Tribunal (IMT),’ in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, 82 UNTS 280), which provides for individual responsibility for crimes against humanity ‘whether or not in violation of the domestic law of the country where perpetrated’, with Article 36(4) of the 1961 Single Convention on Narcotic Drugs, which provides that nothing contained in Article 36 on the subject of penal provisions ‘shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party’.

⁴⁵ With respect to ICL, in the *Tadic* Appeal Chamber decision the ICTY affirmed that an international criminal tribunal could apply international agreements binding on the parties to a conflict as a basis for individual penal responsibility even though these agreements were not part of customary international law. *The Prosecutor v Dusko Tadic*, 2 October 1995, Case No. IT-94-1-AR72, paras 143-4. See, also, *The Prosecutor v Tihomir Blaskic*, 3 March 2000, Case No. IT-95-14-T, para 169. With respect to TCL, Clark above n 7, 25 cites the *US v Arjona* 120 US 479 (1887) as a good example of transnational crime based on custom. In it the US Supreme Court upheld the constitutionality of a Federal power to suppress the counterfeiting of foreign currency at home on the basis of an obligation generated by the law of nations, more than forty years before the adoption of the 1929 Counterfeiting Convention, 112 LNTS 371.

⁴⁶ The influence of soft law in the creation of anti-money-laundering norms is highlighted by Stessens, *Money Laundering: A New International Law Enforcement Model* (CUP, Cambridge, 2000), 15 et seq.

⁴⁷ Hays Butler, ‘The Doctrine of Universal Jurisdiction: A Review of the Literature’ (2000) 11 *Criminal Law Forum* 353, 363. Sed contra, Dinstein, ‘International Criminal Law’ (1985) 20 *Israel Law Review* 206, 214.

because they are of such exceptional gravity that they impinge on international society's fundamental interests.⁴⁸ The Princeton Principles on Universal Jurisdiction⁴⁹ remind us that

universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

Jurisdiction over extra-territorial transnational crimes is more limited, because it is ordinarily only established when a direct injury is threatened or caused to the state taking responsibility. Such jurisdiction is usually dependent on the terms of a particular suppression convention, one of the main legal reasons why transnational crimes are excluded from the jurisdiction of the ICC.⁵⁰ Although the *Lotus* case⁵¹ provides that a state may establish jurisdiction over acts that occur abroad in the absence of an international rule prohibiting such jurisdiction, out of respect for the sovereignty of others, states are generally only willing to take responsibility for extra-territorial transnational offences if there is a 'genuine link'⁵² between them and the offence in question. Various familiar principles of extra-territorial jurisdiction such as objective territoriality and nationality may be relied upon in a treaty to underpin such a link, but at its most general, and most tenuous, this link is generated by a treaty based obligation to apply a form of 'subsidiary universality', created by the duty to extradite or prosecute. Closely associated with universality, it is not universal jurisdiction, because it is subsidiary to the failure to extradite and thus has a limiting territorial element – it depends on the presence of the accused within the territory of the state establishing jurisdiction.⁵³ The application of the subsidiary form of universal jurisdiction through a suppression convention to a particular transnational offence is usually heavily qualified. Such application serves to flag that states have chosen to establish an extraordinary criminal jurisdiction, but it also indicates that they recognise that absolute universality does not apply.

Jurisdiction over purely national crimes is ordinarily territorial. In contrast to transnational crimes, when extra-territorial jurisdiction is established over purely national crimes it is usually done so unilaterally and not as a result of an international obligation or invitation.⁵⁴

Values and interests

Differences in systemic nature and jurisdiction are substantive manifestations of a hierarchy of international, transnational and national crimes. It is intrinsic to this hierarchy that these crimes threaten different values and

⁴⁸ See *Demjanjuk v Petrovsky*, (1985) 603 F. Supp. 1468, aff'd. 776 F. 2d 271; F.A. Mann, 'The Doctrine of Jurisdiction in International Law' [1964, I] *Recueil des Cours* 1.

⁴⁹ *Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Princeton, New Jersey, 2001.

⁵⁰ See 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22 (1996), UNGAOR, 51st Sess., Supp. No. 22, 26.

⁵¹ (1927) PCIJ Reports Series A, No.10.

⁵² See Blakesly and Lagodny, 'Competing National Laws: Network or Jungle?' in Eser and Lagodny, above n 7, 47 and 95.

⁵³ Based on the *aut dedere aut punire* principle advanced by Grotius (*De Jure Belli et Pacis* Book II, ch XXI, paras IV-V) the term subsidiary universality was coined by Carnegie in 'Jurisdiction over Violations of the Laws and Customs of War' (1963) 39 *BYBIL* 402, 405. Clark, 'Offences of International Concern: Multilateral Treaty Practice in the Forty Years Since Nuremberg' (1988) 57 *Nordic Journal of International Law* 49, uses the terms 'secondary' or 'last resort' universal jurisdiction. *Obiter dicta* by members of the ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of DRC v Belgium)*, 14 February 2002, General List no. 121, help to clarify this distinction with pure universality. See Guillaume P's separate opinion at para 7; see, also, Higgins, Kooijmans and Buergenthal JJ joint separate opinion at para 41.

⁵⁴ Extradite or prosecute obligations in extradition treaties, such as Article 6(2) of the Council of Europe's European Convention on Extradition, December 13, 1957, ETS 24, do not impose this obligation with regard to offences that they themselves oblige states to establish, and extraditability is not an independent condition of transnational criminality. See Wise in Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Nijhoff, Dordrecht, 1995) 11.

interests. This is not a novel proposition.⁵⁵ Bassiouni suggests two alternative requirements for proscribed conduct to fit into his omnibus definition of an international crime: the presence of either an international or a transnational element.⁵⁶ Examination of these two elements reveals that they have little in common because they describe conduct that threatens different kinds of interests. This examination provides one of the strongest reasons for distinguishing ICL and TCL.

According to Bassiouni, crimes have an international element if they are inconsistent with a fundamental norm of international law and thus violate a *jus cogens* norm.⁵⁷ They will do so if they are a) sufficiently serious to constitute a threat to the international community, and/or b) so egregious that they shock the conscience of humanity.⁵⁸ In other words, protecting international interests like international peace and security or the most important basic common values of mankind like life and human dignity is the principal purpose of ICL.⁵⁹ International criminality may involve many small actions that threaten individual human rights and interests, but its collective public nature marks out an extraordinary gravity⁶⁰ that gives the individual acts the singular potential to threaten international values or interests.⁶¹ International criminality is also characterised by state involvement, which makes it impossible to expect justice to be carried out by the state itself, and requires the exceptional measure of international law superseding national law.⁶² In essence then, ICL has a unique international element in the sense that it proscribes conduct that threatens international order or international values.

As noted, however, Bassiouni classifies certain types of offences as international even though they do not have this element. Bassiouni's alternative 'transnational' element describes the essence of a multitude of activities affecting the social, economic, cultural and other interests of concern to all or a substantial number of states. These activities may have an indirect public nature,⁶³ but more commonly involve private individual conduct: even when committed by small groups, their motive is private, and they harm persons or private interests.⁶⁴ Expanding upon Bassiouni's analysis, it appears that state interest in suppressing such conduct is triggered in either one of two situations.

The first situation: These offences may be established to suppress conduct that crosses borders and thus has a factual or phenomenological transnational element in its planning or commission.⁶⁵ This element has received an explicit expression in Article 3 on the 'Scope of Application' of the United Nations Convention against Transnational Organised Crime.⁶⁶ Article 3 provides that the Convention applies to a range of offences that the Convention criminalises⁶⁷ when they are transnational in nature, and then spells out that such an offence is

⁵⁵ See, eg, Bassiouni, above n 13, 97; and Gregory, above n 8, 101.

⁵⁶ Above n 13, 28-29. See, also, his *International Law: A Draft Criminal Code* (Sijthoff & Noordhoff, Aphen-aanden- Rijn, 1980) 40-44.

⁵⁷ Bassiouni, above n 13, 4, 39-46.

⁵⁸ See Bassiouni, above n 13, 42; Hays Butler, above n 47, 356; *R v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), [1999] 2 All ER 97, 177 (Lord Millet); Schwarzenberger above n 33, 273; and Wright 'The Scope of ICL: A Conceptual Framework' (1975) 15 *Virginia Journal of International Law* 561 at 567.

⁵⁹ Bassiouni (above n 13, 12) and Kremnetzer (above n 33, 339) share the view that the two conditions are disjunctive contra Lord Millet in the *Pinochet* case (above n 58).

⁶⁰ Kremnetzer, above n 33, 339.

⁶¹ See Bassiouni, above n 42, 421.

⁶² See Kremnetzer, above n 33, 339; Bassiouni, above n 13, 42; and Wise, above n 36, 288.

⁶³ Wise, above n 36, 289, notes that terrorist offences are often the subject of international concern because of apparent state complicity, which may provide a ground for promotion of these offences to international crime status.

⁶⁴ See Bassiouni, above n 42, 421. See, also, Gregory, above n 8, 104.

⁶⁵ See Bassiouni, above n 42, 421-422; Gregory, above n 8, 100; Nadelmann, above n 8, 479-481; Triffterer, above n 33, 371; and Wise, above n 33, 810.

⁶⁶ Opened for signature 16 December 2000, UN GA Doc. A/55/383, 40 ILM 335 (2001).

⁶⁷ Organised crime, money laundering, corruption and obstruction of justice in Articles 5, 6, 8 and 23 respectively.

transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

The material scope of Article 3 expresses an expanded view of trans-boundary criminality where criminal activity, its consequences, or criminal relationships, transcend international boundaries. The scope of this phenomenological transnational element can be further expanded to include those situations where, after the fact, the fugitive offender seeks refuge abroad and as a matter of international necessity states co-operate by either extraditing or prosecuting the individual.⁶⁸ Strong evidence of this phenomenological transnational element or ‘transnational hook’, as Nadelmann terms it,⁶⁹ is the principal rationale used to convince states that they should participate in the construction of a prohibition regime by adopting a suppression convention that creates intra- and/or inter-state offences. Creation of intra-state offences may seem unnecessary in meeting the transnational threat, but one of the central purposes of the suppression conventions is to build a foundation in national law in order to make international co-operation in the suppression of the particular form of conduct effective. Such a foundation is necessary, for example, in the suppression of a domestic supply of contraband feeding into the transnational supply, and in the harmonisation of domestic offences in order to enable the extradition of a fugitive by satisfying the principle of double criminality.

The second situation: Transnational offences may, however, also be established to suppress conduct where no phenomenological transnational element exists, but there is a sufficiently influential cosmopolitan belief that this conduct should be outlawed in all states because of its moral repugnance. In other words, the citizens of different states share the belief that these activities must be prohibited by means of international treaty law solely because, as Nadelmann puts it, ‘each is an evil in and of itself’.⁷⁰ The intra-state offences that result are transnational in origin and have what can thus be termed a normative transnational element.⁷¹ Necessity provides the orthodox rationale of the duty on states to help other states suppress intra-state conduct of this kind. Yarnold recognises the moral basis of this necessity in her analysis of the rationale of the treaty crime of torture, which she recognises ‘tends to shock the conscience of the civilised world’.⁷² Torture may not yet shock the conscience of international society sufficiently for it to take the step of classifying torture as an international crime *stricto sensu*, but torture does undoubtedly shock the conscience of sufficient citizens in influential states for a treaty to be adopted to protect the citizens of other states from torture. The normative transnational element usually involves a cosmopolitan moral response to a violation of human rights of this kind, but not necessarily.⁷³ It may, for example, also be present when the convention signatories find what individuals are doing to themselves to be repugnant.⁷⁴ The normative transnational element is distinct from the normative international element that underpins offences like

⁶⁸ Yarnold, ‘Doctrinal Basis for the International Criminalisation Process’ (1994) 8 *Temple International and Comparative Law Review* 85, reprinted in Bassiouni, above n 11, 127, considers (at 131-2) such situations to be distinct from transboundary crimes because the crime itself is entirely intra-state and that the international community is motivated to ensure effective control in these situations as a matter of necessity because one state acting alone will not succeed in bringing the criminal to justice. The benchmark of phenomenological transnationality is, however, engagement of the interests of more than one state, and from this base line there is little distinction between the situation where a crime crosses borders and a situation where a criminal fugitive crosses borders.

⁶⁹ Above n 8, 482.

⁷⁰ Above n 8, 525.

⁷¹ See Nadelmann, above n 8, 480, on how the suppression conventions are used to set up prohibition regimes which globalise norms that govern intra-societal interactions as well as inter-state relations.

⁷² Above n 68, 136.

⁷³ See, eg, *Pushpanathan v Minister of Citizenship and Immigration and others* [1998] 1 SCR 982; [1998] 4 LRC 365, where the Canadian Supreme Court held that drug trafficking was not contrary to the purposes and principles of the UN and thus could not, unlike a true international crime, be taken into account to deny a refugee claimant asylum under the 1951 UN Refugee Convention, 189 UNTS 150.

⁷⁴ The criminalisation of simple possession of drugs under Article 3(2) of the 1988 Drug Trafficking Convention, for example, clearly has moral roots. It is an intra-state offence to which none of the provisions for inter-state co-operation within the convention apply.

genocide because the threat suppressed is not sufficiently serious to engage a sufficient consensus in international society to use ICL to suppress it.

In a nutshell then, the aim of TCL is to suppress inter- and intra-state criminal activity that threatens shared national interests or cosmopolitan values. It tries to achieve this aim through the suppression conventions projecting substantive criminal norms beyond the national boundaries of the state in which they originated. These norms may have a phenomenological and/or normative transnational element and the presence of either one or the other is sufficient, it is submitted, to classify them as transnational. They apply to both inter- and intra-state conduct, and as a result, transnational crimes may be defined in the suppression conventions either with⁷⁵ or without⁷⁶ explicit transnational elements. Expanded upon in this way, Bassiouni's transnational element is clearly distinguishable from the international element characteristic of international crimes.

Purely national offences lack either an international or transnational element. As Triffterer puts it, in respect of national offences, 'each national legislator has the power to decide for itself which values should be protected through penal sanctions'.⁷⁷

The suppression of different types of threats that impact on international society constituted in different ways

As should already be apparent, there is a link between the type of interest threatened and the kind of society to which these interests belong. In simple terms, different harms affect different human interests, and the nature of these interests depends on the kind of social arrangements that humans have adopted. Different societies in turn generate different types of normative order to suppress these harmful activities. Mullerson makes the point crisply when he says that 'every legal system has its own society'.⁷⁸

The 'English School' of international relations theory provides a convenient typology of the arrangements of states within different international orders that can be put to use in trying to find an appropriate match between crime, interest, and society.⁷⁹ Bull suggests three possible ideal types of international order, a 'world order', an 'anarchical society', and a 'system of states'.⁸⁰ A 'world order' is more than just international order or order among states; it is an order of the whole of mankind. A 'society of states' has common rules and interests and member states co-operate to protect them through international law. A 'system of states' is not necessarily a society of states; in such a system states may have relations with each other but they do not have common rules and values. According to this analysis, community, society and a simple system of states

⁷⁵ They can be made applicable exclusively to inter-state conduct. For example, Article 8(2) of the Transnational Organised Crime Convention recommends that states criminalise the transnational corruption of foreign public officials.

⁷⁶ The omission of an explicit transnational element makes it possible to apply the offence to both intra- and inter-state conduct. For example, Article 3(1)(a)(i) of the 1988 Drug Trafficking Convention requires the criminalisation of the supply of drugs, and can be applied to intra- and inter-state drug supply.

⁷⁷ Above n 33, 371.

⁷⁸ R. Mullerson, *Ordering Anarchy: International Law in International Society* (Nijhoff, The Hague, 2000) 88.

⁷⁹ This typology has been borrowed by Wise (above n 33, 818-820) from the three-fold analysis of international society developed by members of the 'English School' of International Relations, in particular Martin Wight and Hedley Bull. See Bull, 'The Grotian Conception of International Society' in H Butterfield and M Wight (eds), *Diplomatic Investigations: Essays on the Theory of International Relations* (George Allen and Unwin, London, 1966); Bull, 'Martin Wight and the Theory of International Relations' (1976) 2 *British Journal of International Studies* 101; H Bull, *Anarchical Society: A Study in World Politics* (2nd edn, Macmillan, Basingstoke, 1995) 13; and M Wight, 'An Anatomy of International Thought' (1987) 13 *Review of International Studies* 221. For a useful summary of the English School's theory of international society, see D Boucher, *Political Theories of International Relations* (OUP, Oxford, 1998) 13-14, and T Dunne, *Inventing International Society: A History of the English School* (Macmillan Press, Basingstoke, 1998). For a more legal perspective see Bassiouni and Wise, above n 54, 28-36; H Mosler, *The International Society as Legal Community* (Sijthoff, Alphen aan den Rijn, 1980); Mullerson, above n 78, 93.

⁸⁰ See Bull (1977), above n 79, 13 and 23-26.

are points on the range of modes in which groups of states can be organised. These three kinds of international legal order correspond roughly in turn to Kantian universalism, Grotian rationalism and Hobbesian realism. Significantly, these different international orders, and by extension the penal laws they generate, may exist simultaneously.⁸¹

Using this typology, we might conclude that very shocking or state-implicated harmful conduct which threatens general human interests has to be suppressed by humanity acting as a whole. Going down the scale, harmful conduct that crosses borders or threatens cross-border morality may only require affected states to act together. Finally, harmful conduct that only affects interests within states can be dealt with adequately by states acting alone. In other words, this typology suggests the convenient model that different kinds of criminal conduct threaten international society constituted variously as a community of humanity or '*civitas maxima*', and as an 'anarchical society of states', which in turn generate international and TCL, while national law is generated in response to threats to the state alone. Many international lawyers embrace the thesis that ICL plays a significant role in preserving and protecting the world community or *civitas maxima*.⁸² According to this thesis, the international community, acting collectively, uses ICL against the enemies of mankind as a whole, *hostis humanis generis*. Protecting core values, and originating from a higher authority, it follows that ICL is a higher order law than TCL.⁸³ The legal relationship is vertical - the international community is super-ordinate, the individual sub-ordinate. In principle, the state should play no part in this system and all sovereignty-based objections to ICL must fail.⁸⁴ The attractions of this thesis are obvious, not the least because it establishes unequivocally that ICL is a foundation of a world order that is morally prior to other forms of international order. The principal evidence for this thesis is the establishment of a supra-national institution in the area of penal law, the ICC, which suggests that the traditional rejection of supra-national authority has been modified fundamentally and we are moving towards a society to which all individuals belong and through which all interests are expressed.⁸⁵ It follows that the negative reaction of states like the United States to the ICC⁸⁶ can be viewed as a reaction against the disruption of the existing society of states, and its replacement by a world order. Yet at present there is little other evidence of the existence of a *civitas maximum*, and it is difficult to establish the attractive notion that ICL, in the narrow sense, is in fact being transformed into a supra-national criminal law, the product of such a world order.

Although such a world order remains a normative ideal, it is more plausible to suggest that ICL is currently the product not of a community of humanity but of an international society of states acting in a more combined way than the looser society of states used to generate the indirect system contained in the suppression conventions. Simma and Paulus expand the central category of Bull's typology, an expansion which comes in useful in providing a more nuanced view of the kind of international society that produces ICL.⁸⁷ Following Bull himself, they divide the Grotian society of states into two models. The Vattellican model, advocated by the likes of Oppenheim,⁸⁸ views international society as international in the narrow sense and emphasises the individual interests of states. It allows for limited international co-operation and limited institutionalisation of this co-operation – the international law of co-existence. The dominant value

⁸¹ See Bull (1977), above n 79, 39.

⁸² See Bassiouni, above n 42, 405; Bassiouni and Wise above n 54, 28 et seq; and Triffterer, above n 33, 372.

⁸³ The implication is that ICL is 'naturalist' while crimes of international concern (TCL) is 'positivist', a conclusion drawn by many: see J Dugard and C van den Wyngaert (eds), *ICL and Procedure* (Dartmouth, Aldershot, 1996) xiii; AP Rubin, *The Law of Piracy* (2nd edn, Transnational, Ardsley-on-Hudson, 1997), generally; and Yarnold, above n 68, 127 et seq.

⁸⁴ The French Court of Appeal put it well in the *Barbie* case, (1985) 78 ILR 125, 131, when it dismissed argument relating to his disguised extradition as rendering his detention a nullity on the basis that the international crimes with which he was charged made him 'subject to an international legal order to which notions of frontiers and extradition rules arising therefrom are completely foreign'.

⁸⁵ See JG Ruggie, *Constructing the World Polity* (Routledge, London, 1998) 47-48.

⁸⁶ See Bradley "U.S. Announces Intent Not to Ratify International Criminal Court Treaty" ASIL Insights, May 2002. <<http://www.asil.org/insights/insigh87.htm>>

⁸⁷ Simma and Paulus, 'The 'International Community': Facing the Challenge of Globalisation' (1998) 9 *EJIL* 266, 269-271, following Bull (1966), above n 79, 51.

⁸⁸ L Oppenheim, *International Law*, vol. I, *Peace* (Longmans, London, 1905), vol. II, *War and Neutrality* (Longmans, London, 1906). See, further, Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *EJIL* 401, 409 et seq.

is international order. In contrast, the neo-Grotian position, advocated by the likes of Lauterpacht,⁸⁹ is communitarian. It makes for common interests, values and institutions – an international law of co-operation. The dominant value is solidarity among peoples. Following this revised typology, it appears that ICL is a product of an international society that exhibits many of the features of a neo-Grotian international community. There is evidence of common interests, common values and common institutions. The development of the ICC can be viewed as a step towards, in Bull's words:⁹⁰

The fulfilment of the Grotian or solidarist doctrine of international order, which envisages that states, while setting themselves against the establishment of world government, nevertheless seek, by close collaboration among themselves and by close adherence to the constitutional principles of the international legal order to which they have given their assent, to provide a substitute for world government.

The notion that ICL is currently more Grotian than Kantian appears to be substantiated by the way in which the ICC has been firmly moored to the inter-state system through the relationship of complementarity embedded in the Rome Statute. States parties are not likely to let the ICC slip its Westphalian moorings, because if it does so it will threaten the existing international order, and order is important in the neo-Grotian society of states. However, in the neo-Grotian view the society of states is secondary to the universal community of mankind, which is primary, and the former gets its legitimacy from the latter.⁹¹ As modern ICL emerges, it may be that the primary community that underpins international law is slowly being revealed. The ICC, for example, seeks to protect general human values, something not required by the necessity of co-existence among states.⁹² It should be cautioned, however, that resistance to the Rome Statute suggests that solidarity has not yet been achieved.

In my view, the distinction between international and TCL depends on the realisation that international society has a variable nature that depends upon the problem faced. The general point is recognised by Abi-Saab:⁹³

Rather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree of community existing within the group in relation to a given subject, at a given moment.

The distinction in the type of international society protected by international and TCL is revealed most concretely by a distinction in the density of institutionalisation of these legal systems. Abi-Saab's law of legal physics is that 'each level of normative density requires a corresponding level of institutional density in order to enable the norms to be applied in a satisfactory manner'.⁹⁴ The establishment of individual penal responsibility under ICL has required a greater density of institutionalisation than that required to suppress transnational crime. In order to suppress state-implicated conduct in war crimes and the like, conduct performed by the individual agents of states, states have had to co-operate to hold individuals responsible for these actions. Friedman notes that individual criminal responsibility 'presages the inclusion of individuals as passive subjects of international law'.⁹⁵ The establishment of the ICC, the application of absolute universal jurisdiction and the classification of crimes as international crimes are all institutional manifestations of the application of individual criminal responsibility under international law to certain offences.

⁸⁹ See Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *BYBIL* 1, 37 and 51-2.

⁹⁰ See Bull (1977), above n 79, 230.

⁹¹ See Bull (1966), above n 79, 68.

⁹² Bull's early work recognised the role of values in the Grotian view of international society - see Bull (1966), above n 79, 67-8. His later views of international society focussed solely on order and abandoned values entirely - see Harris, 'Order and Justice in the Anarchical Society' (1993) 69 *International Affairs* 725, 734-739.

⁹³ Abi-Saab, 'Whither the International Community?' (1998) 9 *EJIL* 248, 249.

⁹⁴ Above n 93, 256.

⁹⁵ W Friedman, *The Changing Structure of International Law* (Stevens and Sons, London, 1964) 168 and 247.

The product of a manifestly less extensive international solidarity, TCL does not exhibit this degree of institutional density. This is not to deny that TCL exhibits neo-Grotian tendencies. TCL is built on a presumption of a community of interests, a presumption crucial to the neo-Grotian law of co-operation.⁹⁶ When either or both a phenomenological or normative transnational element is present, states institutionalise international co-operation in order to suppress a specific activity. Sovereignty is not entirely inviolable; TCL is about the alteration of national penal practice, and international society has a direct interest in monitoring the effective implementation of the resulting national laws. However, the influence of the pluralist international society identified by Vattel is clear. The dominant value is international order. Sovereignty remains the key restrictive factor, the level of co-operation is relatively low and highly conditioned, and the responsibility of states is limited. Crucially, while in respect of ICL international society exhibits the necessary solidarity to enforce the law directly against individuals, in respect of TCL the degree of international solidarity is weaker with the result that the state remains the locus of penal power. The legal relationship is horizontal (state to state or trans-ordinate⁹⁷) and vertical (the state is super-ordinate, the individual sub-ordinate). Because enforcement is indirect it is more contingent. TCL creates a transnational crime control regime encompassing principles and norms, rules and decision-making procedures around which the expectations of the various states participating in the regime converge but stop well short of unity.⁹⁸

Greater convergence is possible, but it is not likely to be systemic. Instead, particular transnational crimes may change status and be reclassified as international crimes should international society agree that such reclassification is necessary.⁹⁹ As the object of the threat offered by a particular activity broadens from national to international peace and stability, or the cosmopolitan base of moral reprehensibility in regard to this activity broadens, so the legal steps taken against it will tend to progress from TCL into ICL. A current example is large-scale terrorism, which arguably threatens not only national but international peace and security and engages not only transnational but international moral reprobation.¹⁰⁰ The obvious mechanism for reclassification is an increase in the catalogue of core crimes under the jurisdiction of the ICC provided for in the Rome Statute.¹⁰¹ This institutionalisation of the ability to change position indicates that the distinction between TCL and ICL is, at least on a positivist conception of international law, ultimately a political choice by international society. International society may of course choose not to change the status of an offence. For example, offences like drug trafficking may find progression from TCL to ICL difficult because of the absence of a sufficiently broad cosmopolitan moral consensus in regard to the harmfulness of drugs or a sufficiently broad international consensus in regard to the threat of drug trafficking to international peace and security.¹⁰² As a consequence international society may find it difficult to take the step of incorporating these offences into the jurisdiction of the ICC. Other pragmatic considerations such as case load, the

⁹⁶ See *Abi-Saab*, above n 93, 249.

⁹⁷ See *Ruggie*, above n 85, 61.

⁹⁸ For a general definition of international regimes see SD Krasner (ed), *International Regimes* (Cornell U.P., Ithaca, 1983) 2.

⁹⁹ See Mueller, 'Transnational crime: Definitions and Concepts', in Williams and Vlassis, above n 2, 13 and 21.

¹⁰⁰ In a discussion forum on the terrorist attacks of the 11 September 2001, Professor Antonio Cassese states: 'In my opinion, it may be safely contended that ... trans-national, state-sponsored or state-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes.' See <http://www.ejil.org/forum_WTC/ny-cassese.html>.

¹⁰¹ In terms of Article 111 of the Rome Statute. Resolution E annexed to the Final Act of the 1998 Conference, recommends that a Review Conference pursuant to Article 111 should at some undisclosed future date consider the inclusion of new crimes within the jurisdiction of the court.

¹⁰² In this regard, one of the reasons why drug offences were not incorporated within the jurisdiction of the ICC from the outset is revealing: because these offences did not have a qualifying criterion of seriousness – see the Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996', UN Doc. A/AC.249/1, paras 71-2. However, the labelling of the treaty crimes listed in Resolution E as "very serious" and "a threat to international peace and security" suggests that there is significant international political will to transform these crimes, while the technical difficulties asserted in the Preparatory Committee simply disguises the political inclinations of some major powers to prevent this transformation – see Dugard below n 104.

difficulties of agreeing upon a definition of the offence,¹⁰³ and the political influence of powerful states over TCL may also retard such a transformation.¹⁰⁴ Finally, there may also be tendencies at play that will actually undermine the classification of a crime as part of TCL and lead to divergence. States differ in sensitivity to criminal activities, for example, to the impact of terrorism. States also differ in vulnerability to these activities, for example, to the extent to which they can control their sensitivity to terrorism. Greater sensitivity and vulnerability may result in states pushing for provisions in suppression conventions that serve purely national interests. These provisions may increase the level of international co-operation, but they may also play a less benign role – to be used in the absence of acceptable levels of co-operation as tools to prize open the lid of sovereignty and let sensitive, vulnerable and powerful states reach transnational criminals located in other states and suppress transnational criminality perceived as a threat. This kind of disguised Hobbesian realism may ultimately thrust certain offences back into the category of purely national offences, when international co-operation in the suppression of these offences, instead of increasing, breaks down completely.

In the absence of a system of TCL we are left only with purely national offences, where states act in isolation and establish appropriate offences to protect the interests and values they consider important. The legal relationship is vertical - state to individual. While many national offences cross borders or generate moral concern, they will remain purely national until they exhibit a strong transnational dimension and attract the concern of other states and, given the international political will, are transformed into transnational crimes. What this potential for national expansion suggests, however, is that TCL is only a part of a much larger “field of inquiry” into criminality that crosses borders.¹⁰⁵ This field of inquiry includes all such criminality irrespective of whether it has been suppressed in a convention or not, regardless of the position currently taken on such issues by the subsisting positive law of any given jurisdiction, and even if the current national and international law is utterly silent on such matters. This field of inquiry includes all those national offences subject to regimes of purely procedural international co-operation established by extradition and mutual assistance treaties, but it is important to note that these regimes differ significantly from TCL in that they are not concerned with substantive rules that establish guilt in principle, but rather with procedural rules concerned with determining guilt in fact.¹⁰⁶ Although these regimes do frequently specify common schedules of offences through enumeration, they do not impose criminal norms, but rather recognise the pre-existence in national law of at best broadly equivalent offences. Academic opinion supports a distinction between procedural and substantive regimes,¹⁰⁷ and the various distinguishing factors of TCL isolated here – the source of penal norms, jurisdiction, threats and the kinds of society threatened – relate to matters of substance, not procedure.

Why use the term ‘Transnational Criminal Law’?

The distinctions pointed out above between the system of law under discussion, ICL *stricto sensu*, and national criminal law, call for the use of a distinctive label. The terms international and national criminal law indicate both the legal order of reference and the particular kind of criminality suppressed. TCL can be similarly tested.

With regard to the legal order of reference, the problem is that the term used to describe the system of law established by the suppression conventions must adequately describe a system determined by international and

¹⁰³ Another reason why drug trafficking and terrorism were excluded from the jurisdiction of the ICC: see Annex I E of the Rome Statute.

¹⁰⁴ See, eg, Dugard, ‘Obstacles in the way of an International Criminal Court’ (1997) 56 *Cambridge Law Journal* 329, 334, who states: ‘[O]ne suspects that the main reason for resistance to the inclusion of treaty crimes is that powerful states prefer the present arrangement under the treaties creating international crimes that obliges signatory states either to extradite or try offenders (*aut dedere aut judicare*).’

¹⁰⁵ I must thank Paul Roberts for this insight.

¹⁰⁶ The distinction between substance and process is outlined by GP Fletcher in *Basic Concepts of Criminal Law* (OUP, New York, 1998) 7. In Fletcher’s terms substantive rules provide the major premise in the ‘syllogism of legal guilt’, procedural rules establish the facts of the minor premise.

¹⁰⁷ Schwarzenberger, above n 33, 271; Bassiouni, above n 42, 406-9; Wise, above n 33, 803 and 805.

national law. The existing terms for the crimes created by the suppression conventions are inadequate in this regard. Including these crimes within a broadly defined ICL makes 'ICL' a holdall for all international law that has penal implications.¹⁰⁸ Moreover, the term 'ICL' implies a direct relationship between international society and the criminal in question and in the indirect system there is none. A drug trafficker may break the law of a particular state, but he or she is not an international criminal and there is no international crime of drug trafficking. On the other hand, including this system within national criminal law obscures its provenance and the international obligations that exist to implement and enforce it. Recognising the inadequacies of the existing terms, publicists have attempted hybrid labels. However, the potential for terminological confusion abounds. Consider the label "crimes of international concern", and the fact that the preamble to the Rome Statute refers to "the most serious crimes of concern to the international community as a whole". The term suggested in this piece for the system of law established by the suppression conventions is a hybrid label that avoids long and complicated phrasing. Jessup used transnational in order to deliberately attenuate the distinction between national and international legal orders thus avoiding the difficulties of positing an international society acting as a community generating international law.¹⁰⁹ Using the label TCL for this system is sympathetic to Jessup's purpose, and suggests perhaps the existence of something slightly more elusive – a transnational legal order.

With respect to description of criminality, the case for the use of the term TCL is clearer. It has long been recognised that transnational relations can be governed by both domestic and international law.¹¹⁰ The generic or systemic identity of TCL flows primarily from the fact that TCL is a set of international and national norms pursuing a particular function addressing a particular class of subjects. These norms have been established primarily to suppress, through indirect penalisation, certain forms of undesirable conduct that have phenomenological or normative transnational elements, carried out by individuals within the jurisdiction of the states parties to the enabling treaties. Penal and jurisdictional provisions, together with associated forms of legal assistance, are common structures embedded in the different parts of the system, the various treaties. The fact that these provisions perform standard functions in different treaties, illustrates the functional nature of this system. TCL is, it is submitted, an appropriate descriptive term to encapsulate offences spanning – "transcending" – two or more national jurisdictions.

The use of TCL is not an attempt to coin novel terminology for its own sake. Nor is it an attempt to establish a new division of legal normative science. It is rather an attempt to highlight the existing distinction between international criminal law *stricto sensu* and the norms established by the suppression conventions, using an admittedly mainly descriptive rather than normative label.

Conclusion

By adopting the Rome Statute with jurisdiction over core crimes, international society has focussed public attention on these crimes, and has accepted the challenge of dealing with ICL in a more coherent manner. But identifying all forms of international penal co-operation with the core international crimes gives a distorted view of the extent and nature of this co-operation because it ignores the role of the suppression conventions.¹¹¹ Moreover, it leaves unanswered the challenge of developing the coherence of the system of law these conventions establish. This challenge is likely to grow in significance, because this system is likely to increase in importance. Jurisdictional barriers between states will continue to be eroded by the forces of transnational criminality. Political pressure for the convergence of the substantive criminal laws of states will increase. The system of law established by the suppression conventions will be developed to enable this convergence, despite the fact that in its present form it is not a particularly satisfactory vehicle for sponsoring convergence. The poverty of many of its provisions is striking, especially when addressed from perspectives other than effective law enforcement. Greater attention should be focused on this system.

¹⁰⁸ See, eg, Bassiouni, above n 42, 409.

¹⁰⁹ Wise, above n 33, 804.

¹¹⁰ See R Keohane and J Nye (eds), *Transnational Relations* (Harvard University Press, Cambridge, Mass., 1972) xii, cited by Mullerson, above n 78, 174.

¹¹¹ See Clark above n 7, 29.

It should be tested against the benchmarks that have informed the development of the penal function in domestic law. A first step in focussing attention on this system would be to give it an easily identifiable label – ‘transnational criminal law’.

The Year of International Law in Review: An Australian Perspective

Bill Campbell QC¹

As per usual, many of the major issues of the past year have already been covered in the earlier sessions of the meeting. Nevertheless it would not be possible to look at the year in review without canvassing some of these issues again. Also it gives me the opportunity to have at least the penultimate say on the issue.

Iraq

We considered (as did others) the legal basis – or otherwise – for the use of force in Iraq and the law to be applied when force was used. Also, it is an incomplete story. We are still very much engaged in the current phase. However, today I will concentrate on the *jus in bello* – that is, the law applied in the course of the conflict.

The law of armed conflict has developed substantially over the past 30 years. Australia is a party not only to the Geneva Conventions – we have accepted Additional Protocol 1, the Landmines Convention and the Statute of the International Criminal Court. Other obligations are relevant also such as those under the Second Optional Protocol to the International Covenant on Civil and Political Rights relating to the abolition of the death penalty.

All of these obligations were considered in great detail in their application to Australian action in Iraq. Some eighteen advices were prepared including detailed advice on Australian domestic law relevant to armed conflict. The latter advice related principally to the provisions of the Criminal Code Act 1995, giving effect to the statute of the International Criminal Court. The advice given was used in the development of rules of engagement and also on such matters as targeting.

It is no secret that Australia's international obligations were more extensive than those of the United States. The United States is not a party to many of the instruments I have mentioned. It was important to identify the differing legal obligations of coalition members so that each member was aware of the legal limitations that applied to other members.

Australia has personnel in the Coalition Provisional Authority, which is currently responsible for governing Iraq, including in its legal office. Amongst other matters, that office is responsible for drafting laws and regulations applying in the current phase and for ensuring their consistency with the 1907 Regulations on Land Warfare, Geneva Convention IV and United Nations Security Council Resolution 1483.

Solomon Islands

A serious law and order and security problem exists in Solomon Islands and the economy is in decline. In late May of this year Prime Minister Kemakeza wrote to Australia's Prime Minister asking for help to address these issues. A meeting was held between them on 5 June 2003 after which an Australian and New Zealand scoping mission of officials was despatched to Honiara to assess the situation. This was followed by a meeting of Pacific Islands Forum Foreign Ministers pursuant to the Biketawa Declaration. That meeting endorsed the provision of additional assistance to Solomon Islands.

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Australia is concerned to ensure that the additional assistance to be provided has a sound basis in both international law and Solomon Islands domestic law. First, there would need to be a formal request from the Solomon Islands government for such assistance. Secondly, we would be seeking the passage of legislation through the Solomon Islands Parliament to provide a basis in Solomon Islands domestic law for the presence and operation of foreign police, military and civilian personnel. The Solomon Islands Parliament meets this week to consider the legislation entitled the Facilitation of International Assistance Bill 2003. Finally, we would be seeking a multilateral agreement underpinning the assistance to be provided.

Detainees at Guantanamo Bay

I note the issue of the detainees in Guantanamo Bay was touched on in a session yesterday. Messrs. Hicks and Habib are the two Australian nationals being held in custody in Guantanamo Bay. Obviously international law issues have arisen and to a degree these have been the subject of comment in decisions of both United Kingdom and United States domestic courts. Some of these issues have included:

- The application of the Vienna Convention on Consular Relations.
- The status of those held at Guantanamo Bay. The United States asserts that they are unlawful combatants and not entitled to the protection of the Geneva Conventions. In this respect it is relevant to note that the United States is not a party to Additional Protocol I to the Geneva Conventions that expands the definition of prisoner of war.
- The final issue is their potential prosecution by a US military commission. On that matter as you may know, the United States, early Friday Australian time, issued a list of six detainees that had been determined eligible for trial before a military commission and David Hicks was on that list.

Maritime Delimitation

Although Australia has negotiated many of its maritime boundaries, some remain outstanding. These include final boundaries with New Zealand and East Timor. Also the 1997 Delimitation Agreement with Indonesia that finalises the boundary with that country is not yet in force.

At least two rounds of negotiations have been held with New Zealand since ANZSIL last met. We have had a good exchange of views on the relevant scientific, geomorphological, legal and other considerations in relation to most of the areas under negotiation. Some areas under negotiation are extended continental shelf – that is beyond the 200 nautical mile zones of both Australia and New Zealand. Those areas, as well as being subject to delimitation, will have to be considered by the Commission on the Limits of the Continental Shelf. This gives rise to questions about the relationship between those two exercises. Australia is on target to meet the original deadline for its submission to the Commission on the Limits of the Continental Shelf of November 2004. Ideally the delimitation negotiations with New Zealand would be complete by the time Australia's submission is lodged, but it is not essential. I should mention also that Australia will be in a position to cover the area of the extended continental shelf adjacent to the Australian Antarctic Territory in its submission.

In relation to East Timor, many of you will know that arrangements relating to the Timor Gap proceeded apace over the past year. I say apace because in comparison to other maritime negotiations they have been compressed into a very short timeframe, particularly given their complexity. The Timor Sea Treaty was negotiated and entered into force and implementing legislation was passed in both countries. Also a complex unitisation agreement has been negotiated covering the Sunrise Deposit. This Deposit straddles the boundary between areas of Australian jurisdiction and the Joint Petroleum Development Area established under the Timor Sea Treaty. The unitisation agreement will facilitate the exploitation of the deposit straddling as it does two areas of jurisdiction. East Timor and Australia have agreed to commence the negotiation of a permanent maritime boundary between the two countries.

A major domestic court decision in relation to the Timor Sea was that of the Full Federal Court in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003) 198 ALR 269. Petrotimor challenged the validity of the Timor Gap Treaty made between Australia and Indonesia and the Commonwealth legislation giving effect to that treaty. The Full Federal Court struck out all of Petrotimor's claims except one relating to confidential information. The Court accepted the Commonwealth's argument that it had no jurisdiction to determine the validity of grants of concession by the Portuguese government on the basis that the domestic courts will not enforce rights granted by a foreign sovereign. That decision is the subject of an application for leave to appeal to the High Court.

Illegal fishing and hot pursuit

On the international plane, Australia defended a vessel release case brought by the Russian Federation in the International Tribunal for the Law of the Sea in respect of a fishing vessel the *Volga*. That was the subject a separate paper to the meeting by one of the counsel for the Russian Federation, Mr Paul David.

The other vessel of note that was apprehended by Australian authorities in the course of Easter this year, again after a hot pursuit, was the *Pong Su*, a vessel with North Korean connections. This time the pursuit was on the basis that the *Pong Su* was the mother ship of another vessel illegally landing drugs on the Victorian coast.

Both the *Pong Su* and *Volga* episodes demonstrate the need to update aspects of the 1982 Convention on the Law of the Sea relating to the apprehension of vessels at sea carrying out illegal activities. Other aspects of the Convention require updating also, including Article 73.3 that prevents a state from imposing imprisonment as a penalty for illegal foreign fishing. Australia may well sponsor such amendments when the Convention becomes open to amendment in November 2004.

Unarmed Peace Monitors and Post-Conflict Situations: Practical Lessons from the Bougainville Peace Process

Richard Fairbrother* and David Lewis**

The Bougainville conflict was possibly the bloodiest and longest running conflict in the South Pacific since World War II. Although much has been written about the complex causes of the conflict, few authors have analysed the bases of the peace process.¹ In this paper we canvass these bases, particularly the critical but largely unheralded work of the Peace Monitoring Group (PMG). We also highlight some key practical lessons for embedding peace in a dynamic, and sometimes fragile, post-conflict situation. Not all of these will be transferable to other scenarios, but all are well worth consideration by practitioners and researchers of post-conflict peacebuilding.²

Context: the legal framework of the Bougainville peace process

The Crisis

The conflict on Bougainville has been covered by several commentators. Most agree that the conflict developed from a complex mix of a latent secessionist sentiment (starting at least as early as Papua New Guinea's independence in 1975), a complex and culturally fractious Melanesian ethno-nationalism with its own rivalries and, especially in the 1980s, growing tension and resentment among some (but not all) Bougainvilleans about the economic and social impact of the large copper mine at Panguna in Central Bougainville.³ As is by now well known, this complex mix of factors eventually led to armed conflict, widely known as 'the Crisis'. Estimates vary about the numbers killed as a result of the conflict but suffering on the island was widespread and prolonged.⁴

By 1997 the Crisis had lasted nearly a decade and attempts to resolve it had failed.⁵ In that year the PNG government seriously considered employing mercenaries and the resulting Sandline Affair⁶ proved to be a circuit breaker, seized upon by New Zealand.⁷ A large delegation of Bougainvillean leaders were quickly

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¹ Anthony Regan is a notable exception, (eg: AJ Regan, 'Case Study: Bougainville' in P Harris and B Reilly (eds), *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Institute for Democracy and Electoral Assistance, Stockholm, 1998) 169-178). See also D Lewis, *Dispute Management on Bougainville – Escalation and De-escalation of the Conflict*, October 2001, unpublished manuscript, for an analysis of the processes of conflict and peace-building in the lead-up to the *Bougainville Peace Agreement*. Copy available from author.

² The ideas in this paper form the basis of a much more considered and detailed work currently under preparation.

³ See generally, Alexander Downer, *The Bougainville Crisis: An Australian Perspective* (Department of Foreign Affairs and Trade, Canberra, 2001) at 2-4. For more detail, refer to A Matthew, 'Bougainville and Papua New Guinea: Complexities of Secession in a Multi-ethnic Developing State' (2000) 48 *Political Studies* 724-744, and A Stratham and P J Stewart, 'The Problems of Peace-makers in Papua New Guinea: Modalities of Negotiation and Settlement' (1997) 30 *Cornell International Law Journal* 681, especially at 693-697.

⁴ Downer, above n 3, 1.

⁵ Notably the *Endeavour Accord* (1990), the *Honiara Declaration* (1991) and the aborted Arawa peace conference (1994): Sean Dorney, *Papua New Guinea. People, Politics and History since 1975* (fully revised edition, ABC Books, Sydney, 2000) 133-136.

⁶ Ibid 141-164.

⁷ Downer, above n 3, 16-19.

assembled to meet at Burnham, New Zealand in July 1997, which resulted in a declaration that called, among other things, for a ceasefire and an international peacekeeping force.

Burnham I was followed by a meeting between Bougainvillean leaders and the PNG government, at the same venue in October 1997. The result was a truce and requests for the establishment of a regional force to monitor it - the New Zealand-led Truce Monitoring Group (TMG) was deployed within seven weeks.⁸ The TMG consisted of military and police personnel from New Zealand, Australia, Fiji and Vanuatu, and a contingent of Australian civilians.

In January 1998, the parties met again at Lincoln and agreed to a permanent ceasefire from 30 April 1998. On the latter date an Australian-led Peace Monitoring Group (PMG) replaced the TMG. The *Lincoln Agreement* also established a Peace Process Consultative Committee (PPCC) to facilitate ongoing negotiations, and secured a request from the PNG government to deploy a United Nations Observer Mission to Bougainville. For reasons of procedure and precedent, the Mission is known to the United Nations as a Political Office, but is known locally as the United Nations Observer Mission on Bougainville (UNOMB). The Director of UNOMB, Noel Sinclair, a UN diplomat from Guyana, chairs the PPCC.

Negotiation

In the three years following the establishment of the PMG, the parties met in a variety of configurations, on a number of occasions and made numerous agreements.⁹ Notably, difficult issues of substance were deferred and negotiations over process were used to establish, and re-establish, trust between the parties.¹⁰ In this sense, pre-negotiation was a necessary pre-cursor to negotiation over the core issues of substance, namely the PNG government's demands for weapons disposal and the Bougainville Revolutionary Army's (BRA) demands for independence.

Eventually, these issues were addressed and agreements were reached regarding a referendum on Bougainville's future status, with autonomy in the meantime, and weapons disposal. Agreements on these matters were signed in Kokopo (referendum, autonomy) and Buka (weapons disposal) in January and May 2001, respectively.

The three pillars of the peace process therefore became:

- weapons disposal
- autonomous government and a Bougainville constitution; and
- a referendum in 10-15 years on Bougainville's political future (including the option of independence).

The three pillars were linked by the *Bougainville Peace Agreement*, signed in Arawa in August 2001. As part of this agreement, the PNG government undertook to entrench provisions for autonomy and referendum in the PNG Constitution and an associated Organic Law.¹¹ Each of the pillars became contingent upon progress in the other. For example, the Bougainvillean Constitution (and subsequent autonomous government elections) could not come into effect until Stage 2 of the weapons disposal process (outlined below) had been verified as complete. Conversely, former combatants were reluctant to contain their

⁸ A Regan, 'Why a Neutral Peace Monitoring Force? The Bougainville Conflict and the Peace Process' in M Wehrner and D Denoon, *Without a Gun. Australians' Experiences Monitoring Peace in Bougainville, 1997-2001* (Pandanus Books, 2001) 21.

⁹ Such as the *Loloata Understanding* and the *Gateway Communique* in March and June 2000, respectively.

¹⁰ Regan, above n 1.

¹¹ In PNG law, Organic Laws define the Constitution, and are more entrenched than regular laws.

weapons until the PNG government had entrenched the autonomy and referendum provisions in the PNG Constitution.

A fundamental strength of the negotiation process was that much of the power in, and responsibility for, the peace process was devolved directly to the parties. The PPCC was used to good effect throughout that period. When this strength was ignored, the process stalled.¹²

Implementation

The weapons disposal process was itself a compromise. As early as 1999, the National government insisted on weapons disposal as part of a settlement for Bougainville. It also insisted on a common Bougainvillean negotiating position on this and other issues, such as autonomy/independence.¹³ By the beginning of 2001, following long negotiations on the full range of issues, the two Bougainvillean factions still did not agree on what to do with the weapons. The Bougainville Resistance Force (BRF) favoured immediate destruction (as did the National government), and the BRA favoured retaining the weapons.¹⁴

After much discussion and negotiation between the factions, agreement was finally reached and documented in the 'Rotokas Record' in May 2001. This weapons disposal plan called for a graduated containment of weapons, with a decision on their 'final fate' being deferred to the future. As with many breakthroughs on Bougainville, progress was made when the *process* was agreed, even though the actual *outcome* (in this case, weapons disposal) might be some way off.¹⁵

The weapons disposal plan was subsequently endorsed by the PPCC. The PPCC resolution was itself endorsed by the parties to the *Bougainville Peace Agreement* and included as Article 329 (sub-articles (6)-(8) extracted below with annotations):

Stage 1

6. Stage 1 will begin immediately...

(3) the National Government will be advised and take appropriate steps to arrange for Defence Force and Police Mobile Unit personnel to withdraw from that area;

(4) weapons will be handed in to BRA and BRF unit commanders who will store them securely in containers provided through the PPCC and sealed for the purposes of verification by UNOMB. ...

[Note: a unit consisted of 10-30 men. A 'Stage 1 Trunk' was a plastic trunk about 2m x 0.5m x 0.5m. The trunks were provided by New Zealand and could be padlocked (key held by unit commander) and sealed with a UN wire seal (which was tamper evident but provided no additional security).]

Stage 2

7. (a) After implementation of Stage 1 in any area, Stage 2 will begin in that area with the delivery of weapons to company commanders, who will place the weapons in secure containers at a small number of central locations.

¹² Evidenced by the quick dissociation of the parties from the *Matakana and Okaitaina Understanding* of 1999, which sought to establish a 'Special State Negotiator' to develop a peace package: Joint Standing Committee on Foreign Affairs, Defence and Trade, *Bougainville: The Peace Process and Beyond*, Commonwealth of Australia, Canberra, September 1999, 75.

¹³ See Downer, above n 3, 26-30.

¹⁴ Ibid 35-37.

¹⁵ At the time of writing, a decision on the final fate of the weapons had not yet been made.

(b) ...the weapons will be held in containers under UNOMB supervision and secured by two locks – with one key held by the relevant commander and the other held by UNOMB – pending a decision on the ultimate fate of the weapons.

(c) the Bills to amend the National Constitution will provide for the constitutional amendments to take effect on verification by the UNOMB that the weapons are in secure, double-locked containers under its supervision.

[Note: the Stage 2 containers were half-sized shipping containers called ‘connexes’ provided by Australia. They could be double padlocked and sealed with the tamper-evident UN seal, but provided little physical security.

The verification by the UNOMB (made by UNOMB Director Sinclair in July 2003) triggered the National Government legislation that amended the PNG Constitution to allow for Bougainvillean autonomy, as established by the Peace Agreement. Verification did not depend on the completion of Stage 3, a decision on the final fate of the weapons, which had not been made at the time of writing.]

Stage 3

8. (a) A decision on the final fate of the weapons should be made within 4 and a half months of the coming into effect of the constitutional amendments. ...

[Note: the Peace Agreement provides a mechanism to delay the elections if the time-frame for Stage 3 is not met.]

Following signature of the Peace Agreement, the focus shifted from negotiation to implementation. The first task was implementation of the three-stage weapons disposal process, which acted as an important trust-building exercise. Under Stage 1, factional leaders had to convince individual former combatants to part with weapons which, in many cases, amounted to their sole source of influence, wealth and even personal identity.

Once this psychological barrier was overcome, and as former combatants became accustomed to living without weapons, the small Stage 1 trunks (under the control of factional unit commanders) were centralised under United Nations observation (Stage 2). Successful completion of Stage 2 would trigger the constitutional amendments noted above and would begin a four-and-a-half month negotiation period to decide the final fate of the weapons (Stage 3).

In addition to breaking the dependence on arms by a majority of former combatants, the process fostered trust between the factions. It also facilitated the re-integration of former combatants into their communities and, in a number of cases, the re-emergence of more traditional forms of authority. Finally, the process provided the PNG government with a tangible indication that Bougainvilleans were committed to peace. After a slow start, and a number of setbacks, the weapons disposal process has been primarily successful. In the course of less than 18 months, more than 1900 weapons were registered. By the end of July 2003 enough of those¹⁶ had been contained under United Nations supervision for the UN to declare that Stage 2 of the process had come to an end, and that the weapons disposal plan had served its purpose.¹⁷

In parallel with the weapons disposal process, Bougainvilleans began to move slowly towards autonomy. Following significant efforts in the weapons disposal process in January 2002, and again in March 2002, the PNG Parliament unanimously voted to support constitutional amendments to allow for Bougainvillean autonomy. In September 2002, once weapons disposal was well underway, the Bougainville Constitutional Commission (BCC) was established to develop a draft constitution for the autonomous government. The

¹⁶ Over 90 per cent: Senator R Hill, ‘Bougainville Peace Process Enters New Phase’, (press release, 30 June 2003).

¹⁷ Noel Sinclair, statement to the United Nations Security Council (contained in UN press release SC7839 of 6 August 2003).

BCC again harnessed the strength of inclusiveness by including 25 members from across the full spectrum of Bougainvillean society.¹⁸

By January 2003, the BCC had undertaken a wide-reaching series of consultations across Bougainville and had developed a draft constitution for the autonomous government. The PNG government then formed a Bipartisan Parliamentary Committee to consider the draft, contingent upon satisfaction of Stage 2 of the weapons disposal plan.¹⁹

In recent months, efforts have also been made to facilitate the move towards autonomy. In February 2003, the parties established an Interim Joint Supervisory Body (IJSB), as a mechanism to develop working relationships between Bougainville and the PNG government while establishing the agreed arrangements for autonomy, and the processes for making them work.²⁰ One of its first tasks will be to develop plans for the establishment of a viable law and order system.

The current situation

At the time of writing, a number of issues remain outstanding. Although Stage 2 was verified by the UNOMB in July 2003²¹, the parties are yet to reach a decision on Stage 3, the ultimate fate of the weapons. Although negotiations have started through the IJSB, much work needs to be done to develop and implement autonomy, including short and long-term solutions to law and order problems. Finally, Francis Ona and the Me'ekamui Defence Force have retained their persistent position of staying outside the peace process, without seeking to undermine it.²² While many parties to the peace process have made attempts to engage Ona, he remains outside the peace process. His engagement may well be an issue for the autonomous government.

Structure and operations of the Peace Monitoring Group

The Legal Framework

The PMG operated within this dynamic context. Although the original requests for the TMG and the PMG came from the *Burnham Truce* and the *Lincoln Agreement*, respectively, the formal request for the Groups came from the PNG government. The *Arawa Annex* to the *Lincoln Agreement* set out the mandate proposed for the PMG by the parties to the Ceasefire Agreement.

This was closely reflected in Article 4 of the *Protocol Concerning the Peace Monitoring Group made pursuant to the Agreement between Papua New Guinea, Australia, Fiji, New Zealand and Vanuatu Concerning the Neutral Truce Monitoring Group for Bougainville done at Port Moresby on 5 December*

¹⁸ The BCC included representatives from across society, including traditional leaders, women, the former combatant factions, churches, and trade unions.

¹⁹ Sir Peter Barter, Minister for Inter-Government Relations and Bougainville Affairs, 'Bipartisan National Committee on Bougainville Constitution to Meet', (press release, 17 March 2003).

²⁰ Sir Peter Barter, Minister for Inter-Government Relations and Bougainville Affairs, *Bougainville Update – Ministerial Visit, The Peace Process, and Development of the Bougainville Constitution*, Ministerial Statement to PNG Parliament, 6 March 2003.

²¹ Above n 17.

²² As Andrew Ladley put it, Ona's view is that 'he will not interfere with a peace process although he doesn't fully trust it': interview with Chris Laidlaw, *Sunday Morning*, Radio New Zealand, 6 July 2003.

1997, which contained the formal mandate for the PMG.²³

The mandate of the Group shall be to:

- (a) monitor and report on the compliance of the parties involved in the Bougainville peace process to all aspects of the ceasefire;
- (b) promote and instil confidence in the peace process through its presence, good offices and interaction with people in Bougainville;
- (c) provide people in Bougainville with information about the ceasefire and other aspects of the peace process;
- (d) provide such assistance in implementation of the *Lincoln Agreement* as the parties to the *Lincoln Agreement* and the Parties to this Protocol may mutually determine and available resources allow; and
- (e) such other matters as may be mutually determined by the parties to the *Lincoln Agreement* and the Parties to this Protocol which will assist with the democratic resolution of the situation.

A key success of the PMG was its ability to evolve with the changing demands of the peace process. From a height of 300 personnel located at six permanent sites, the PMG was reduced to 195 personnel and, following the signature of the *Bougainville Peace Agreement*, 75 personnel in three permanent locations. In late 2001, when it became clear that logistical support was needed to encourage weapons disposal, nine weapons disposal experts were attached to the PMG to assist the UNOMB in coordinating that process. Although not explicitly stated as a PMG task, weapons disposal was accommodated within the broad mandate following the agreement of all contributing countries.

An integrated force

Military doctrine refers to ‘combined’ and ‘joint’ operations. A combined operation has personnel from more than one country. A joint operation has personnel from more than one military service (eg, Army and Navy). The PMG was both of these, having personnel from four countries and various services of each country’s military. However, the PMG also had an integrated civilian component, with personnel from the Australian Public Service operating in headquarters and field positions.

For example, the Command Group in late 2002 was made up of the Commander (an Australian Army Brigadier), the Chief Negotiator (a DFAT officer), the Chief of Staff (an Australian Army Lt Colonel) and the Chief of Operations (or ‘X-3’, a New Zealand Army Lt Colonel). The Command Group in late 2001 included the same core, along with another civilian, and a handful of Major and Captain level officers.

A typical field patrol team would be led by an Army Captain (usually but not always from Australia or New Zealand), and have several Australian and New Zealand soldiers, a Fijian or Ni-Vanuatu military or police member (essential for cultural and linguistic interaction) and an Australian ‘civilian monitor’. The civilian monitor was an integral component of the team, expected to act within the ‘chain of command’.

The presence of civilians in the headquarters and in the field teams gave a significant boost to the capability of the PMG. In particular, it provided a broader spectrum of analytical capacity (including policy, economic and cultural analytical experience) than was typically available from military personnel, whose training was in other skills. This meant that PMG strategies could be developed based on a military assessment of the factions *and* a broader assessment of the political, social and economic dynamics of Bougainvillean society.

²³ [1998] ATS 12.

Civilian monitors brought to the PMG the important ability to engage Bougainvillean ‘civilians’ more successfully than soldiers, who through no fault of their own sometimes intimidated Bougainvilleans who were not former combatants. Many women, for example, felt uncomfortable dealing with male soldiers, because of the various bad memories they held of PNG Defence Force soldiers. Of course, this was no reflection on PMG soldiers, simply an understandable wariness of military personnel in a post-conflict environment.

At the same time, many PMG soldiers were inclined to be more comfortable with former combatants, so civilian monitors had an important role to play in engaging chiefs/elders, women, teachers, district managers and other ‘non-former combatants’. Important information and perspectives were obtained through this process of civilian-civilian liaison, often more than could be gleaned from former combatants. Finally, these civilian relationships were very important in conveying information to the Bougainvillean community. Former combatants could not always be relied upon to pass information about the peace process to the broader community, where women’s leaders, teachers or District Managers were more diligent about passing on news.

Integration of this kind also presented challenges. Military and civilian work practices do not always mesh seamlessly, and close co-operation can be a ‘culture-shock’ for military and civilians alike. Civilian staff required extra training in skills that military personnel already possess (such as radio operation, first aid, or cross-country driving). Managing the interaction of so many different experiences and professional backgrounds was always a challenge in an operational environment like the PMG.

At its most effective, the integrated PMG worked very well, with seamless co-operation between military and civilian staff at the headquarters/planning level and at the field operational level. Excellent results could be achieved, taking advantage of the different skills and perspectives available among military and civilian staff. At other times, and generally less frequently, it would be true to say that the clash of cultures could create palpable and genuine obstacles to efficient and effective operations.

An unarmed force

The PMG is probably unique in having been a completely unarmed military force. Many UN peacekeeping forces are very lightly armed, but the PMG had no weapons at all. Its security was derived completely from its efforts to build the trust of Bougainvilleans. Neutrality was an important factor in building this trust, as noted below.

The absence of weapons helped the PMG demonstrate that it was not an invasion force. This was important early on in the deployment to establish the PMG’s identity as observers rather than enforcers of the ceasefire. It was important throughout the deployment to counter rumours that the PMG was leading a subsequent Australian or UN-led effort to take over Bougainville once weapons disposal was complete. Most Bougainvilleans did not believe these rumours precisely because they could see the PMG was nothing of the sort.

While many military personnel had to adjust to the unusual nature of an unarmed deployment, the absence of weapons meant that extra effort was devoted to managing PMG security. The TMG was originally deployed on the basis of a security guarantee by the parties, including the two Bougainville factions.²⁴ This arrangement informally flowed on to the PMG deployment, with factions regulating each other (and potentially disgruntled individuals or other groups) and with the broader community regulating the factions.

²⁴ Article 1(c), *Cairns Commitment on Implementation of the Agreement Concerning the Neutral Regional Truce Monitoring Group (TMG) for Bougainville*, Cairns, Australia, 24 November 1997.

The PMG concentrated carefully on maintaining its neutrality and on building relationships of trust with the factions and the Bougainvillean community. This work contributed to the PMG's own security, by making the PMG a well-respected entity within Bougainville. Where disputes arose, they were dealt with openly and fairly, to avoid resentment developing towards the PMG. Many times, if an unreasonable claim was made about the PMG, the broader community would resolve the matter. This community support was a direct result of the relationship building efforts by PMG personnel.

As an unarmed observer, the PMG also demonstrated to the Bougainvillean parties and community that weapons were not required to resolve differences between Bougainvilleans themselves and between Bougainville and the National government. It communicated to Bougainvilleans that their society was now safe enough that PMG personnel felt secure without weapons.

Of course, the PMG was able to be unarmed because the post-conflict environment on Bougainville was one where most Bougainvilleans could see that there was no advantage to be gained by continued violence. Indeed, the view that more could be gained by fighting was one reason earlier peace initiatives failed. Once the society itself was tired of violence, it was important that the PMG was unarmed to consolidate the perception that weapons and violence had no place on the island.

A neutral external force

The success of the PMG showed the positive role that external actors can play in facilitating and encouraging negotiations. The PMG provided logistical support to vital peace meetings, effectively managed information to prevent harmful rumours and, through its painstakingly neutral good offices, kept vital lines of communication open between the parties. The PMG's security was underwritten by its community acceptance, and it was ultimately successful in its operations because it was invited and trusted by the leaders and people of Bougainville.

Once involved in the process, external actors can use their involvement to good effect. The announcement of the PMG's withdrawal was a recent, and striking, example. The announcement in February 2003 spurred renewed efforts from all parties, brought home the realisation that the peace process would soon need to become 'self-sustaining',²⁵ and once again shifted the focus from process to outcomes. In the space of just over four months, Stage 2 was brought close to a conclusion, factional meetings were held to discuss Stage 3, a PNG Bipartisan Parliamentary Committee was established to receive the draft Bougainville Constitution, the final contingent of PNG Defence Force soldiers were withdrawn, and the IJSB was established to facilitate moves towards autonomy.

Key lessons learnt

Legal agreements as enablers: flexibility and adaptability are vital

The implementation of the *Bougainville Peace Agreement* demonstrated the way in which legal agreements can be used to shape operations. The peace agreement entwined weapons disposal, autonomy and a referendum so closely as to make the achievement of one goal dependent upon another. In this sense, the peace agreement was an enabler, and a text to which parties could refer in order to stimulate action from other parties. It was important, though, to retain a sense of the broader goals by maintaining flexibility throughout the process of implementation. This helped avoid the paradox of the strict legal text restricting its own practical implementation.

This was particularly so in the dynamic situation that existed on Bougainville, compounded by the fluid nature of the PMG's operations. A case in point was the way in which Stage 2 of the weapons disposal

²⁵ Barter, above n 20.

process was implemented (see Box 1). The agreed Stage was interpreted broadly to overcome serious practical concerns about the security of the weapons and the integrity of the process.

Although not precisely what was in mind when the weapons disposal process was designed, the modification worked to resolve a problem not foreseen when the process was designed. Importantly, it more closely reflected the local structures that had developed during the weapons disposal process, while still fitting into the broader design parameters of the weapons disposal process.

Box 1: Modification of Stage 2 of the Weapons Disposal Agreement

Under the *Bougainville Peace Agreement*, weapons contained under Stage 1 were to be delivered to mid-ranking former combatant commanders who would then ‘place them in secure containers in a small number of central locations’ (Stage 2).²⁶ At the time of negotiation, Stage 2 was envisaged as meaning a small number of shipping containers (‘connexes’) located in central locations across the province. To this end Australia donated 30 connexes for the 12 weapons disposal sub-committee areas, allowing one per faction in each district and a number of spares for more sensitive regions.

In practice, though, these connexes were insecure. Two connexes were broken into as a result of localised disputes. This was followed by a small number of break-ins by hardened criminals which, in turn, led to more moderate former combatants removing their weapons from containment to prevent them being stolen. Former combatant factions, the National government, and the broader Bougainvillean community rapidly lost confidence in the practice of using connexes for Stage 2 containment.

All of a sudden the focus of the peace process had shifted from completing Stage 2 to preventing further regression. To allay these concerns, and reinvigorate the weapons disposal process, the PMG developed the notion of ‘Stage 2 (mod)’ in which Stage 1 trunks were enhanced and the weapons that they contained were deemed to be at Stage 2.

Under Stage 2 (mod), weapons in Stage 1 trunks were brought to Stage 2 by sealing and double-locking the original Stage 1 trunks. Both keys were then handed to the UN (rather than one key being held by a factional commander as was done with Stage 2 connexes). For extra security, firing pins were removed and stored separately to the weapons, in the custody of factional commanders. The phrase ‘a small number of central locations’ was interpreted as meaning a small number of central locations *within* the smaller, existing Weapons Disposal Sub-Committee districts, rather than across Bougainville itself.

This process greatly reduced fears about the security of weapons containers and encouraged re-containment, particularly in areas where former combatants had been reluctant to contain their weapons. Within a small number of weeks the number of weapons contained had recovered to, and risen above, the level immediately prior to the first break-in.

Organic consensus

A key to success of the Bougainville peace process has been devolution of ownership of the solutions to the parties themselves. Despite frustrations for individual peace monitors, and policy makers in Canberra and Wellington, at the pace of progress on Bougainville, consensual solutions reached without external influence were most likely to gain widespread acceptance. Although personnel of the PMG encouraged, and even suggested, solutions, they never proffered them as their own. The most successful suggestions were those raised as hypotheticals, which could then be adopted and adapted by Bougainvilleans themselves.

²⁶ Article 329(7)(a), extracted above.

The most successful solutions also ensured that the community was kept involved in their development and implementation. Once agreements were reached between high-level leaders, for example, awareness campaigns were essential to ensure that they were effectively implemented. The same was true of key targets in the peace process. Externally imposed deadlines were invariably missed, while ‘home grown’ targets received wider support.

Throughout its deployment, the PMG vacillated between focusing on leaders and focusing on the communities from which these leaders were sourced. In particular, there was a tendency during the weapons disposal process to focus solely on former combatants – as individuals and as a group. This sometimes left important sectors of the community feeling isolated and disengaged. The PMG was most successful when its operations included engagement with women, chiefs, elders and churches to encourage organic pressure on former combatants to disarm. In other words, it was most successful when it filtered its external pressure through existing community groups to develop what we called ‘organic pressure’.

Relationships and credibility: maintaining momentum

Central to the strategy of fostering organic pressure was the need to build and foster personal relationships and credibility. As noted above, strong relationships underwrote the PMG’s safety and security. Such relationships also facilitated smooth negotiations and implementation. Without strong personal relationships, negotiations faltered and legal agreements remained unimplemented. Without credibility, individual members of the PMG could become ineffective.

This was even more critical in a high turnover organisation such as the PMG. With a number of contingents arriving at different times,²⁷ it was theoretically possible for the PMG to retain some corporate knowledge. In practice, though, key appointments sometimes rotated at the same time, undermining continuity and credibility. Hard won trust and confidence was often lost. Relationships often needed to be built from scratch.

Conversely, the rotation of key appointments sometimes allowed for a much-needed change in direction. Cliques and divisions within the PMG could be mended. Operational dead-ends could be discarded for new ideas. Relationships with key Bougainvilleans could be re-built. On rare occasions where a key relationship was not functioning properly, rotation meant that any damage was short-term only.

Ideally, in high-turnover situations, the rotation of personnel involved in maintaining personal relationships should be staggered. In practice, this is not always possible. Ultimately, the success or otherwise of the PMG boiled down to the individual personalities and interpersonal skills of its personnel.

Process as reconciliation

It is a truism that reconciliation is a necessary pre-condition for lasting peace in post-conflict situations. In Bougainville, peace and reconciliation have progressed hand-in-hand. The long and arduous role of pre-negotiation and negotiation has both led and followed reconciliation. Indeed, the peace agreement specifies the importance of reconciliation²⁸, and holds itself up as a symbol of progress in reconciliation²⁹.

There have been no Rwanda or Yugoslavia-style tribunals, nor have there been major calls to establish them. To the contrary, parties have agreed to put the past behind them, having reached a binding agreement

²⁷ Australian civilians were generally deployed for three-month rotations; Australian and New Zealand military for four-month rotations; Fijian and Ni-Vanuatu for six-month rotations; Commanders for six-month rotations; and Chief Negotiators for three to four-month rotations. These rarely coincided.

²⁸ *Bougainville Peace Agreement*, Articles 337-343.

²⁹ *Ibid* Article 341.

on amnesty and pardon for all crisis-related activities.³⁰ Reconciliation has been left to long-standing traditional Melanesian mechanisms under which, once reached, reconciliation is generally lasting.³¹

Although the peace process has progressed significantly since 1997, with many significant issues of substance addressed, parties still revert to negotiations over process. Indeed, processes are as important in developing trust as they are in developing solutions.

Managing defactionalisation

It is important for a post-conflict situation such as Bougainville to move beyond factional identification. While the factions have not formally disbanded, as they eventually will in accordance with the *Bougainville Peace Agreement*,³² this process has been largely successful on Bougainville. Practical (if not formal and final) defactionalisation has been successful due to the personal relationships built between key leaders.

Common peace-building exercises, such as traveling weapons disposal awareness campaigns, have helped foster and rebuild pre-crisis affiliations between high-level factional leaders. By mid 2002, the factional leaders frequently spoke with one voice, including at PPCC meetings, and senior BRA and BRF leaders would work together to persuade former combatants of both factions to disarm. Communities have begun to declare themselves free from the crisis, and beyond factional affiliations.

There is a danger, though, that this process may swing too far in the other direction. If not carefully managed, defactionalisation carries the danger that a new ‘former combatant’ identification may develop, set apart from the rest of the community. Former combatants may seek to write their role into civilian constitutions, or to establish niches within the post-conflict order. On this point, Bougainville is a work in progress.

In any post-conflict situation, the ‘former combatant’ identity needs to be managed very carefully. Former combatants are a necessary driver of a peace process in the transition from conflict to peace, but they need to be absorbed back into broader society before they become a brake on transition, or an unnecessary link to the past conflict.

Postscript

The PMG ceased operations on 30 June 2003, and withdrew on 23 August. When announcing their decision to withdraw both Australia and New Zealand affirmed that they would remain appropriately engaged on Bougainville through their aid programs. The focus, though, would shift towards support for Bougainville’s economic development, service delivery and the establishment of a functioning autonomous government.³³

On 12 June 2003, Australia and New Zealand announced that their immediate post-PMG engagement in Bougainville would be a small civilian successor, the Bougainville Transition Team (BTT). This

³⁰ Ibid Article 331 - as defined by a further agreement. Former PNG Defence Force Commander Jerry Singirok is likely to become the first person to utilize this agreement: ABC Radio Australia News, ‘Court test for Bougainville amnesty’, 10 June 2003.

³¹ A Regan, Submission Number 30 to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry, n 12.

³² Article 344(b).

³³ HE J Dauth, Ambassador and Permanent Representative of Australia to the United Nations, *Statement on Bougainville to the UN Security Council*, 28 March 2003 <www.australiaun.org/Statements/ UNGA_57/ 030328_scbougainville.htm>.

announcement followed consultation with the PNG government and requests from all parties to the peace process for a continued regional presence beyond the PMG.³⁴

The BTT's deployment was formalised by the signature of a treaty-level agreement in Sydney on 30 June 2003.³⁵ Although considerably smaller, and civilian-led, the BTT will take over some of the PMG's key functions. In particular the BTT will seek to maintain confidence in the peace process and oversee a transition from that process towards autonomous government.³⁶ Among its duties, the BTT will maintain good offices, liaise with all parties and communities, facilitate key meetings, and continue the publication of the PMG's regular newsletter. Ultimately, the goal is to encourage the peace process to be truly self-sustaining, and for Bougainvilleans themselves to complete the transition from conflict to peace.

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³⁴ Alexander Downer, 'Bougainville Transition Team', (press release, 12 June 2003).

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³⁶ Downer, above n 34.

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Unilateralism vs Multilateralism: Is there hope for international institutions?

Andrew Byrnes*

International lawyers – or at least academic international lawyers – are regularly beset by a sense of professional existential angst. Having reduced the assault by Austinian positivism on international law as law to a challenge easily disposed of in the classroom, we are continually haunted by the demons of realism, by the nagging fear that perhaps the realists' assertion of the irrelevance of international law when the chips are down is really right, and that our attempts to talk of the moderating and channelling influence of international law are, at bottom, a rather pathetic attempt to assert a minor role from the very margins of power politics.

This sense of disposability and the fungibility of international lawyers and their advice is nicely underlined by the story told of Madeleine Albright, who when Secretary of State was told by her British counterpart, Robin Cook, that he was having problems with his lawyers over using force against Yugoslavia without the approval of the Security Council. Albright is said to have responded, “Get new lawyers”.

This deep insecurity is brought to the surface nowhere more clearly perhaps than when we grapple with the international system and its efforts to control the use of force – reflected in the anguished titles of seminars and conferences on the subject punctuated with question marks and references to the (ir)relevance of international law. It also emerges whenever there are significant challenges to what José Alvarez has called our “shared secular religion” – multilateralism – and its associated core belief that the “international is to be preferred over the national, integration over sovereignty”, and that “multilateral approaches, accompanied by institutionalized dispute settlement, are the most enlightened responses to modern dilemmas”.¹

This, of course, is the situation in which we apparently find ourselves now.² We see a US administration that has charted a firm course in some fields away from what some commentators have called “principled multilateralism” to a form of “à la carte multilateralism”,³ “instrumental multilateralism”,⁴ or “effective multilateralism”⁵ as a means of pursuing its perceived national goals.⁶ We are told by international lawyers such as Michael Glennon that the multilateral institutional “caravan of humanity has finally ground to a halt”,⁷ while others suggest that the edifice of the system of collective security under the United Nations Charter has come tumbling down, and President George W Bush warns us that, if the United Nations does

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¹ José E Alvarez, “Multilateralism and Its Discontents” (2000) 11 *European Journal of International Law* 393, 394.

² See, generally, Pierre-Marie Dupuy, “The Place and Role of Unilateralism in Contemporary International Law” (2000) 11 *European Journal of International Law* 19.

³ The phrase is attributed to Richard Haass, formerly Director of Policy Planning in the US State Department: Thom Shanker, “White House Says the U.S. Is Not a Loner, Just Choosy”, *New York Times*, 31 July 2001.

⁴ The phrase is that of Robert Kagan, “Multilateralism, American Style”, *Washington Post*, 13 September 2002.

⁵ Stephen G Rademaker (US Assistant Secretary of State for Arms Control), “The Commitment of the United States of Effective Multilateralism”, Remarks to Conference on Disarmament, Geneva, 12 February 2003.

⁶ There is also some discussion in the literature over the definition of “multilateralism” for various purposes, and also whether actions which may be characterised as multilateral are in fact unilateral in effect under the leadership of a powerful state. See, generally, Christine Chinkin, “The State That Acts Alone: Bully, Good Samaritan or Iconoclast?” (2000) 11 *European Journal of International Law* 31.

⁷ Michael J Glennon, “Why the Security Council Failed” *Foreign Affairs*, May/June 2003.

not respond to challenges to the international order posed by weapons of mass destruction and terrorism, it will “fade into history as an ineffective, irrelevant debating society”.⁸

I wish to offer a few thoughts on these perceptions and the sense of panic they sometimes seem to induce. We certainly face challenges to the rule of law internationally and to efforts to reach solutions to critical issues through consensus or through the major multilateral institution of the United Nations, a process made more difficult by the approach of the current US administration in foreign policy (though this is not the only impediment to the achievement of those goals). Yet, at the same time, it is important that we not forget history, or politics, or the contribution of international law, by either being excessively pessimistic in our assessment of the current state of international law and politics, or persuading ourselves that the past was so much better than perhaps it was. Nor should we ignore the limitations of multilateral institutions.

First of all, the events of the last few years do not constitute either the end of history or the beginning of a new history, notwithstanding the changes in power alignments and international practices that are under way. There is a real temptation for every generation to see the events that occur in its time as truly epochal and to lose sight of historical advances and regressions. Some epochal events *do* take place, but often the “parochialism of the present”⁹ may seduce one into overstating the case.

In this regard it is important to remind ourselves, as Glennon does, that the UN Charter's restrictions on the use of force have always been under strain, and that countries such as the US have frequently resorted to unilateral uses of force that are cloaked in dubious assertions of legality – Grenada, Panama, Nicaragua, Vietnam are just some of the names that come to mind – and the US is not the only state that has engaged in such activity. To romanticise the Charter's system of collective security as a superbly effective, functioning system that has suddenly collapsed and is now rendered totally irrelevant is to forget not just the chequered history of the system of collective security and its failures both to prevent the use of force and to mobilise and legitimate the use of force in compelling circumstances, but also the contributions the UN Security Council *has* made to international peace and security, as evidenced by the plethora of UN peacekeeping missions in different parts of the globe.¹⁰ At the same time we must also recognise that the current US administration has put certain aspects of the international system under stress and laid down a clear challenge to collective efforts of others.

Secondly, there is a danger of fetishising issues relating to the use of force and the Charter as the *only* indicators of health or functioning of the international legal system, or indeed as the only major problems confronting today's world. Of course, these issues are vitally important and, if mishandled, might in the

⁸ Remarks by the President at Naval Station Mayport, Jacksonville, Florida, 13 February 2003, <http://www.whitehouse.gov/news/releases/2003/02/iraq/20030213-3.html> (though it should be pointed out that President Bush expressed the view that he did not think that “free nations” would allow this to happen).

⁹ Owen Harries describes this phrase (which he attributes to the philosopher John Anderson) in the context of responses to 11 September 2001 as indicating “a condition resulting from a combination of an ignorance of history and an egotistical insistence on exaggerating the importance of events that more or less directly involve oneself”. Owen Harries, “The Return to Realism” in Imre Salusinsky and Gregory Melliush (eds), *Blaming Ourselves: September 11 and the agony of the left* (Duffy & Snellgrove, Sydney, 2002) 23, 24.

¹⁰ By March 2003 there had been 55 UN peacekeeping operations since 1948, 13 of which were still in the field: <http://www.un.org/Depts/dpko/dpko/ques.htm> (visited 12 October 2003). Of course, the record has been mixed, with some significant failures as well as a number of successes: Robert Lane Greene, “Blue Man Group” *New Republic*, 27 August 2003, <http://www.globalpolicy.org/security/peacekpg/general/2003/0827blueman.htm> (visited 12 October 2003).

short – or longer term have extremely serious consequences, but can we really share the position of Prime Minister Howard in a speech given on 1 July 2003:¹¹

Today the most fundamental challenge facing Australia and the world at large ... is how to protect our citizens and our society from a shadowy enemy, who is closed to negotiation, who has no fixed base and no transparent political structure.

Whether one best addresses these important security issues through multilateral, regional or bilateral approaches (or a combination of all three), it seems a curiously myopic view of the world's problems – given issues of hunger, water, environmental degradation, disease, violence and other forms of repression faced by millions of our fellow human beings – and the contribution and potential of international cooperation and multilateral institutions to responding to these problems.

To focus on Chapter VII, and its failure, and to impugn multilateralism generally is to neglect the enormous amount of work that has been done through multilateral institutions which has contributed to the betterment of people's lives. Our assessment of the benefits of a commitment to multilateralism must not be distorted by one, albeit extremely important, area. One only needs to point to the SARS epidemic in early 2003, in the response to which the World Health Organisation played a very important role and one that could not have been so effectively played by individual states or by an ad hoc coalition.

Of course, it is with exactly this pragmatic approach that governments have proceeded in many areas – even those governments which have been critical of multilateral institutions and their performance in responding to particular issues. Even the “unilateral” US participates – and not always grudgingly – In many areas of international cooperation, such as the World Trade Organisation, once again in the work of UNESCO (from which it had withdrawn in 1984),¹² and other areas, notwithstanding its rejection of others (such as the International Criminal Court, the Kyoto Protocol, and so on). This is no profound insight – those engaged in the practice of diplomacy and international relations see this on a daily basis – but it is worth reminding ourselves of the essential pragmatism of much foreign policy and diplomacy of considerable practical importance.

Thirdly, the dangers of rushing to judgment on such events are real, tempting though it may be to do so. Similarly dangerous is the acceptance of the rhetoric of governments at face value. The immediate aftermath of the war on Iraq illustrates this. While the rhetoric was clear and the positions about the legality of the war and the (ir)relevance of the United Nations were stridently put forward, the practicalities of dealing with an occupied Iraq and an evident concern on the part of some of those who split over the war to get back to some form of modus operandi, suggests that, significant though the Iraq disagreement was, it is unlikely to be a final dramatic rupture in the United Nations governance structure. The jockeying in the Security Council over the exemption of peacekeepers from the jurisdiction of the ICC and the broader tug of war over the ICC can equally be seen as an engagement and struggle over the power and meaning of a new institutional entity rather than a decisive and determined break with the international system.

Furthermore, governments change in both the US and Australia, so the assumption that the course is set irretrievably may be unfounded. There are articulate voices, such as Joseph Nye's – heeded in some quarters – that even a hyperpower cannot go it alone in every area and that the unilateral deployment of military economic and political power cannot achieve every national objective, and may backfire.¹³ The

¹¹ Address by the Prime Minister, Mr John Howard to the Sydney Institute, 1 July 2003, <http://www.pm.gov.au/news/speeches/speech323.html> (visited 12 October 2003).

¹² The decision to rejoin UNESCO was formally announced by President Bush in his address to the General Assembly of the United Nations on 12 September 2002: UN Doc A/57/PV.2, at 6 (2002).

¹³ Joseph S Nye, “Unilateralism vs. Multilateralism: America Can't Go It Alone”, *International Herald Tribune*, 13 June 2002; Joseph S Nye, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (Oxford University Press, NY, 2002).

United States' engagement with multilateral fora in various areas – even its decision to rejoin UNESCO – reflect this hard-headed and pragmatic assessment. At the same time, it needs to be remembered that there is a long history of mixed unilateral and multilateral approaches in United States policy, and that even US multilateralism may be different from that of other countries.¹⁴ And international law is not all (or only) about what the US is and what it does.

Fourthly, it may sometimes be the case that a laudable goal *can* be most effectively pursued by a unilateral measure or outside a universal multilateral forum. Unilateral acts by states which result in the development of international law or precipitate an agreement or positive development are not uncommon in international relations – and are a tactic which many countries have employed when it corresponds to their own assessment of their national interest. In other cases the universal forum may simply not be an appropriate one, or it may be deadlocked over issues which are not germane to the substantive issues involved in any given situation. The Solomon Islands is a good illustration of this – being a situation the UN would not have been interested in taking on, or unable for political reasons to do so – yet which is being dealt with through a form of regional “multilateralism” which observes the niceties of international legality and which enjoys a considerable measure of political legitimacy.¹⁵

To be multilateralist or not to be multilateralist?

Most countries engage in a combination of multilateral and non-multilateral actions, though some states may be more explicitly and assertively unilateral, a stance that may result from a variety of factors including their assessment of the short and long-term benefits of that posture, internal political demands, their (perception of their) power relative to other states, their assessment of the importance of the issue and the possibility of eventually bringing other countries along with them, among many other factors.¹⁶

The attractions of non-multilateral approaches have seemed compelling to administrations in the US and Australia over a number of issues recently, in particular the war against Iraq. However, more generally, one can see a number of levels at which a government should evaluate whether a unilateral approach will be in the national interest of the state (the standard most governments apply).

The Australian Foreign Minister, Alexander Downer, has sought to portray some of these actions as part of a no-nonsense, pragmatic approach to foreign policy.¹⁷

We look for outcomes not just empty form and posturing.

We cannot afford to be complacent and cannot afford to spend time and effort on processes and institutions that are marginal to our interests...

¹⁴ Kagan, for example, argues that “Most Europeans believe in what might be called principled multilateralism. In this view, gaining U.N. Security Council approval is not a means to an end but an end in itself, the sine qua non for establishing an international legal order. ... Not many Americans would agree. Most Americans are not principled multilateralists. They are instrumental multilateralists. Yes, they want to win international support. They like allies, and they like approval for their actions. But the core of the American multilateralist argument is pragmatic. As Baker puts it, ‘the costs will be much greater, as will the political risks, both domestic and international, if we end up going it alone.’ This would seem unarguable. But Baker’s multilateralism is a cost-benefit analysis, not a principled commitment to multilateral action as the cornerstone of world order.” Kagan, above n 4.

¹⁵ For a review of the broader arguments against an uncritical adherence to multilateralism and the importance of lower level approaches in particular fields such as human rights, see Alvarez, above n 1, 396-403.

¹⁶ For a discussion of the multilateralist/unilateralist outlooks in the context of the nuclear non-proliferation regimes, see Jayantha Dhanapala, “Multilateralism and the Future of the Global Nuclear Nonproliferation Regime” (Fall 2001) *The Nonproliferation Review* 1, 3-4.

¹⁷ Alexander Downer, “Security in an Unstable World”, Address to the National Press Club, Canberra, 26 June 2003.

He calls for “practical solutions” to the urgent issues facing Australia and the world:

We also need to ensure that our actions are focused on achieving practical outcomes that advance our national interests.

The Government, through its actions on Iraq and weapons of mass destruction, has signalled that we are prepared to take the hard decisions to enhance our security.

Some multilateral institutions will remain important to our interests.

But increasingly multilateralism is a synonym for an ineffective and unfocused policy involving internationalism of the lowest common denominator.

Multilateral institutions need to become more results oriented if they are to serve the interests of the international community, including Australia.

A state, which is proposing to take an action outside an established multilateral forum with responsibility for regulating an issue, should consider at least the following two questions (even if its focus is a narrow conception of the national interest):

- (1) Does a “lower level” multilateralist/non-multilateral approach achieve the immediate goal and a sustainable settlement in a manner which is consistent with international law and politically legitimate? Does it solve the problem, or at least make sense in cost-benefit terms (however one might make that calculation)?¹⁸
- (2) Even if the answer to the first question is yes, an equally critical question is whether a shift from a “principled multilateralism” to an “effective” or “à la carte multilateralism” (that is, picking and choosing in relation to each case whether to follow a multilateral route) impedes solutions to other issues and leads to a loss of benefits in other contexts – does the international cherry-picker undermine its position and persuasiveness in multilateral fora when it *does* want to use them because its lack of commitment to the principle undermines the advantages of status and credibility on which a good international citizen may be able to draw.

These issues, especially the second one, are of particular importance for a small or middle-sized power such as Australia, for which a multilateralist approach is likely to bring benefits, an assessment given effect to by our pragmatic/principled engagement in many multilateral fora, from the World Trade Organisation, the Law of the Sea Convention, and the International Criminal Court. Notwithstanding the close symmetry of US and Australian positions on some issues (including the Iraq war) there are other issues on which Australia has taken a contrasting multilateral approach (for example, the International Criminal Court). The US request to enter into a bilateral immunity agreement is something of a litmus test for Australia’s commitment to multilateralism in this field, particularly in light of the strong Australian support during the drafting of the ICC Statute, and one hopes that the request will be declined or that at least the discussions over an agreement will continue indefinitely.

¹⁸ Unilateral actions may in the long-term not be particularly successful in bringing about change. For example, if one were to look at the aftermath of the action taken against Iraq in 2003, then it is somewhat ironic that a cooperative multilateral approach of some sort seems essential to deal with the post-war situation, though this result has clearly been made more difficult by the way in which the multilateral process unfolded before and during the war.

The debate over unilateralism vs multilateralism generates a dichotomy and oversimplifies the complexities of international law and politics. No state – not even the United States – really has a choice of being one or the other. As José Alvarez comments:¹⁹

The question – is unilateralism or multilateralism a good thing? – cannot be answered in the abstract. It depends – and not always on whether existing international rules sanction the unilateral response or permit the ostensible multilateral action. Some multilateral responses, fully sanctioned by the law, may not be wise, may cause untoward suffering for large numbers of human beings, or may serve to undermine the rule of law itself ... On the other hand, some unilateral responses, as most recently the United States' and its allies' actions in Kosovo, may be needed, even if illegal. Yet, other action, such as the United States' refusal to sign the ICC and Landmines Conventions, may be perfectly legal but imprudent – unless one believes, in the ICC case, that the United States' decision is a principled attempt to protect non-party rights under traditional Vienna Convention rules, or in the case of landmines that US abstention is vital to its legitimate security interests. Yet another set of unilateral actions, such as the Europeans' refusal to follow through with WTO panel decisions or the United States' refusal to pay its UN dues, seem both illegal and imprudent by any measure.

Conclusion

Although there are some depressing features of recent developments in the international system, arguably this is part of the ebb and flow of international relations and the role that international law plays. While there are plainly difficulties with the effectiveness and responsiveness of multilateral organisations, they have also contributed enormously to addressing global problems. Not only can a commitment to principled multilateralism serve our national interest directly in many cases, but it frequently brings benefits to the broader international community as well. There are many obvious benefits that flow from a strong commitment to multilateralism, yet it is not an act of apostasy each time we critically assess a multilateral forum or option and decide that it may be appropriate to address an issue through a non-multilateral approach. However, when doing so, it is important that our result-orientation and immediate effectiveness test do not undermine our credibility, status and effectiveness in other contexts in the long-term.

¹⁹ Alvarez, above n 1, 403.