

ANZSIL

*Australian and New Zealand Society
of International Law*

PROCEEDINGS *of the* **6th Annual Conference** **1998**

19 – 21 June 1998

Australian National University



Organised by the
Centre for International and Public Law
Faculty of Law
Australian National University



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of the
6th Annual Conference
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Organised by
Hilary Charlesworth and Robert McCorquodale

for

The Centre for International and Public Law
Faculty of Law
Australian National University



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

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

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

ANZSIL

Australian and New Zealand Society of International Law 6TH ANNUAL INTERNATIONAL LAW CONFERENCE

19 – 21 JUNE 1998

Friday 19 June 1998 — Law Faculty, ANU

8.35 Registration

Welcome & Introduction—Professor Hilary Charlesworth

Keynote Speaker—Ambassador Richard Butler AO

Can the Security Council Enforce International Law

Richard Butler AO (UNSCOM)

10.30 *Morning Tea*

10.45 **Panel—50th Anniversary of the Universal Declaration of Human Rights**

Chair: Gillian White (ex Manchester)

Ann Kent (RSSS, ANU), China and the Universal Declaration: Breaker or Shaper of Norms? Narratives of Humanness in International Human Rights.

Annemarie Devereux (ANU), Australian Human Rights Policy at the Time of the Universal Declaration.

Peter Heyward (DFAT), The Universal Declaration: Time for a Reassessment?

12.30 Lunch

Meeting Editorial Committee – *Australian Year Book of International Law*.

1.30 **Panel—International Criminal Court.** Chair: Don Mackay (NZMFAT)

Alberto Costi (Budapest), Is there an Obligation to Prosecute or Extradite Alleged International Criminals under Customary International Law?

Susan Coles (DFAT), Human Rights Issues Arising from the International Tribunal for Yugoslavia.

Kenneth Keith (NZ Court of Appeal), The Substantive Jurisdiction of the Proposed International Criminal Court: Crimes that Might be Covered.

Ivan Shearer (Uni. Syd.), An Overview of the Issues Facing the Rome Conference on the International Criminal Court.

Kriangsak Kittichaisaree (Bangkok), Practical Difficulties for the International Criminal Court to Overcome (paper presented by Don Mackay).

3.00 *Afternoon Tea*

3.30 **Panel—Are international Lawyers Myopic?** Chair: Robert McCorquodale (ANU)

[Discussion of P Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435]

Ryszard Piotrowicz (Uni. Tas.)

Shirley Scott (Uni. NSW)

Jeni Klugman (ANU)

Gervase Coles (ANU)

5.30 **Reception, Government House, Yarralumla**

Saturday 20 June 1998 — Law Faculty, ANU

- 10.00 **Panel—Recent Developments in International Law.** Chair: Henry Burmester, (Acting Solicitor General)
Don Rothwell (Uni. Syd.), Recent High Court Cases.
Stephen Bouwhuis (PM&C), United Nations Report: an Overview of Progress.
Penelope Ridings (NZMFAT), Recent Developments in International Law: New Zealand.
- 12.00 Lunch
- 1.00 **Panel—Human Rights and Trade.** Chair: Anne Orford (ANU)
Bill Campbell (AGs), The ‘Project Blue Sky’ Case.
Johanna Sutherland (ANU), International Trade and the Social Clause: Broadening the Debate.
Sarah Joseph (Monash), Human Rights Obligations and Multi-National Corporations (MNCs).
Krysti Guest (Com. Parl. Research Serv.), Entrenching Corporate States: The Multilateral Agreement.
- 2.30 *Afternoon Tea*
- 3.00 **Panel—Non-State Actors in International Law.** Chair: Rosalie Balkin (AGs)
Christopher Ward (ANU), Non-State Actors and the Interaction between Australian and International Law.
Helen Durham (Red Cross), Non-State Actors and the Nuclear Tests Case.
Roland Rich (DFAT), Non-State Actors and Development Assistance.
Hilary Charlesworth (ANU), Non-State Actors and Customary International Law.
- 4.30 **ANZSIL Annual General Meeting**
- 7.30 **Conference Dinner** Vivaldi’s ANU.

Sunday 21 June 1998 — Law Faculty, ANU

- 9.30 **Panel—Recent Treaty Action.** Chair: Brian Opeskin (Uni. Syd.)
Deborah Nance (AGs), Progress Report on the Development of an Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.
Kate Eastman/Gavan Griffith (Barristers), Where Private Meets Public International Law.
Stuart Kaye (Uni. Tas.), Multiple Boundaries in Maritime Boundary Delimitation: The Problems of Common Jurisdiction.
Jeff Hart (DFAT), The Review of the Reformed Treaty-Making Process.
- 10.45 *Morning Tea*
- 11.15 **Panel—Race Discrimination and Indigenous Issues.** Chair: Pene Mathew (Uni. Melb.)
Catherine Iorns Magallanes (Uni. Waikato), The Implementation of Indigenous Rights in Canada, New Zealand and Australia (paper presented by Pene Mathew).
Stephen Bull (HREOC), The Credibility Gap: Australia’s tenth, eleventh and twelfth periodic reports under the International Convention on Elimination of all Forms of Racial Discrimination.
Greg Marks (ATSIC), Race Discrimination and Indigenous Issues: The Perspective of ATSIC in the Current Climate.
- 12.30 **Conclusion.**

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Introduction

The sixth annual meeting of the Australian and New Zealand Society of International Law was held at the Australian National University from June 19–21 1998. It was organised by a sub-committee of the ANZSIL Executive Council through the Centre for International and Public Law.

The meeting was launched with bravura by Richard Butler AO, Executive Chairman of UNSCOM, the UN Special Commission, whose mandate is to monitor Iraq's biological, chemical and missile capabilities. Few other Australians have had such close involvement with the United Nations in such a range of areas and at such a high level. Mr Butler came to the ANZSIL meeting directly from Baghdad, resisting pressure to return immediately to report to the Security Council. ANZSIL is very grateful to Mr Butler for his contribution to the conference, published in these *Proceedings*.

A consistent feature of ANZSIL meetings, and their predecessor, the International Law Weekend, is interaction between academic and government international lawyers. These *Proceedings* indicate the value of this interaction, presenting a range of perspectives on current international law debates. The *Proceedings* cannot of course capture the liveliness of the questions and discussion after each session, nor the value of the informal contacts that give ANZSIL annual meetings a special quality.

The ANZSIL meeting is made possible by the hard work of many people. Thanks are due to all the speakers and chairs. Henry Burmester QC worked with us on the organising sub-committee; a riotous game of international law trivial pursuit at the conference dinner was also organised. Kate Booth, Christine Evans, Cathy Hutton, Janine Lapworth and Jyoti Larke laboured long hours in making preparations for the conference. Jenny Braid was splendid in her overall organisation of the conference and preparation of these *Proceedings*. ANZSIL is very grateful to them all.

**Hilary Charlesworth
Robert McCorquodale
Centre for International and Public Law
Australian National University**

Can the Security Council Enforce International Law?

Ambassador Richard Butler AO

Executive Chairman
United Nations Special Commission
(UNSCOM)

Keynote Speaker

If this were Dickensian times, I suppose there would be a very high stool here, on which those people used to sit with their eye shades and quills. I am sorry it is not, because that is a bit how I feel. I would really like to be giving this talk sitting down, but, you know, I woke up this morning after too little sleep and as the old cliché goes, I knew it must be Friday because it was Canberra. A few days ago, it was Baghdad.

Hilary Charlesworth was right, I have been under a lot of pressure to cancel this visit but I succeeded in resisting it and I am really happy that I did. I don't know for how much longer I will succeed. I am under pressure to go back to New York tomorrow, because of things that are happening there. But I am here, and that is because of the importance I place on international law, which is pretty remarkable when you consider that I am not a lawyer. But, in the sort of work I have done over the years, it has become very very clear to me that rules of law in the conduct of international relations are of the deepest importance. They are very often abused, but that should not dissuade us from seeking to build them and strengthen them and I think Australian and New Zealand international lawyers have made a quite disproportionate contribution to the development of the corpus of international law. These are my excuses. That's why I have travelled from Baghdad to be here because I think what you do is very important. I am grateful for your invitation, and am proud to be associated with your conference.

Obviously, I will be talking a bit about Iraq, but my subject is one that is not only crucial to the issue of Iraq but is of far deeper and wider importance—the role, ability or willingness which I sum up in the question: can the Security Council enforce international law?

Now I want to enter this subject by talking about the present time, the time in which we live and, indeed, have lived for some 50 years, which I choose to call the era of the Charter of the United Nations.

A truly remarkable thing happened in San Francisco 52 years ago. It was shaped by the fact that the world had just been, for the second time in our century, through a devastating war. This is illustrated by the Charter's use, in its opening sentences, of the words 'the scourge of war'. A group of people got together in San Francisco, representatives of the non axis powers, the sovereign independent states that then existed which were not on the Japanese and German side of the war, to write a charter—a body of international law under which international relations should, henceforth, be conducted.

I don't think it is an exaggeration to call the time in which we live the era of the Charter of the United Nations because that utterly gifted document, a document may I say as an aside, we would find very hard to get agreement on today, but that utterly gifted document has in it concepts that lawyers had striven for centuries to codify. It was made possible, unfortunately, because of a terrible war, but it succeeded in codifying rules on how states and peoples should conduct their international relations.

Crucial amongst those rules, are things like this: the peaceful settlement of disputes. I like that one because it actually is very wise. It is wise on two counts: that is, it implicitly assumes that disputes will occur in human life. Of course that is true. But it urgently insists that the best solution to them will always be the peaceful one.

It talks about the fundamental requirement to maintain international peace and security and in this context, gives the body that we're going to be discussing in a few moments—the Security Council—the basic role.

The role of the Council is defined in the charter as "the maintenance of international peace and security". In my notes I always call that MIPS as we live in a world of acronyms. But that is what it is—the maintenance of

international peace and security. In this context the Charter asserts its very important that all states exercise respect for treaties and the obligations that flow from them. It also sets forth, in other places, some very fundamental rules of conduct in international relations, such as that invasions of states, as Iraq did to Kuwait in 1990, should not occur.

Now, central to the vision of the charter was “the maintenance of international peace and security”. It gave primary responsibility for this to the Security Council. This threw up, straight away, the question of how would the Council, a small but representative or quasi representative body of 15 states—five permanently appointed named by name in the charter—maintain its relationship to the totality of the membership of the General Assembly. The Assembly is of a semi or parliamentary character, the Council has an executive character, with respect to peace and security.

There were obviously questions to be resolved about the relationship between the two: which one has prime carriage; which one will have the superior authority. Those things are sorted out in article 12 of the charter. Article 12 says, that the General Assembly may not deal with a matter of peace and security while the Security Council is seized with it.

Going beyond this, the Charter gave the Council, in article 24, primary responsibility for peace and security and another unique power, that is, it is the only body whose decisions are mandatory, who have the force of international law. This is to be found in article 25.

Interestingly, certainly interesting to me in my career in disarmament, is that the Charter also foresaw that the United Nations should draw up proposals for the regulation of armaments. This would be done in relation to both General Assembly and the Security Council through a body called the Military Staff Committee.

Now, for the enforcement or to ensure that the decisions that it takes are acted upon in addition to the mandatory character that they have under article 25, the Security Council was given two paths of action. One under chapter VI which is entitled ‘Peaceful Settlement of Disputes’ and the other under chapter VII of the charter which deals with enforcement.

I point out now that all of the resolutions of the Security Council, with respect to Iraq's action when it put itself into the UN's record books as being the only member state of the UN ever to invade and seek to absorb a fellow member state, all of the resolutions of the Security Council with respect to that action, the expulsion of Iraq from Kuwait and everything that flowed from it, were done under chapter VII. So, they all carry with them, at least implicitly, the possibility that they may be enforced by use of force, sanctioned by the Council.

When the Council, in 1990 and 1991, considered the special case of Iraq's invasion of Kuwait, it put together, it legislated, a series of obligations which are nothing, if not heavy. I am not saying they are not right or that they are unjust. But I am saying they are heavy. In this sense, the speciality of what Iraq did, the uniqueness of what Iraq did in invading Kuwait, was recognised, as was the revelation, when action was taken to expel it of the very considerable quantity and quality of weapons of mass destruction that Iraq had put together.

I asked my legal adviser in New York about six months ago, in preparation for some talks in Baghdad, to do me a quick note on all of the obligations Iraq faced. I said, “John, I don't want any description. I want dot points, just citing the obligation. I just need to have that in my back pocket”. He went and researched all the resolutions, all the legislation, put together this paper for me and I tell you that, in normal sized paper, one and a half spaced, that document was 28 pages long.

So, the Council really did it to Iraq. It put very heavy obligations upon it, in a whole range of fields, beginning with the notion of peaceful intent. Did you know that one of Iraq's obligations is that it has to swear that it has peaceful intentions and then it must adhere to certain treaties, return Kuwaiti property, pay compensation, et cetera, et cetera—28 pages of very heavy obligations.

The point I am making is that the law was exercised with great weight and in great detail. To back it up, of course, sanctions were imposed upon Iraq. All under chapter VII, always with the possibility that if this law wasn't adhered to, it would be enforced by military means.

But short of that, sanctions were imposed upon Iraq in terms of trade, economic and financial relations and, in particular with respect to the export of oil—all as the means of encouraging Iraq to fulfil its obligations.

What has occurred in these past eight years?

Well, it's been quite mixed. In one respect I can stand here proudly in the name of Rolf Ekeus, my predecessor and the women and men who work for UNSCOM today and say, it's been a brilliant track record. We started off facing what I described earlier as a very substantial array, quantity and quality of weapons of mass destruction and we have located, found and destroyed the lion's share of them. It's been a very significant achievement. I am talking quantities like 40,000 chemical munitions. I am talking about the Al Muthanna state establishment for the manufacture of chemical weapons, which I have visited. It is a helicopter ride north-west of Baghdad. I can't tell you exactly how large it is, but to me it looked awfully like five or six Sydney or Melbourne cricket grounds. I mean, this is an enormous place where extraordinary weapons of mass destruction were made.

Well, that place has been destroyed and the residual poisons have been sealed into bunkers. We go back regularly and sniff the air with air samplers and detect whether or not any of that stuff is leaking.

So, on one level there has been a very substantial record of achievement. And I always think that the best way of registering that is by a question. Just ask yourself, given their track record in respect of these weapons, their deep affection for these weapons, just imagine where we would be today if the Security Council had not so legislated and if UNSCOM hadn't been doing this work? This is not to slight Iraq. It is to speak a fact. They have a demonstrated interest, deep interest, in making and weaponising and distributing and using weapons of mass destruction.

On the other hand, the past record has not been good enough. It has taken far too long. The impact of sanctions upon the ordinary Iraqi citizen is not acceptable. However, the reason for these circumstances is the way in which Iraq, from the beginning, sought to thwart the law-making power of the Security Council—from the beginning.

Let me illustrate this. The primary piece of legislation, resolution 687, says that Iraq shall declare to us within 15 days all of its weapons of mass destruction, a truthful, full, final and complete declaration—FFCD, that is what they are called—within 15 days. Almost eight years later, we are still waiting for full, final and complete declarations—certainly in the biological weapons field. It is perfectly clear that the relatively complete ones we now have in the missile and chemical field will need to be altered and made complete, if Iraq follows the work program accurately that we agreed upon three days ago.

So, 15 days was what the Council wanted eight years ago and we're still waiting for those declarations.

Secondly, the Council insisted that all destruction of Iraq's weapons of mass destruction be undertaken under international supervision, that is, by us. Yet, Iraq's main claim today, to the effect that it has no more weapons of mass destruction, rests on their claim that they destroyed them all in 1991. One of our jobs is to try to verify whether or not that is true. If there were such actions of destruction they were illegal because they were carried out unilaterally without any international supervision. This has simply created a maze for us, over these last six to seven years, of trying to put together the jigsaw pieces of Iraq's actions of unilateral destruction in order to verify their claims about what quantities and what qualities of weapons they did, in fact, make.

Thirdly, there was a policy of concealment. This is not just spinning with words. I mean, surely if the declarations are not complete and there was unilateral destruction that amounts to concealment. But I am going beyond that. They have admitted to, and we know, we have evidence of, a high policy decision by President Saddam Hussein, from the beginning, to hold back from us some of the weapons of mass destruction, to conceal them. For example, when they declared their missile force, originally, they never declared all of it. They separated it into two parts, concealed one part and showed us the other.

The policy and the practice of concealment has slowed down the process of bringing to account and getting rid of Iraq's weapons of mass destruction.

So, when you hear people of good will complain about how long this has taken and how hard the sanctions are, please bear in mind that if there is any reason for that length of time and for these outcomes, any salient reason, it is those that I have just given you. It is that Iraq, from the beginning, refused to obey the law and, indeed, attempted to thwart it.

This turned around, up to a point, in 1995 with the defection of a person called Hussein Kamel and the revelation by him to us of a very large place called the Haidar Farm which was a chicken farm. So we now have over three million pages of documents in our archives which we call the chicken farm documents. They gave us a very substantial account of Iraq's weapons of mass destruction programming. But what this meant was that five years of work had to be more or less stopped, while we reviewed what it all meant, and start again.

So if one reviews the whole period of time involved in doing this job with Iraq it actually has had two distinct parts—the pre-chicken farm time and the post-chicken farm time. This has slowed us down.

As you know, within this time frame, there has also been the phenomenon of recurrent crises of which the largest one occurred in the period from November last until the 23rd of February this year when a mighty armed force was assembled in the Gulf ready to be used to bring Iraq back inside the law.

The Secretary-General, Kofi Annan, went to Baghdad and signed an agreement with Iraq which gave us access to places we need to be able to visit in Iraq but, above all, in my view, gave us once again, but this time at a very significant level, the promise by Iraq of full cooperation with UNSCOM.

That achievement was a stunning piece of diplomacy, by Kofi Annan, who was under pressure of the kind that I have rarely seen. I was very much involved in the preparation for his visit but nothing, especially his own modesty, should detract from the fact that what he personally achieved was extraordinary.

The Secretary-General's achievement made possible the agreement, last week in Baghdad, of an accelerated program of work to deal with the remaining issues in the missile chemical and biological field. I will go back to Baghdad at the beginning of August to check in with Mr. Tariq Aziz on how we're doing, to see if we're getting to the end of the program of work and to see whether that does not provide a basis for me beginning to prepare reports under paragraph 22 of resolution 687 on the basis of which the Council might take a sanctions decision.

Paragraph 22 states that: "When the Council agrees that Iraq has taken all the actions required of it" the embargo will be lifted.

The specified actions Iraq must take are: all ballistic missiles with a range greater than 150 kilometres and all their related major parts facilities and production, and all chemical and biological weapons and facilities.

During the seven years in which we have been attempting to implement this law, the Security Council has, in fact, been confronted by plain unwillingness of this state to obey its law. This is why I pose the question: Can the Security Council enforce its law or enforce treaties?

It is why the Iraq case is of such importance, as well as for the reason of the wider battle that we are supposed to be waging (somewhat shaken by India and Pakistan) to create a tapestry of treaties under which weapons of mass destruction will be regulated: the nuclear non-proliferation treaty, the chemical weapons convention, the biological weapons convention.

The question that arises in the face of such recalcitrance is: what does the Security Council do? Bear in mind that this is all chapter VII law, heavyweight law. Iraq has made clear it does not intend to obey the law, or it will obey it only partially only on its terms. What does the Council do? Should it change the law? Should it make new law? Should it simply move in and enforce it militarily? These are the sorts of options.

The last of those options, I think is now fairly clear, is one that very few people want to see exercised with respect to Iraq leaving aside of course were Iraq to make a significant move on another state.

So, what is the answer to this problem? Should the Security Council simply, as one writer has put it, declare victory and go home? Say that we have done enough with Iraq, all that we can do and, just leave it at that? Wouldn't that involve altering the standard of their own law? These are very serious issues.

The key may be in the nature of the Council and, in particular, its permanent members. What we've seen in the case of Iraq is something that, I suspect, provides the answer to my own question. That is, the need for the Council to act with unity. It seems that whenever the Council, especially its permanent members, are divided on an issue the first victim of such division is actually its own ability to enforce its own law.

It is interesting to reflect in this context on the veto because some people would say, in answer to what I have just said, "Well, it is all very well to talk about the permanent members acting together and so on, but how does that square with the fact that each of them has got a veto?" And we have seen over the years, certainly during the Cold War period, a fairly high degree of willingness for them to use that veto.

Well, I must address this tactfully because, after all, UNSCOM is an organ of the Council. I work for them. The original reason, in San Francisco, for the establishment of the veto, as I understand it from the record, was to give comfort to the permanent members that chapter VII powers of enforcement would not be used on them. And, it was expected, I think understood in San Francisco, that on that basis they could have a veto. This was perhaps necessary to get their agreement to the sort of rules of international law and the wide ranging if small democracy that the UN is that they had that protection.

But if that is the case, and I think the record shows it is, what then can one say about: (a) the use to which the veto came to be put over the years—going far beyond that original concept, (b) the frequency with which it was used by all of them to protect, quite simply, their own interests, as against the original idea that the five of them would be the custodians of the maintenance of international peace and security; and that acting together they would keep the Charter principles like respect for international law, treaties and the obligations flowing from them and perhaps especially the insistence that states shouldn't invade other states.

Now, that basic custodianship, it seems to me, is important and its exercise requires them, as far as possible, to act together. In the case of Iraq, that has overwhelmingly been the case and has been the source of great strength to UNSCOM and to the international effort generally in our work with Iraq.

But there have been occasions where they've been divided on Iraq, as on some other subjects and, as I said earlier, the most evident victim of such division has been the common custodianship of the maintenance of international peace and security.

Now, of course, anyone who has read Stanley Hoffman's great book, *The Political Foundations of International Law*, will say, "Well, what's Butler talking about, where's this utopian world where these five powers won't have their own national interests and after all, they were given the veto to protect those interests weren't they? Isn't this overly idealistic?", to which I would say, "No, I don't think it is."

What was identified in San Francisco was an interest, a deep interest, an interest in the maintenance of peace and security, in the ongoing development of international law and in respect for the obligations established under that law.

The era of the Charter is one in which rules of law will make international relations work better and more peacefully. And, in my opinion, that is a deep interest, an interest which surely should be recognised, above all, by those who have great power.

Didn't the veto give expression to that, to insulate them from certain exercises of power so that they could concentrate their minds fully on the business of common custodianship of peace and security?

There's a final reason why this question is an important one, going beyond Iraq and going beyond other contemporary issues. It is that we have developed a world, which has within it a tapestry of treaties designed to give a negative answer to the question, "Must we live in the twenty-first century awash with weapons of mass destruction?". The answer that all the world wants is, "No, we must not, we should not have to accept this".

One of the ways of ensuring that that is not the case, is through the treaty framework that has been built. That framework: rests on a moral consensus that weapons of mass destruction are wrong; has political backing by governments to develop the law which then becomes the superstructure of that moral commitment, and; establishes an inspectorate, a verifying agency to ensure that everyone is keeping the law.

One of the common characteristics of those treaties is their answer to the question, "What do you do if someone cheats and breaks the law?". The answer in all cases is, "We take it to the Security Council". This is why the question of Iraq, is not only intrinsically a major challenge to that tapestry of treaties, to the moral commitment against weapons of mass destruction but it is also important, from the point of view of the question, "Is a Security Council willing or able to enforce its own law?".

It is very important that the answer to this question be given in the affirmative. I can only say from this room to my friends in the Council in New York that there is, and can be no substitute for unity in the Council and for keeping alive the original idea that the great powers will share a common custodianship for the maintenance of peace and security, and for respect for the obligations of international law.

Question:

Would you be able to give an illustration of how the varying attitudes of significant powers complicate your role as a neutral bureaucrat, working for the UN Security Council.

Richard Butler:

I would be nuts if I dissected the proclivities of the persons for whom I work. So I am not going to do that. But what I will tell you is this. I have been to their capitals, other than Beijing recently, including meeting with Mr. Primakov for example, and I haven't any doubt that the permanent members have a common commitment to see that Iraq meets its legal obligations—absolutely no doubt about that. They reiterate it and they mean it.

But I would be misleading you and treating you as fools if I didn't recognise, as I know you do, that there have recently been some considerable differences on the approach to that goal amongst them. I guess the basic thesis I have attempted to put before you today is that such differences should be managed with great care to ensure that the most precious source of authority that the Council says, namely the unity of its members, in particular its permanent members, is not dissipated, for whatever reason.

Question:

I would like to pursue that. Given that what you have reported represents a period of eight years of strenuous effort and eight years in which much was discovered only after a defection brought with it revelations, what is left to be discovered as a result? I wonder how you could comment on the verifiability and enforcement with respect to biological weapons and the level of intrusiveness required in Iraq

Richard Butler:

That is a good question and not easy to answer.

In 1995, the defection of Hussein Kamel was a turning point for us. What I am about to say is in no way any implied criticism of Rolf Ekeus. Rolf did a fantastic job. But it is true, he knows it and the Council knows it, and Tariq Aziz and Saddam Hussein know it, that in July 1995 we were very close to signing off paragraph 22 reports, and then Hussein Kamel defected giving us a cache of documents. They revealed that those decisions by us would have been a terrible mistake. Now, that raises all of the worrying questions you've raised.

Of course, we didn't sign off. In fact it made us much more sceptical about Iraqi declarations. We had to go back over stuff that we thought made sense and we discovered a lot of things that didn't make sense. It made us very convinced about the policy of concealment. And in this context, I made it very clear to Mr. Tariq Aziz last

Sunday night that this new program of work we're doing is important and I want it to work well. It should provide a basis for paragraph 22 reports, at least in the missile and chemical area, but there will be no reports unless and until we have a very serious further conversation about concealment, because I will have to be able to say to the Security Council that concealment has stopped.

Now, one of the basic problems in arms control verification is how can you know about what you don't know?

Now, applying this to those treaties that you mentioned, NPT, the chemical weapons convention and so on, NPT has been cheated on through concealment.. But it is not a hopeless situation.

Remember the three elements I mentioned: first, a moral consensus that these weapons should not be held by anybody. The NPT gives expression to that consensus with respect to nuclear weapons. NPT gives expression to the notion, the conviction of the international community, that no one should have nuclear weapons. It states that those who have them should get rid of them and those who don't have them should never get them.

Verification, the third basic element, can work if you have the other two elements: moral consensus that these weapons are wrong; and, political backing for that consensus, the willingness of governments not to make them or acquire them and all of this verified by an inspection regime that drops in from time to time and is able to state, "We didn't find anything bad".

The real purpose of that dropping-in, which the chemicals weapons convention very much has in mind in the concept of challenge inspection, is not so much to physically prevent the diversion from peaceful to military uses but to give confidence to others, that every one is obeying the rules.

This is my answer to the problem: how can you know what you don't know? One hundred per cent verification in arms control is virtually impossible, but what you can do is create a circumstance where you are substantially getting the effect you want, namely that no one has these weapons.

All of this can be a tough call but it is better than trying to kid yourself that you can have 100 per cent verification. It is why we shouldn't lose the Iraq case. That case is really about the first thing, that is: the moral commitment, that people shouldn't have these weapons. But it is also about a viable non-proliferation regime and about the Security Council's law being obeyed.

Question:

How much, exactly, is Iraq holding back?

Richard Butler:

I can't answer that. It is not politically smart to do so because what if I am wrong? What if I say, "We think they have ten missiles". The trouble is they might turn up at the front door of our office in Baghdad tomorrow and give us ten but we would never know whether there were twelve, for example. It's their job to come forward first with the truth. Our job is to verify.

But there is another reason. You can't state a percentage of how much remains unless you know the base number. And because of declarations that weren't honest, because of concealment we actually don't know precisely—in many fields we do—but not in all fields we do not know the precise base number.

So, I stick with the position that says, as I did to Mr. Tariq Aziz on Sunday night, the program of work we have designed is fine. But, it will rely utterly on the same thing that we've always found wanting, which is Iraq telling us the truth. When we have the truth, I will be able to answer your question.

Question:

On the theory of the proclivity of the Security Council to follow national interests?

Richard Butler:

I was entering a plea to my friends in the Council to never forget the importance of unity amongst them given the very extraordinary responsibility they have for maintenance of international peace and security.

Question:

What is your response to Iraq's request to use the proceeds from the sale of oil for humanitarian purposes?

Richard Butler:

Not my line of country. I have no responsibility for oil-for-food.

Question:

The US Ambassador Richardson has said in the last 24 hours or so according to the wire services that Iraq still has a long way to go before sanctions can be lifted, also there has been a unnamed UN ambassador in the security Council who said the same thing. Is there anything that you are going to tell the Security Council on your arrival in New York contrary to that?

Richard Butler:

Funny you should ask. I have been up for many hours this morning on the telephone with New York on the same issue. I signed off our report to the Council on our last visit to Baghdad—that is the one of a few days ago—in Kuwait just as I was stepping on the plane to come here. Members of my staff took it back to New York and lodged it yesterday for translation into languages and of course, it leaked immediately.

So, that written report is already out there. It makes very clear these things: we now have a clear list of the remaining outstanding issues in each weapons area; it is up to Iraq to clarify those issues; for our part we will verify, honestly and quickly.

Can I predict whether they will do that. I don't know. I am interested that some people have been saying I've been too optimistic, there's a long way to go, et cetera. I'm no different from anyone else in this respect which is that I cannot predict the future. Does Iraq clearly understand these circumstances? Yes it does. Will it do it? I don't know. I hope to God it will. Will the Council then act in terms of paragraph 22? I assume so. Are there other issues that some other governments or ambassadors want covered? Sure, I've heard about that, but that is their call which is really the kernel of your question. What are these other issues? That's their call. What I and my organisation will do is what the law of the Council asks us to do—give the Council the clearest, most objective, correct reading on the weapons situation, an account of those weapons so that the Council's political decision on those issues will be fully informed by the facts. What they do about associated issues is another matter.

Question:

I think we have all been most encouraged that Iraq has been put into the position where its weapons of mass destruction have been enormously reduced, if not excluded all together but there are two general problems. One I've heard you talk about before, about the lack of even handedness with request to other states such as Israel which shares the same area. It, of course, has weapons of mass destruction, nuclear ... I know you are not allowed to discuss ... but that is one. The other is the more general one that stems from the UN charter and the organisation that came out of that, the most recent of which is the Conference on Disarmament which has a very extensive permanent agenda which covers all the weapons including so-called conventional, which I should stress are, indeed, weapons of mass destruction if you look at this century's history. Now, the problem as I see it and on which I would like you to comment is, since that agenda has been in existence, we have seen arms trading, the largest traders being the permanent members of the UN Security Council, and we've seen

defiance of the NPT article VI with respect, not only to nuclear weapons, but to the building down of conventional arms which, of course, should be the agenda of the UN generally and, of course, that should be led by the UN Security Council permanent members. If they aim at moral persuasion, that is what they have got to do. Would you please comment, Richard.

Richard Butler:

The double standard issue is one about which we are hearing a great deal. Certainly whenever I go to the Gulf, I hear a lot of it. India and Pakistan have put the double standard issue under something of a microscope by their actions. I assume you are all familiar with this notion of the double standard—that some people can have these weapons, indeed, be protected in their possession of these sorts of weapons, where others are not allowed to.

It's a fact but I hope you will understand it is a very difficult issue for me to speak about in public. It is a fact and it is out there in a renewed and big way. I believe it will need to be addressed.

As far as the context in which I work is concerned, I would point out that paragraph 14 of our basic resolution, 687, is one to which many Middle Eastern states attach great importance. Its origin, actually, was Egypt, in the negotiations of this resolution and remember, Egypt was a member of the coalition that expelled Iraq from Kuwait.

Paragraph 14, is not a universally popular paragraph but it is in the legislation. It states that what we are doing with Iraq will be regarded by the Security Council as a step towards the wider goal of the ultimate formation of the Middle East as a zone free of weapons of mass destruction.

When people talk about the light at the end of the tunnel, they often mean the light of the lifting of sanctions. But I actually refer to paragraph 14 from time to time in my talks with the Iraqis as being the other light that I see at the end of the tunnel. I say to them, I know you must feel pretty bad about all this stuff we're doing to you and I know you feel you are being singled out. Well you are, because you deserve to be'. But there's a wider issue here. Just look at it this way: you're making a contribution to something and that, if it really works, we will move on and address the wider issue of getting this most heavily armed part of the world down from the precipice. I'm not sure this line of argument is very successful even though I think, its right.

The Middle East is armed to the teeth in all sorts of ways, and it would not be a bad thing if we could alter that.

On conventional arms, all I can say is, right on, I agree. I have spent more than a quarter of a century, and my age is showing I guess, starting at this great university where I did my post-graduate research on preventing the spread of nuclear weapons. I have spent a lot of time in my life concerned about that big stuff, but deeply aware of the incredible scandal that is involved in conventional weapons and the arms trade. You go to the bazaar up on the Pakistan/Afghan border and ask what the market price of an AK47 is. The last I heard it was a couple of bucks, something like that. How many AK47 assault rifles were made, in production? About 30 million. And how many people get killed by nuclear weapons as against AK47's? You know what the answer is.

The AK47 was a standard Soviet, Kalashnikov, attack rifle. It's delightfully simple, works under all conditions, especially places like the jungles of Cambodia. Cheap as dirt. And it was a major cash crop, export income earner for the countries that made it, not only the former Soviet Union. They were made under licence in a couple of other countries as well.

So, sure, if you're talking really serious stuff like who gets killed by what weapons, how many are there are out there, who benefits from their manufacture and trade and what level of resources does it represent being taken away from economic and social development, the big answer has to be, for God's sake, when will this world get real about conventional arms.

I don't know how. That was a lovely impassioned speech wasn't it? I don't know how. It is one of the hardest

nuts to crack but it must be cracked.

Maybe I should end here. What I would like you to think about is how to get the message out to the Security Council that it has a responsibility that goes beyond national interests and that their unity is really important to all of us which, I guess, in a nutshell, is what I am trying to say to you.

But, those of you who are thinking of future developments in international law, please spare a thought too for this terribly difficult area of international law in relation to manufacture, sale, possession, et cetera, of conventional weapons.

Thank you

50th Anniversary of the Universal Declaration of Human Rights

China and the Universal Declaration: Breaker or Shaper of Norms?

Ann Kent *

On the fiftieth anniversary of the Universal Declaration, there has been a general stocktaking of the strength and universality of its norms and discussion of the possibility of reviewing them. As part of this process, it is important to focus on the changes that have already been occurring, in one sense before our eyes, and in another, quite covertly. China has been playing an important role in this change. Apart from the US, there is no other state which is both a Permanent Member of the UN Security Council and a source of such extraordinary power and influence within the UN. This paper seeks to document China's increasing tendency to challenge at an international level the universality of the norms of the Universal Declaration and the procedures of the UN human rights regime.

Lest my comments be interpreted as suggesting that China has not also been a "taker" (as opposed to a "breaker" or "shaper") of the norms of the Universal Declaration, I should first observe that my comments are made against the background of an important fact: that in the early 1980s, a decade after it had replaced Taiwan as representative of China in the UN, the People's Republic chose to give meaning to its obligations under the Charter and the Declaration by voluntarily commencing participation in the UN human rights regime. It became a member of the UN Human Rights Commission in 1981 and of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1984. It also acceded to core human rights treaties, CEDAW (1980), CERD (1981), CAT (1988) and CROC (1992). Although it did not sign or ratify the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR), in 1997 it signed the ICESCR, and is currently considering signature of the ICCPR.

Norms

At the level of declaratory policy, China's position has been ambiguous. On 30 May 1972, China made its most comprehensive statement on human rights questions. Its representative, Wang Junsheng, stated that:

The question of human rights was an important issue for the Economic and Social Council. China was ready to work together with all the countries and peoples who loved peace and upheld justice in supporting the struggles of the peoples of the world against imperialism, colonialism and racism and for the attainment and defence of national independence, national sovereignty and fundamental human rights in accordance with the spirit of the Charter..¹

In line with its strict focus on collectivist and state-based Maoist norms, however, China maintained a cautious approach to the Universal Declaration and the two International Covenants, emphasising as they did the rights of the individual as well as of the collective:

...the Universal Declaration of Human Rights...had been adopted at the third session of the General Assembly, prior to the founding of the People's Republic of China. It was therefore necessary for [the Chinese] Government to examine its contents²

One of China's first positive references to the Declaration was a statement by China's Foreign Minister before UNGA in September 1988, that "despite its historical limitations, the Declaration has exerted a far-reaching influence on the development of the post-war international human rights activities and played a positive role in

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¹ UN Doc. E/AC.7/SR.699 (30 May 1972), at 143, cited in Samuel S.Kim, *China, the United Nations and World Order* (Princeton, Princeton University Press, 1979), 485.

² Ibid. 486.

this regard".³ In the same year, China commemorated the 40th anniversary of the Universal Declaration of Human Rights with a number of activities in Beijing, and has undertaken to do the same for the 50th anniversary. Yet, in August 1997, Premier Li Peng endorsed Malaysian Prime Minister Mahathir Muhammed's call to review the Universal Declaration as a proposal of "vision and courage".⁴ Initially, in the 1970s, China, insisting on the importance of state sovereignty, was more inclined to emphasise those norms in the Universal Declaration which cohered with the socialist values of the collective right to self-determination, opposition to apartheid, racism and colonialism, the rights of women and the right to development. However, by the 1990s, and already to some degree in the 1980s, it was showing a more differentiated, sophisticated understanding, acknowledging the interdependence of individual civil, political, economic and social rights. This was partly in reaction to the horrendous violations of civil rights during China's Cultural Revolution in the 1960s and early 1970s and partly a result of its learning process within the UN.

Nevertheless, China has been, and will always be, more likely to cite as its source of authority the UN Charter, which emphasises both state sovereignty *and* human rights, than the norms of the Universal Declaration. It is also to be noted that, while endorsing human rights norms, China has sometimes also given them a curious twist. Thus, it has characterised the Universal Declaration and the Vienna Declaration as "clearly providing for the ideas guiding international activities in the field of human rights", by "conducting international cooperation on the basis of equality and mutual cooperation".⁵ Again, in a UN specialised agency, the ILO, China's representative gave an intriguing reformulation of the purpose of freedom of association. He declared that "the aim of freedom of association is to improve working conditions and promote peace".⁶

China's most obvious attempt to subvert or shape norms has occurred not in the treaty bodies but in the Charter-based bodies, the UN Commission on Human Rights and its Sub-Commission. As political forums, they are highly susceptible to lobbying, coalition building and manipulation by powerful states. At a basic level, from the early 1980s, China began to comply with the norms and procedures within those forums, accepting the right of the international community to monitor the civil rights of Member states and the procedures, in particular, the resolutions on "country situations", adopted to this end. This was so, even though it later objected to being made a subject of the same resolutions. At the same time, it gave priority to certain norms in the Universal Declaration over others, stressing the right to development, economic and social rights and, from 1992, the right to subsistence. It also emphasised cultural relativism, challenging universality by arguing that human rights were relative to time, place and culture. At a normative level, in other words, it helped shape the debate, but did not succeed in undermining it.

The most significant forums for normative development, have, of course been the UN human rights conferences. In these forums, China has made a more strenuous attempt to challenge norms. At the 1993 Vienna Conference and at the preceding Preparatory Committees and the Bangkok Conference, China adopted a mix of approaches by accepting some existing norms, by attempting to reformulate priorities of rights, and trying to negate other norms or prevent the development of new ones.⁷ The initial Chinese statement made in each forum emphasised China's different human rights priorities. At Bangkok, the official Chinese statement was far to the left of the general Asian position, stressing state sovereignty and the collective values of opposition to racism, to colonialism, to foreign aggression and occupation and the right to development. In Vienna, it gave pride of place to the right to subsistence and the principles of state sovereignty and non-

³ Zhonghua renmin gongheguo waijiaobu waijiaoshi bianjishi, *Zhongguo waijiao gailan (Survey of China's Foreign Relations)* 1989 (Beijing, *Shijie zhishi chubanshe*), 459.

⁴ Kamarul Yunus and Kang Siew Li, "China Supports UN Charter Review Plan", *Business Times* (Malaysia), 23 August 1997, 1.

⁵ Liu Xinsheng, cited in "China Proposes Reforms in UN Human Rights Body", Xinhua Newsagency, 22 July 1997, Reuters "China" News, 28 July 1997.

⁶ International Labour Office, *270th Report of the Committee on Freedom of Association*, G.B. 245/5/8, 245th Sess. (Geneva, February-March 1990), para. 302, at 84.

⁷ For details of China's role at Bangkok and at the Vienna Conference, see Ann Kent, *China, the United Nations and Human Rights: Compliance, Learning and Effectiveness* (Philadelphia, University of Pennsylvania Press, 1999), Chapters 5 and 6.

interference, and it deployed the cultural relativist argument that each state had the right to its own interpretation of human rights. During the course of the Conference, and in the Drafting Committee, it also made efforts to negate existing assumptions, such as acceptance of the universality of human rights, or to head off new initiatives, such as requests for new funding, the idea of an International Human Rights Court and the plan to appoint a UN High Commissioner for Human Rights. In the Conference Drafting Committee, Chinese pressure fed into the emphasis in the Vienna Declaration on the right to development, the weakening of the right to self-determination in a way which undermined minority rights, the support for a Special Rapporteur on Racism, and references to the role of historical conditions and development in shaping each state's human rights and the importance of state sovereignty. The last two provisions, although crucial planks of China's human rights platform, were articulated in a much weakened form in the Declaration.

However, in these forums China's was only one of the many voices competing to advance its proposals. At both Bangkok and Vienna, its proposals failed to gain significant support and overall its efforts did not have a negative impact on the final Declaration. The final Chinese statements tended to show positive acceptance of the views of the majority of participants, and to be supportive of the consensual *status quo*. Thus, China formed part of the consensus upholding the Vienna Declaration, which contained many provisions it would not have voluntarily supported. However, its subsequent statements on the Vienna Conference showed continued unwillingness to accept the standards it had earlier conceded.

It may be concluded that, at the normative level, while China has been part of the effort to shape, and, in some case, subvert human rights values, it has not been effective in corrupting them, for a number of reasons, including the democratic structure of UN conferences and the consensus requirement. Indeed, by focussing on the importance of giving more attention to economic and social rights and the right to development, it could be seen as having helped shape these norms, or at least the priority of norms, in a reasonably constructive manner.

Procedures

It is at the level of the procedures giving shape, direction and force to human rights norms that China's interventions have been the most troubling. Most of this audience is aware of the problems that beset the UN Women's Conference in Beijing in late 1995.⁸ The venue in itself was proof of China's acceptance of the application to it of regime norms and mechanisms. However, because of their concern about the domestic impact of the conference, Chinese authorities insisted that even the area in Beijing officially designated as UN territory would remain partly subject to China's own laws and human rights practice. From the beginning, Chinese authorities maintained strict control over the visa process, with organisations or individuals seen as "unfriendly" refused entry to China, thus restricting freedom of movement. Authorities tried to control NGOs by isolating them a considerable distance away in Hairou, thus restricting freedom of movement and assembly. They initially blocked the publication of the UN conference paper, *The Earth Times*, thereby challenging freedom of the press. They forbade meetings of groups of women in hotels outside the UN premises, further restricting freedom of assembly. On Chinese television, although the activities of NGOs (*feizhengfu zuzhi*) were reported, attempts were made to trivialise them by restricting reports to song and dance routines. In the clash between international norms and procedures and China's domestic law and practice, the latter emerged victorious, even at the expense of the international prestige which had been China's reason for hosting the Conference in the first place.

Other examples give some idea of the procedural difficulties. In the Preparatory Committees leading up to the Vienna human rights conference, Adrien-Claude Zoller, of the International Service for Human Rights, observed that China, in the company of Syria, Yemen, India, Pakistan, Indonesia and Singapore, was attempting to transform the consensus rule into a right of veto, thereby trying "to force other delegations to

⁸ See, for instance, Steven Mufson, "Chinese Harassment Angers Women", *The Washington Post*, reprinted in *Guardian Weekly*, 10 September 1995, 18; and Simon Jenkins, "Beijing Shanghai UN Talkfest", *The Times*, reprinted in *The Australian*, 11 September 1995, 11.

accept their proposals wholesale, even if this meant jeopardising the success of the entire meeting”.⁹ At the Vienna Conference China, along with other states, attempted to block the participation of NGOs in the main conference. In the recent meetings drafting the Optional Protocol to the Convention against Torture, China’s strict position on sovereignty has remained a barrier to progress. At issue was whether States are agreeing in advance to prison visits or whether ratifying states might grant or withhold consent to a request for a visit. On Article 1 of the Draft Protocol, China, together with Cuba, Mexico and Colombia, argued the need for prison visits to be subject to “full respect...for the principles of non-intervention and the sovereignty of States”. On Article 12, China wanted to make visits to prisons and prisoners subject to national laws. It also stood with the US in favour of allowing reservations to the Optional Protocol, and with Australia in favouring a high number of ratifications before the Optional Protocol could enter into force.¹⁰ Likewise, during the debate at the 1997 ILO Conference on the proposal to adopt a Declaration on Workers’ Fundamental Rights, China’s Minister for Labour, Li Boyong, expressed vigorous opposition to the Declaration on the sovereign grounds that “the nature of this proposal forces Members who have not ratified the standards to undertake the same obligations as those that have ratified them.”¹¹

However, China’s negative influence has been the most conspicuous in its activities in the Human Rights Commission and Sub-Commission.¹² In the 1989 Sub-Commission, when the draft resolution criticising its human rights conditions was first introduced, China’s inordinately aggressive lobbying tactics prompted the experts to adopt a resolution requiring a secret ballot for all country-specific resolutions. China opposed this procedural innovation in 1989 and continues to oppose it. It has consistently argued against the right of the Sub-Commission to “engage in political debate and attack states” through country situation resolutions. From 1989, China threatened developing states which might support the China resolution, both diplomatically and commercially. From 1995, it also threatened developed states, particularly the Dutch and Scandinavian governments. It thereby sought to reduce a multilateral process to a series of bilateral relationships. It has also consistently opposed the role of NGOs in both bodies and has undermined the principle of the independence of Sub-Commission experts.

To avoid the resolution, from 1990 China continually resorted to the procedural no-action motion, thereby preventing the issue of its human rights being brought to the vote. From 1995, when the no-action motion was overturned in the Commission, and the draft resolution on China failed by a narrow margin of one, China commenced particularly aggressive lobbying, bringing its weight behind the idea of “cooperation” on human rights replacing “confrontation”. This idea has now become common currency in the Commission and Sub-Commission. At the 1996 Commission, China stated that it did not favour country situation resolutions and deemed they should be the subject of consensus.¹³ It also argued for reform of the Commission, by “setting straight the ideas guiding the activities of the Commission”, “putting a quick end to political confrontations in the Commission” and taking into full consideration the interests and demands of developing countries.¹⁴ The effectiveness of the country situation resolutions is highlighted by the fact that China has also offered some

⁹ Adrien-Claude Zoller, “Third Session of the Preparatory Meeting Ends in Failure”, Geneva, 14-18 September 1992, *Human Rights Monitor* (May 1993), 21:12.

¹⁰ “Working Group on the Draft Optional Protocol to the Convention against Torture”, 6th session (Geneva, 13-24 October 1997), *Human Rights Monitor* (1997), 36:24.

¹¹ International Labour Office, “Extracts from Statements made at the 85th Session (1997) of the International Labour Conference during the Discussion of the Report of the Director-General Concerning the Universal Guarantee of Fundamental Workers’ Rights and the Possible Adoption of a Solemn Declaration”, 270th Sess., GB. 270/3/1 (Add.) (Geneva, November 1997), at 10.

¹² For details, see Ann Kent, “China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994”, *Human Rights Quarterly* 17 (February 1995) 1:1-47 ; and Kent, *China, the United Nations and Human Rights*, Chapt. 2.

¹³ UN Doc. Press Release HR/CN/96/41, 18 April 1996, at 5.

¹⁴ See Liu Xinheng, n. 5. Liu argued that “in particular, they must reflect the views and concern of the developing countries, increase the proportional weight given to the right to development, economic, social and cultural rights, change the existing balance in the membership of the Commission and in the geographical distribution of personnel in the Centre for Human Rights”.

notable human rights concessions, such as its signature of the ICESCR and the invitation to UN High Commissioner for Human Rights, Mary Robinson, to visit China, as a *quid pro quo* for its exemption from consideration by the Commission and Sub-Commission. However welcome these concessions, China's attempt to move away from adversarial procedures is a source of continuing concern. The country situation resolutions in the Commission and Sub-Commission submit China to an important process of "reintegrative shaming" in relation to its human rights conditions, as well as providing useful leverage for prompting further concessions.¹⁵ China's efforts in this regard were rewarded in August 1997 when, on the initiative of its expert, Fan Guoxiang, the Sub-Commission adopted by 20 votes to 1 the resolution, "Promotion of Dialogue on Human Rights Issues". Co-sponsored by twenty-two experts, this expressed deep concern at "the possibility of human rights issues being used for political purposes" and invited "members of the Sub-Commission and governmental and non-governmental observers to carry out constructive dialogue and consultations on human rights".¹⁶ While apparently cooperative and constructive in spirit, for China the point of this resolution was spelled out in its reference to the political purposes of human rights and in other Chinese statements deploring the practice of country situation resolutions.

Conclusion

Manipulation of UN procedures provides an indirect mechanism for undermining the norms for which they provide vital support. Normative compliance is a curiously circular phenomenon, being itself based partly on the degree and scope of state compliance. The legitimacy of international rules, as Thomas Franck has argued, depends in part on the number of states respecting them.¹⁷ If China is able to demonstrate that international human rights law should not apply to it, if it is allowed to manipulate entrenched and time-honoured UN procedures to evade its reach, and if, as is increasingly the case, it is able to persuade the majority of states of the legitimacy of its cause, the tenuous compliance pull of human rights will be weakened, not only for China, but for every state. The jury is still out on the question of whether Chinese tactics will slowly undermine the norms of the Universal Declaration, or whether the recent procedural fencing will simply fade into a sideshow. At the moment the international community is preferring to interpret the latest developments as China's contribution to shaping, rather than breaking, international human rights norms and procedures. Yet, the actual procedural and normative outcomes also partly depend on the firmness, and decisiveness, of the international community's response. In the meantime, in order to facilitate the correctness of the judgement, and the appropriateness of the remedies, it is fitting that judge, lawyers and jury should all be properly briefed.

¹⁵ For articulation of this concept, see John B. Braithwaite, *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press, 1989).

¹⁶ UN Doc. E/CN.4/Sub.2/1997/L.33.

¹⁷ Franck argues that "with a few arguable exceptions, the failure of states to obey an international rule ... does affect its 'rule-ness'. It becomes more acceptable for others also to ignore the rule until, eventually, habitual disobedience may lead to the rule's demise". See Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York, Oxford University Press, 1990), 44.

The 50th Anniversary of the Universal Declaration: Reflections on Narratives of Humanness in International Human Rights

Shelley Wright ¹

Introduction

Who are human rights for? What standards, whether individual or collective, are to be accepted as universally applicable to everyone? In other words, what constitutes the “humanness” of human rights? Is subjectivity, or identity, something which exists across boundaries of gender, race, class, culture, sexuality, age, local circumstances, etc.? As Sandra Harding has said in another context:

Feminist scholars have studied women, men, and social relations between the genders within, across, and insistently against the conceptual frameworks of the disciplines. In each area, we have come to understand that what we took to be humanly inclusive problematics, concepts, theories, objective methodologies, and transcendental truths are in fact far less than that. Instead, these products of thought bear the mark of their collective and individual creators, and the creators in turn have been distinctively marked as to gender, class, race, and culture... Western culture’s favored beliefs mirror in sometimes clear and sometimes distorting ways, not the world as it is or as we might want it to be, but the social projects of their historically identifiable creators.²

One of “Western culture’s” most “favoured beliefs” is the belief in inherent and universal human rights. The year 1998 marks the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights.³ The Universal Declaration was a resolution passed by the United Nations General Assembly by a vote of 48 countries for, none against, and eight abstentions. Although the Declaration is not a binding convention as such, it has probably achieved the status of customary international law, or even *jus cogens* (at least for some provisions) as a result of its enormous influence in shaping post-World War II human rights instruments and laws, both internationally, and in many of the new constitutions drafted for the emerging nations of the post-War era. It was also explicitly designed to elaborate in more detail the references to human rights in the United Nations Charter.⁴ Yet we still seem to be struggling with an understanding of what universal human rights might mean. Even after fifty years of concerted effort by the United Nations and other bodies, the world is still far from the full adoption and implementation of universally recognised human rights for all.

The main problems within the field of international human rights are often identified as revolving around standard setting or enforcement. Although both areas are and will remain serious concerns I would suggest that the major issues go deeper than this. The extent and variety of human rights conventions indicates a sense of fragmentation over who is entitled to human rights and how standards can be set which are truly universal and indivisible. The Universal Declaration was meant to be a lasting and universal statement of basic human rights. Nevertheless, when it came to implementing these standards into a binding convention, two main covenants had to be drafted,⁵ and many subsequent treaties on human rights indicate that turning universally acceptable standards into enforceable norms is very difficult. This is reinforced by renewed discussions leading up to the fiftieth anniversary of the Declaration within the United Nations on altering this most basic document

¹ Faculty of Law, University of Sydney.

² Harding, Sandra *The Science Question in Feminism* (Cornell University Press, Ithaca, 1986) at p.15.

³ UN Doc.A/811 (10 December 1948) [henceforth “Universal Declaration” or “UDHR”].

⁴ See below, Chapter 2. See also Brownlie, Ian *Basic Documents on Human Rights*, 3d edition (Clarendon Press, Oxford, 1992) at p.21.

⁵ The International Covenant on Economic, Social and Cultural Rights, 1966 [“ICESCR”] (in force 3 January 1976) and the International Covenant on Civil and Political Rights, 1966 [“ICCPR”] (in force 23 March 1976). See also Brownlie, *supra.*, at pp.114 and 125.

to better represent differing cultural perspectives on human rights. Some Asian countries, including China, seem to be particularly sensitive to this issue.

Fragmentation and contention over what human rights are is particularly curious in relation to women and the Women's Convention. Women constitute more than 50% of the world's population. If the Covenants and other conventions are inadequate in dealing with women's rights, then whose *human* rights are they? If we add racial minorities, refugees, children, Indigenous populations, migrant workers and the populations of separate regions such as Europe, the Americas and Africa as groups requiring separate conventions, then the question of whose rights are contained in the Declaration and the two main Covenants becomes even more acute. It is not enough to say that the additional conventions merely provide more detail or more specificity to general lists of rights. The more specific conventions contain lists of civil, political, economic, social and cultural rights the same or similar to those already enumerated in the Covenants. But there can also be significant differences.

For example the African Charter on Human and Peoples' Rights⁶ contains civil, political, social and economic rights similar to those in the European Convention on Human Rights⁷ and the European Social Charter⁸ as well as the International Covenant on Civil and Political Rights [ICCPR], the International Covenant on Economic, Social and Cultural Rights [ICESCR] and other conventions.⁹ In addition, however, articles 19 to 24 contain a list of peoples' rights. These include the right to self-determination, the right to freely dispose of a peoples' wealth and natural resources, the right to development, the right to peace and the right to a satisfactory environment. This is the only major human rights treaty which explicitly recognises peoples' rights (other than Common Article 1 of the ICCPR and the ICESCR recognising the right of self-determination), but the reiteration of the other rights is similar to most other regional and global conventions. Although political and civil rights are generally treated separately from economic, social and cultural rights, as in the two main Covenants, the African Charter is not alone in grouping them together.¹⁰ But because of the emphasis on group rights, peculiar to this Convention, the individual human rights which are enumerated cannot in fact be seen in the same light as in, for example the European Convention. Individuality, so central to human rights in Western Europe and North America, has a much less central role in the rights of Africans—or at least as they are expressed in the African Charter. In addition, this convention sets out a list of duties in Chapter II for each individual covered by the Charter. These include duties towards “the family and society, the State and other legally recognised communities, and the international community”. The rights and freedoms contained in the African Charter must be exercised “with due regard to the rights of others, collective security, morality and common interest”.¹¹ This hybrid formulation illustrates how difficult it is to separate how much of human rights may be seen as universally binding and how much may be due to culturally specific or regional needs, whether as an inheritance of a colonial past, or as part of the desire to create a post-colonial present and future with autochthonous roots.

The legacy of European colonialism is a major complicating factor in international human rights. Western commentators tend to ignore colonialism as a minor consideration in the search for universal standards, and discussion is usually limited to the topics of “cultural relativism” or “difference” as problems and how they may be contained or dealt with. Commentators from the Third World are much more sensitive to histories of colonialism that may effect the expression and implementation of human rights in non-Western countries.

⁶ African Charter on Human and Peoples' Rights, 1981 [often referred to as the “Banjul Charter” or the “African Charter”] (1982) 21 ILM 59. See also Brownlie, *ibid.*, at p.551.

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 [“European Convention”] UNTS, Vol 213, p.221. See also Brownlie, *ibid.*, at p.326.

⁸ European Social Charter, 1961, European Treaty Series, No.35. See also Brownlie, *ibid.*, at p.363.

⁹ See also the American Convention on Human Rights, 1969 [“American Convention”] (1970) 9 ILM 673. This convention applies to North, Central and South America, however, neither the United States nor Canada are as yet parties. See Brownlie, *ibid.*, at p.495.

¹⁰ See the African Charter, Articles 2 to 17. See also the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 [“Women's Convention”] (1980) 19 ILM 33 and the Convention on the Rights of the Child, 1989 [“Children's Convention”] UN Doc.A/44/25. See Brownlie, *ibid.*, at pp.169 and 182.

¹¹ *Ibid.*, Chapter II “Duties”, especially Article 27.

However, analysis has often been limited to either a superficial rejection of Western standards, a blanket denial of the possibility of universality, or (in more sophisticated discussions) perspectives which concentrate on the impact of European colonial institutions on non-European cultures, often ignoring the reciprocal influences between colonisers and colonised, and the frequent interchange of roles, including the role of non-Europeans as “colonisers with brown faces”, colonial collaborators or legitimate beneficiaries of some aspects of colonial intrusion.

Part of the difficulty lies in distinguishing colonial influences from other factors which are not necessarily connected to any European intrusion into a specific society, especially where there has been an ongoing interaction between the two, or where there has been non-European colonisation. Human rights infractions may occur for reasons that have little to do with a colonial past. On the other hand, human rights standards may be rejected out of a fear of the reimposition of neo-colonial institutions under another name. One extremely complicated example involves the interaction of Islam with Western institutions, and the role human rights may or may not have in this interaction. The entrenchment of Islam in much of Africa and Asia, as well as in the Middle East, has had a profound impact on the peoples of these regions which cannot be directly attributed to European colonisation, although the two influences have interacted and often conflicted with each other in important ways for over a thousand years. Islam is frequently portrayed in the Western media and by Western political leaders as the antithesis of human rights ideals, a view which is for the most part a caricature of one of the world’s major religions, ignoring the diversity within Islam and its strong tradition of belief in the dignity of the human person.¹² Although Islamic leaders may themselves reject Western standards of human rights protection, the most strenuous defenders of classic civil and political rights, as well as more contentious economic, social, cultural and collective rights are frequently citizens of newly emergent states, including states with a majority Islamic population, for whom the promise of human rights is a major focus of solidarity and resistance to home grown, as well as imported, authoritarianism. In addition, Islamic forms of democracy may develop which can incorporate human rights perspectives more sensitive to an Islamic world-view. Finally, although Islam has developed separately from European cultural traditions, the impact of colonisation and the evangelical and imperialistic drives of both Christianity and Islam has meant that the two great Western traditions have been in contact with each other for centuries, including continuing disputes over penetration and boundaries. This contact has not always been one of conflict, although it is frequently portrayed as a matter of fundamental religious and political dispute on both sides. The colonising tendencies of both Euro-Christianity and Arab-Islam has necessarily meant severe competition over the physical, mental and spiritual territory of the “Old World” (meaning Eurasia and North Africa) such that it is probably no longer possible to divide where one begins and the other ends, despite their apparent stark contrast. The debate over human rights and Islam, usually conducted with more heat than any possibility of light on the subject, cannot be understood outside this long history of contact and conflict.

A major gap in many analyses of human rights is the lack of any deep or complex awareness of the historical context in which they developed. Human rights in international law are intimately connected to the development of such modern institutions as the nation-state, particularly in Europe; colonial expansion within and beyond Europe; the laws of war and peace between and within states; political and economic revolutions in Europe from at least the fifteenth century onwards; the globalisation of capitalism and the consequent economic, political, scientific and technological values which accompany this expansion; the ongoing fury of religious struggles, particularly within the monotheistic traditions of Christianity, Islam and Judaism, as well as amongst these traditions, and between Christianity or Islam and Indigenous religious beliefs of Asia, Africa, the Americas and the Pacific; and the changing nature of the patriarchal family in Europe and elsewhere. Where these histories have been referred to, they tend to be dominated by one History—the Rise of Europe—which dominance is often taken as axiomatic. So for example it is possible for a recent history of technology to begin:

This is a book about technological creativity. Why would an economic historian write such a book? Technology is about how to make things and services that are useful and enjoyable, that is, it is about production. The difference between rich nations and poor nations is not, as Ernest Hemingway said,

¹² See Said, Edward W. *Covering Islam: How the Media and the Experts Determine how We See the Rest of the World*, revised edition (Vintage Books, New York, 1997).

that the rich have more money than the poor, but that rich nations produce more goods and services. . . . If the West is on the whole comfortable, even opulent, compared to the appalling poverty still rampant in most of Asia and Africa, it is in large part thanks to its technology...as I shall try to show, technological creativity was at the very base of the rise of the West. It was the lever of its riches.¹³

In one sense a focus on the history of European institutions and traditions is an accurate portrayal of the development of international law and international human rights as their development *has* been largely determined by political and economic changes emanating out of Western Europe and the results of colonisation in the Americas and elsewhere. But what is perhaps more disturbing, particularly within human rights discourse, is the lack of an account of histories of those people who have been silenced or marginalised within this “meta-narrative”, i.e. women, children, the poor, the colonised, the Indigenous, the “disappeared”. These are the “people without history” in Eric Wolf’s evocative phrase—people who, when they are brought within the objective gaze of Western rationalist narratives, are treated as static, unchanging, their “development” dependent on biology or nature or tradition and, above all, the guiding hand of White European Man.

Although I believe it is necessary to place human rights within the very complex context of European and overseas colonial history, it is not my intention to demean or destroy the deeply transformative effect human rights, or a belief in their efficacy, can have. The following is meant as a preliminary exploration, a kind of archaeological dig through the past and present of human rights within international law. I focus particularly on some of those “people without history”—mainly women and Indigenous peoples—as groups and as individuals in raising questions about the meaning and efficacy of human rights. In particular, I wish to examine the “humanness” of rights and how the characterisation of this humanity from a Eurocentric perspective effects who gets to be fully human, and who doesn’t quite make it. My intention is to take a critical perspective. As Hilary Charlesworth has said:

While there have been lively debates about the relationship between the generations of rights and the best methods of implementing human rights law, there has been a general reluctance to question the basis or value of the international human rights system itself. Analyses of the foundations and scope of international human rights law frequently lapse into heroic or mystical language; it is almost as if this branch of international law were both too valuable and too fragile to sustain critique...¹⁴

Human rights law is a robust and dynamic area of international law that not only can, but must, sustain repeated and major critiques of its underlying assumptions, aims and effectiveness in order to retain its relevance for those it most needs to include—the powerless and the oppressed.

Three Challenges Facing International Human Rights

At the beginning of the twenty-first century it is becoming increasingly obvious that international human rights faces several very serious challenges to their legitimacy and acceptability. These challenges have, I would argue, three major facets. First of all, the identification of international human rights with the United Nations system means that the credibility of their parent body is closely tied to the efficacy of human rights more generally. In one sense this operates in a positive sense. Because the United Nations as an institution has been relatively successful in riding the wave of decolonisation and the creation of new nation-states, it has been able to incorporate the voices of the emerging or developing world into the task of standard setting, if not enforcement, of human rights. Thus human rights have tended to develop in several directions, moving away from the “first generation” of civil and political rights towards other kinds of rights better suited to the needs of people attempting to move into a post-colonial future. The disparate and fragmented nature of human rights can then be seen as a very positive dialogue among many different points of view about the meaning and value

¹³ Moky, Joel *The Lever of Riches: Technological Creativity and Economic Progress* (Oxford University Press, New York, 1990) at p.vii.

¹⁴ Charlesworth, Hilary “What are ‘Women’s International Human Rights’?”, Chapter 3 of Cook, Rebecca J. *Human Rights of Women: National International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 58, at p.59.

of human dignity and how it may be protected and enhanced. It has also necessarily meant that the discourse of international human rights can no longer (if it ever could) be dominated by the primacy of civil and political rights, or remain stagnated in the Cold War divisions between these rights and social, economic and cultural rights, or socio-economic rights. Collective rights in particular, and what can be perhaps described as a “fourth generation” of rights—the rights of women, children, Indigenous peoples and other oppressed groups who do not easily fit into either individual or collective rights frameworks—present the traditional perspectives with serious challenges.

But the close association of the development of international human rights with the United Nations also has a less positive aspect, as the UN has been relatively unsuccessful in convincing the major world powers to fully accept its authority, or even its existence. This is particularly so with regards to the United States, but is not limited to this country. The old Soviet Union, and the new Russia, China, the powerful new nations in East Asia and the old colonial and imperial powers within the European Union are frequently less than enthusiastic about UN initiatives and UN leadership. This dissatisfaction extends to the failure to pay a share in the cost of paying for the United Nations as a financially viable organisation, with the United States again as the worst offender. Debates in the US over payment of its UN debt as being dependent on UN “restructuring” looks very much like blackmail, even when the charges of bureaucratic bloat and institutional corruption may be warranted. International human rights within the United Nations have managed to divorce themselves from much of this debate, but the lack of funds and the constant international bickering over organisational structures and purposes has had, I would argue, a debilitating effect on the ability of the UN to establish institutional mechanisms for the implementation and enforcement of human rights, beyond the task of standard-setting.

The institutional problems associated with the UN are however a minor problem compared to the second major challenge to international human rights. This is the failure of human rights to adequately deal with the deep and complex effects of European colonisation, or to seriously address issues of decolonisation beyond the creation of new nation-states as an exercise in self-determination. Indeed the divisions within the UN are very much related to this deeper problem. Within human rights it translates as an inability on the part of many Western activists, commentators, standard-setters and advocates (who still control much of the legal discourse) to either understand or to accept responsibility for the role that Western nations have had over the past 500 years in the dispossession and disappearance of most of the world into the European colonial enterprise. A “post-colonial” world cannot come into existence simply by declaring it to be so.

One major positive consequence of decolonisation has been the revival of decolonised peoples through a right of self-determination which goes beyond mimicking Western models of political and economic life and towards the creation, or re-creation, of non-European models of human behaviour. International human rights has not proven itself sufficiently flexible or open to this cultural renaissance, and has so far failed to move beyond its own culturally specific standards described as “universal”. International human rights may very well be universal in some sense, but I would suggest that we do not yet know in what sense this might be. The challenge of addressing the meaning and impact of colonialism within human rights means facing the complexity and positive aspects of diversity and cultural pluralism. That human rights is reluctant to see diversity as a “good” is indicative of this inflexibility. Yet it seems clear that if international human rights is not able to adapt themselves to cultural difference and change, they may become irrelevant at precisely that moment when they are most necessary as a positive force in transforming human governance away from authoritarian structures and towards democratic participation, governmental and corporate responsibility and respect for the dignity of all human beings. Nevertheless, moves to radically redefine the nature of human rights must be careful not to incorporate cynical attempts by major power-holders to dilute their effectiveness in the name of a superficial or spurious type of “cultural diversity”.

This leads to the third major challenge, which is again related to the first two. This is the inability of human rights to adequately take cognisance of, and provide some measure of remedy for, those who are directly effected by the globalisation of capitalist economic forces and their accompanying political, social and psychological effects. Because international human rights is part of an inter-state legal order, piercing the veil of the State to directly address the power of non-State actors, such as multinational corporations, is extremely difficult to do. This means that much of the abuse which human beings suffer cannot be really addressed by human rights as they are presently constituted. Relative to the second major challenge, that of colonialism and

cultural diversity, it means that new forms of colonialism described as development or globalisation do not become visible as aspects of human rights abuse. It also means that new players in the neo-colonial game, such as the emergent powers in East Asia, escape attention within those areas of human rights, such as socioeconomic rights, where real progress has been at least partially achieved, but where serious problems of political and economic monopolies on power, corruption and the distribution and access to wealth and resources persist. Both the achievements and the problems tend to be ignored in discussions of human rights in Asia. While international human rights advocates in the West challenge China, Indonesia, Burma and other East Asian countries for their obvious and egregious abuse of civil and political rights, they fail to pay adequate attention to the effects of uncontrolled corporate penetration of much of the Third world by Japanese, Korean, Taiwanese, Malaysian, Indonesian, Filipino, Singaporean and Thai corporate players, usually with the backing of national governments in these, and other, countries. Nor is there sufficient recognition of the sometimes extreme social, economic and cultural dislocation felt by the residents of Asian and other countries, particularly women, children, Indigenous peoples and the poor generally when this economic penetration either fails due to financial or structural collapse, or is instituted without regard for the human and environmental costs of uncontrolled development. Only very recently have international human rights become sensitive to these problems, mainly through the insistence of grass-roots movements dedicated to the inclusion of women, children, Indigenous peoples and the poor who have brought these problems into international discourse. The late economic woes of countries in East Asia may also serve as a catalyst for greater attention to human rights in a broader sense. I would argue that the structural and theoretical paradigm within which human rights still exist, and the dominance of neo-rationalist economic discourse, tends to make the inclusion of most people as genuinely effective subjects of human rights still very marginal.

One possible approach in relation to Asia, where perhaps the greatest insistence on cultural diversity has been most recently expressed, is to explore the human rights applications of Eastern philosophical and religious systems. Stress by some Asian leaders is often placed on something called "Confusion values", particularly by the former Prime Minister of Singapore, Lee Kuan Yew. This notion has been adopted by some Western commentators in an overly enthusiastic manner. "Confusion values" obviously have little relevance to countries in East Asia which are predominantly Muslim, as in Malaysia or Indonesia, or which still adhere to socialist political values, such as in Vietnam or even China. But even in those countries which have been historically deeply influenced by Confucian values, their adoption by leaders is often caricatured and politically or economically motivated. K'ung-Tzu, or his great philosophical heir, Meng-Tzu, would probably not approve of much of what is said in their names. In addition, East Asian traditions also contain a wealth of different religious and philosophical perspectives which may be much more sensitive to something we might call "human rights". Perhaps the most promising for further study is Buddhism, in particular Mahayana or "Greater Wheel" Buddhism most popular in China, Zen Buddhism in Japan and Vajrayana or "Diamond Wheel" Buddhism practised in the Himalayas, Mongolia and other parts of western China, northern India and Tibet.¹⁵ The Dalai Lama is not only a great spiritual leader, but also a major exponent of respect for human rights, but from a very different cultural tradition than that of Western Europe.

That the vast majority of human beings—those "people without history"—can still be dismissed by most Western commentators on international human rights and international law as peripheral, or can be ignored altogether, is indicative of a deep level of irrelevance within international legal discourse which goes well beyond debates on priorities, standard-setting or enforcement. Much of Asia, Latin America, the Islamic world, Eastern Europe, Australasia and the Pacific, and at least some parts of Africa are now going through major economic, political and cultural resurrections out of colonised histories which, although very different at some levels, share many common features. International human rights must either adapt to the fact of cultural diversity as something more than "cultural relativism", or they will not survive the new century. In my view this would be a terrible loss, as human rights contain within them a truly radical, even revolutionary, idea—that every human being on this earth matters.

¹⁵ See Billington, Ray *Understanding Eastern Philosophy* (Routledge, London, 1997).

The Division between Mind and Body

It can be argued that human rights have as a primary purpose the healing of wounds created by decades of warfare and colonialism. Although the conflicts of the first half of the twentieth century were the immediate precursor to and catalyst for the creation of international human rights under the aegis of the United Nations, the concept of human rights is much older. Ideas about rights, or the protection of respect for human dignity, have roots going back at least to the beginning of the modern period in Europe (dated from about the end of the fifteenth century) and arguably much longer. The conflicts of the past one hundred years were themselves the culmination of centuries of European colonialism both within Europe itself (Ireland is arguably the first modern European colony)¹⁶ and, after the mid-fifteenth century, through overseas expansion. This colonial period has seen the infliction of horrendous human suffering by way of war, slavery, genocide, religious persecution, dispossession of land and resources, and extreme systemic and individual violence inflicted largely by or through European-derived institutions and individuals on women, children and men who did not (and do not) fit the model of the white, middle-class, heterosexual, European Man as the exemplar and monopoly owner of the quality called “being human”.

The deep impact of the division between mind and body, especially as mediated through the Cartesian subject, cannot be ignored when examining the philosophical bases for human rights. The “humanness” of human rights would appear to be strongly coloured, if not constituted, by this division and by the mechanistic view of the universe which seems to have accompanied it. Duality is a theme which runs consistently through European thought and Eurocentric definitions of what is “human” or not. The deep dichotomy between mind and body replicates itself in distinctions between male and female, white and black (or white and coloured), spirit and materiality, rationality and emotion, heaven and earth, West and East, North and South, good and evil. The intellectual aspects of human development are seen as better, dominant, acceptable and are placed in positions above the corporeal realm which is seen as subordinate, unacceptable, less good, less human. Within Eurocentric thinking, duality is an expression of power, of dominance and subservience. It is almost impossible to calculate how deep this division goes and how much it affects all aspects of our thinking about humanness and human rights.

The consequences of the division between mind and body exist for all categories of rights and appear at very basic levels. These levels are so basic that they cannot be captured by the discourse of anti-discrimination which attempts to place international human rights on an egalitarian footing, eliminating racism and sexism. All human rights, including economic and social rights (which would appear to be more closely attuned to the needs of women) are gendered as male. This goes beyond the use of masculinist language, which dominates nearly all international conventions, descending below levels of definition and implementation to the very nature of the rights which are in fact protected. In addition, there are ongoing disputes over apparent divisions between civil and political rights versus economic and social rights, disputes which seem to have continued despite the ending of the Cold War and the ideological division between East and West. There are also apparent conflicts between individual and collective rights. This divisiveness can be attributed to the nature of identity on which rights are based. This duality would seem to underlie all aspects of human rights language and practice.

For example, persons who are portrayed as being more closely attuned to the corporeal or material are likely to be seen as less fully individuated or less inherently capable of individuation, and therefore less capable of being bearers of rights. This can be seen in the example of children, but it also includes women, Indigenous peoples, the poor, and non-Europeans generally. Human rights for these groups may be more closely associated with needs, or the provision of services. This can lead to the argument that civil and political rights, the classic rights of white men, are more truly “human rights” than economic, social or cultural rights which deal with physical or material needs apparently more appropriate to women, children or men from poor or non-European backgrounds. These needs may give rise to the paternalistic provision of care by male-dominated State or international structures, but may be less readily seen as true “human rights”. Where they are characterised as “rights” the political role of women in fighting for them, or the parts played by other persons who do not fit the

¹⁶ See Bartlett, Robert *The Making of Europe: Conquest, Colonization and Cultural Change 950-1350* (Princeton University Press, 1994) at pp.306-314.

white male European model, tends to disappear. Needs becomes “rights”, appropriated and redefined by male-dominated institutions. The effect of this is frequently the exclusion of those for whom these rights may be most beneficial.

In addition, despite the primary role of women in providing for social needs where their status as rights is questioned or withdrawn, the rights themselves are described in masculinist language. Article 11 of the ICESCR talks about “the right of everyone to an adequate standard of living for himself and his family...”¹⁷ This reference suggests that the middle-class European patriarchal family is the norm throughout the world. This is simply not true, and yet the wording is quite specific. It is estimated by the United Nations that one third of the world’s households are headed by women.¹⁸ This is probably a conservative figure in that it does not account for male heads of households who are frequently absent, or who play little role in the economic or psychological well-being of their families. The model of the patriarchal family which underlies the rights enumerated in Article 11 itself contributes to problems in ensuring the basic requirements of survival to large numbers of people, especially women and children, who are subordinated and silenced within this model.

Human rights are also usually predicated on protecting the individual against the State. Communities or groups other than states play a much less significant role in how human rights are defined, at least from a Eurocentric perspective. Partly this is a result of the development of the modern nation-state in Europe and its transformation through colonialism. In addition, value is placed on certain forms of national culture usually described as at least literate. Even in postmodern discussions of popular culture, literacy in some language of European origin (usually English or French) is assumed and individualism emphasised, even as the cultural values themselves are deconstructed.

Ideas based on “humanism” and the Enlightenment have created philosophical bases which have condemned colonial practices—practices which are still part of our European heritage. But these ideas have also provided justifications for the creation and continuation of such practices, often in disguised forms. These justifications, based on race, gender and class (themselves largely products of European invention during the colonial period) we now refer to as white supremacy, anti-Semitism, apartheid, religious intolerance, forms of discrimination such as racism, sexism, homophobia, as well as widespread political oppression, economic disparities and other forms of bigotry and disempowerment. The language of human rights has helped to delineate and even create these categories, giving us a structure and a language for condemning and, at times, eradicating colonising practices and the degradation and destruction of living human individuals and communities. Unfortunately, justifications for demeaning and degrading human beings are also often hidden beneath more benign-sounding labels, such as economic development, nation-building, cultural relativism and even human rights themselves.

Human Rights and European Colonialism

Those who expose and resist such labels, whether the labels are seemingly benign or obviously malignant, are frequently subjected to vilification and abuse ranging from disputes over “political correctness” in Western universities and the popular media, to much more serious instances of harassment, torture and killing. The execution of Ken Saro-wiwa and others in Nigeria on November 10, 1995 is only one especially egregious example of the large number of attacks against human rights activists that go uncounted and unnoticed every year.¹⁹ Although Saro-wiwa’s immediate executioners were officials of the nation-state of Nigeria, responsibility must also lie with Western political and economic interests, especially multinational petrochemical companies and their European governmental supporters and apologists, and the legacy of political and economic instability directly associated with centuries of slave-trading and colonialism in West Africa. I am not suggesting that European colonisers have or had a monopoly on either violence or the means

¹⁷ ICESCR, Article 11(1).

¹⁸ United Nations Department of Public Information, *Women: Challenges to the Year 2000*, UN Doc.DP1/1134, 1991, at p.40.

¹⁹ Waro-Wiwa, Ken *A Month and a Day: A Detention Diary* (with an Introduction by William Boyd) (Penguin Books, New York, 1995).

of justifying violence. It is simply that the particular political, economic and legal models (including that of international law) that, to an almost overwhelming extent, determine the structures under which we all live are ultimately derived from the project of European expansion outside Europe.

This is usually dated from the year of Columbus' first voyage, but it in fact began in Europe itself at a very early stage and was carried overseas sporadically from about A.D.1000 through Viking excursions to Iceland, Greenland and Newfoundland and through later Mediterranean adventurers' travels to Asia or attempts to conquer small offshore islands, such as the Canary Islands. Denmark's presence in Greenland is a result of this very early European expansion overseas. The colonial project began in earnest, however, with the establishment of the first major Portuguese trading post in Saharan Africa at Arguim in 1448.²⁰ In 1492 the rather tentative efforts of Portugal were supplemented by the major enterprise begun by Spain, followed by France, the Netherlands, Great Britain, Russia, Belgium, and, very belatedly, Italy and Germany.

But aggressive territorial expansion was not confined to European states. Ottoman Turkey was also a major imperial power from the fourteenth century onwards. European attempts to circumvent or compete with Turkish expansion was a major force behind the external drive of European colonialism, which in turn was a continuation of the old conflict between Christianity and Islam for control of the known world. The "discovery" of hitherto unknown territories to the west of the Old World after 1492 was a massive upset to the existing balance of power which ultimately favoured European over non-European empire-builders. The world as a whole was changed utterly as a result of these events. We do not in fact live in a post-colonial world, but one which is still deeply structured at all levels by the European colonial experience. This includes the still continuing conflict between the Christian West and the Islamic East, now usually presented as secular liberal democracy versus a rising tide of "fundamentalist Islam". To paint human history in its broadest terms, the world is still caught up in the ancient conflict between and within the monotheistic patriarchal religions of the Middle East, Europe and Asia and their many perceived enemies both within and without. Human rights, as the secular heir to Latin Christendom, is very much a part of this old and frequently violent struggle.

Part of the process of healing old wounds caused by colonialism, war and dispossession lies in the completion of the task of decolonisation, only just begun in the second half of the twentieth century. Self-determination and human rights are indeed crucial to this process, as the engineers of the new international order after 1945 at least partially intended. Nevertheless, neither of these terms can be taken at face value. Human rights in particular contain a complex set of claims, potential claims, assertions, assumptions, silences and lacunae that need to be explored in greater depth. This is directly related to their own complicated history, a history which is intimately connected to both the processes of colonialism and decolonisation.

Development and Diffusionism

The historical development of civil rights, fundamental liberties or human rights as we know them today can be traced back to the growth of modern political and economic systems in Europe and its colonial possessions from the early sixteenth century onwards, although it is clear that the basic principles are borrowed from philosophical and religious systems which are much older.²¹ Almost all commentators, including those in Third World or developing countries, accept that the modern formulation of international human rights is largely European, originally expressed as "the rights of Man" contained in early constitutional documents in the United States, France and elsewhere. It is less widely acknowledged that the phrase "rights of Man" was originally meant to be gender, race and class-specific, confined to white, property-owning, middle-class European men either in continental Europe itself, or for the benefit of European colonists in the Americas, Asia, Africa and the Australasian/Pacific region, as European colonisation expanded from the eighteenth century onwards.²² The idea of the "rights of Man" has since spread globally, mainly through the agency and at

²⁰ Fernandes, Armesto, Felipe *Millenium* (Doubleday, Toronto, 1995) at p.228.

²¹ See eg. Fields, B. and Narr, W. "Human Rights as a Holistic Concept" (1992) 14 *Human Rights Quarterly* 1; Wright, S. "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" (1992) 12 *Australian Yearbook of International Law* 241.

²² Wright, *ibid.*

the instigation of individuals and organisations developed during the colonial transformation of world politics from the nineteenth century onwards, much of which was dominated by Europeans.²³ But this expansion, or diffusion, was a complex process in which much that was allegedly “European” was taken from non-European sources through misappropriation and destruction of Indigenous cultures, and reintroduced in different guises and in different locations. This process is part of what has been called Eurocentric diffusionism, and is related to and dependent on colonialism.

“Diffusionism” is the process by which Europeans claim for themselves the capacity to spread civilisation and the benefits of European rationalism and enlightenment to the non-European world, defined as non-rational, unenlightened, uncivilised and backwards. This phrase is taken from the work of J.M. Blaut who writes:

Diffusionism became a fully formed scientific theory during the nineteenth century. The origins of the theory, however, go back to the sixteenth and seventeenth centuries in Western Europe, where a belief system was being constructed to give some coherence to the new reality of change within Europe and colonial expansion outside Europe. The conception of a two-sector world, the diffusionist distinction between Inside and Outside, emerged from a very old conception of Christendom and the Roman imperial legacy..... [Medieval Europeans] had some idea, not of a collective identity, but of a distinction between the lands inhabited by Christians, given divine guidance and protection for this reason, and the lands of non-Christians. Nevertheless, it was only after 1492 that Inside acquired a sharp geographical definition, less as a result of medieval ideas than of colonialism in the early modern period.²⁴ This resulted in a resolutely Eurocentric view of the world.

However,

[t]here is ... a problem with the word ‘Eurocentrism’. In most discourse it is thought of as a sort of prejudice, an ‘attitude’, and therefore something that can be eliminated from modern enlightened thought ... But the really crucial part of Eurocentrism is not a matter of attitudes in the sense of values and prejudices, but rather a matter of science, and scholarship, and informed and expert opinion. To be precise, Eurocentrism includes a set of beliefs that are statements about empirical reality, statements educated and usually unprejudiced Europeans accept as true... If they [European historians] assert that Europeans invented democracy, science, feudalism, capitalism, the modern nation-state, and so on, they make these assertions because they think that all of this is a fact.²⁵

The European role in the spread of human rights appears to consist of the merging of many diverse concepts, both European and non-European, into a polyglot and cosmopolitan mixture which has been labelled “European” by scholars, jurists and lay people alike. This mixture was then diffused throughout the world through colonial and neo-colonial appropriation and expansion.

But the process of diffusion was not one simply of European introduction of human rights to post-colonial constitutions or the new international order. Rather it was frequently a process of dialectic or revolutionary struggle, often violent, in which rights consciousness was forged out of direct opposition to colonisation. Much of the human rights standards which provide a rallying cry around which anti-colonial struggles are, and were, carried on borrow openly from French or American sources. At other times new rights or new approaches to human rights have been created out of the need to clarify the requirements of post-colonial societies. And sometimes human rights have been rejected altogether as themselves a form of Western imperialism.

It is often forgotten that the American Bill of Rights was itself an early manifestation of the American anti-colonial struggle and that the French Declaration of the Rights of Man and the Citizen was an application of radically subversive ideas within the context of perhaps the most significant revolutionary struggle in

²³ When the phrase “European” is used, white ex-colonial populations outside Europe are also included, in particular the United States.

²⁴ Blaut, J.M. *The Colonizer’s Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, New York, 1993) at p.18.

²⁵ *Ibid.*, at p.9.

European history, at least until the Russian experience of radical change after 1917, or possibly the collapse of the Eastern Bloc and the Soviet Union between 1988 and 1991. Human rights are at their core radical, even revolutionary, statements about the pre-eminence of human dignity and integrity. These statements, whether couched in the language of political struggle or confined to the more sedate field of juridical claims and counter-claims, are often fundamentally opposed to the demands of political and economic elites. Within the American and French experiences at the end of the eighteenth century this expression of human rights took on historically specific forms which have become entrenched in the mythologies of nationhood of these and other countries, and are contained within the constitutional norms of the modern nation-states of France and the United States. We have inherited what we now understand as civil and political rights largely through these two media of expression. But the development of even this “first generation” of human rights, and their roots in European and American history, are much more diverse than is generally acknowledged.

Economic, social and cultural rights also owe their early development to revolutionary struggle in Europe and its former colonial possessions. They were clearly already embedded in the concepts of equality and solidarity expressed in the French revolutionary struggle, and peoples’ or group rights have clear links to the expressions of nationhood first exemplified by the French revolutionary movement, even after it collapsed into Napoleonic imperialism. From the adoption of the Universal Declaration onwards, these complex expressions of human rights ideals were translated into international and constitutional law. It may be possible to find both universal and culturally specific aspects within even the most traditionally accepted civil and political rights which can help us in our search for the humanness of rights in a wider sense.

Cultural Diversity in International Law

Most colonies granted independence since World War II either chose to, or were forced to, include extensive bills of rights guaranteeing at least civil and political rights in their post-colonial constitutions. Some, such as India, also included catalogues of economic, social and cultural rights.²⁶ These rights provided an appearance of legitimacy to the new regimes, allowing them to enter into the international community of nation-states for whom human rights had become a priority under the United Nations’ Charter. They also acknowledged a primary purpose of the anti-colonial struggle, which was to achieve real social, political and economic transformation for the citizens of the new nation-states. Little regard was paid, however, by either the ex-colonial powers or most of the new governments to political, economic or cultural barriers to actual implementation of these rights. Pre-colonial religious or cultural means of protecting human life and dignity had either been destroyed under colonialism or were denigrated as “traditional”, and therefore inferior to “modern” formulations of human rights, perceived by the post-colonial powers as necessary for nation-building in the new international era following 1945. But many of the traditional forms have survived, and are even enjoying a renaissance as part of the process of decolonisation. This can be seen most vividly in our earlier example of Islam, but it is also true of Indigenous communities around the world. International human rights must be capable of adapting themselves to this process, or they may run the risk of becoming irrelevant. Nevertheless, so long as the expanding global economic order continues to rely on the oppressive power of nation-states to maintain some political and legal stability ensuring the steady incursion of international capital, and where these same nation-states continue to jealously guard the interests of small elites, human rights may be the only tool by which people can hang onto some measure of individual and communal integrity. Human rights are part of a political and legal order which dominant economic players cannot completely ignore as it is embedded in the ideology of global capitalism itself, especially as mediated through the American tradition of rights and freedom. The exception to this ideological compatibility is the emergence of major economic and political forces which are not directly connected to Western liberal theories of rights and constitutional governance. This is particularly so in relation to East Asia. As discussed above, international human rights seem to be having relatively little real impact on the way in which these powers operate. This is a serious problem, and one which most human rights analysts have yet to adequately resolve.

It may be possible to find alternative sources for the development of human rights which might open up the possibility for a more integrated approach. For example, modern human rights, democracy and constitutional

²⁶ Constitution of India...

federalism seem to owe some of their history to Indigenous peoples of North America. Other sources may also exist which we need to uncover and discuss. What we have now is a body of doctrine which has been filtered through a long history of colonial dispossession, including the misappropriation of Indigenous cultural values without acknowledgment. That human rights still have strong connections to ideas about property means that they cannot be seen as somehow separate from this history, but are still intimately connected to ongoing problems of colonial dispossession, exploitation and oppression, both as contributing, and as liberating, tools. The history of human rights is therefore much more complex than it is usually portrayed as being. This does not necessarily detract from the value or importance of human rights, but it must make us cautious in our analysis of their historical development and of contemporary problems with cultural diversity or Eurocentric dominance disguised as universality.

Cultural or religious differences have become important complicating factors in discussions of human rights in international law. The Beijing Conference on Women and Development incorporated a compromise on this issue stating that “religion, culture and tradition should only be factored in if they contribute to women’s rights, not when they take away from them.”²⁷ Culture is however a much more difficult problem than is at present being conceded by most human rights analysts. There is no doubt that cultural difference is used as an excuse by authoritarian regimes to justify their continued violation of basic human rights, and that it is important to distinguish between the positions of governments and of people themselves on this issue. But there is a note of triumphalism creeping into some human rights talk. International human rights and cultural practices are not necessarily in contest with each other and one need not “trump” the other when a conflict does arise.

By insisting on universality without examining the underpinnings of this term, it becomes impossible to deal with such difficult problems as presented by the following statements by Zenebu Tulu, a woman of the village of Moulou, Ethiopia:

When a girl is born, people are not very happy. They think it is much better when a woman gives birth to a son. When a girl is born, people do not celebrate like they do with a boy... I want women to be equal, but it is our culture [for them not to be] and I accept that... I’ve heard that women are treated as equals in many foreign countries, but I do not know it for a fact. For myself, I want to stay as I am. I want to fit in this society, with this culture.... My daughters are not circumcised, but [my son] Teshome is already circumcised... It is a tradition—our tradition. I have no idea why, but it is a tradition... The others would laugh at Like [Zenebu’s ten-year-old daughter] when she goes to school if she were not circumcised. It is a humiliation, not circumcising a daughter. It is terrible not to... She [Like] keeps complaining that she is not circumcised. Like, herself, is complaining. She says, ‘Many of my friends are circumcised and you did not circumcise me.’...²⁸

When asked about her own circumcision, Zenebu says she thinks it was done when she was a year and a half old. The operations are still done by women who specialise in the procedure in the traditional way—for a bowl of porridge, butter to oil their hair and the equivalent of US\$0.32. When asked about the pain and complications, Zenebu responds that, although a powder from a private clinic (what she calls “Western medicine”) is used to help with the pain, women in fact do not suffer, rather it is men who suffer. Male circumcisions, including that of her son, are done at the private clinic, but women’s circumcisions may not be done there. Zenebu believes this is because the government will not allow it. When asked about whether there are health or other reasons for not allowing girls to be circumcised, Zenebu’s response is:

In the clinic they complain about it. They say, ‘You lose all this blood and it always ends up infected.’ When a woman gives birth, the cervix will not relax sometimes, because of the infection. And they teach us that circumcised women can have problems in relations with men... They never tell us the

²⁷ From an oral presentation by Carrie Buck at the Canadian Council on International Law 1995 Conference “Globalism and Regionalism: Options for the 21st Century” referring to the Final Platform for Action of the Fourth World Conference on Women held in Beijing, September, 1995.

²⁸ Statements made by Zenebu Tulu as quoted in D’Aluisio, Faith and Mann, Charles C. *Women in the Material World* (Sierra Club Books, San Francisco, 1996) at pp.79-80. Questions by interviewer omitted.

details.²⁹

Zenebu was kidnapped by her husband at the age of eighteen, after which elders were sent to negotiate a dowry and organise a marriage ceremony. Zenebu herself knew nothing about her husband prior to this, but now she says her parents and herself are happy "... because I have my own children. I have my own life... It's better to get married than to stay at home with no children." Getu, Zenebu's husband, would not like his own daughters to be kidnapped. Instead he would like them to get an education and to marry "... someone who has an office job." His own actions, he says, were done out of ignorance. "I am an illiterate person", he says.³⁰ But, although his twelve-year-old son Teshome is attending school, his daughter Like cannot. Her mother says she needs her in the home, and the family cannot afford her school fees.³¹

It is not enough to say simply that "traditional" practices such as female genital surgeries are wrong, a violation of women's rights, although this position has been strongly argued.³² Simply denying the importance of being within her own culture for women such as Zenebu, even where it involves serious human rights infractions, may create a situation where human rights become coercive, multiplying problems rather than resolving them. We can fall very easily into the trap of paternalism and disrespect for choices that women themselves, however wrongheaded they may appear to us, are in the best position to make. On the other hand, it is also clearly not sufficient to end the discussion with the argument that any human rights infraction is mitigated by the cultural practices which are accepted by this woman's community and family, and even by herself.

...for the feminist concerned with genital surgeries one wants to do more than describe them accurately, one wants to evaluate, indeed, condemn. For as feminists, even if we do not abandon a paradigm of right versus wrong, we must develop a method of understanding culturally challenging practices, like female genital surgeries, that preserves a sense of respect and equality of various and different cultures. The focus needs to be on multicultural dialogue and a shared search for areas of overlap, shared concerns and values.³³

Even where cultural practices are deeply embedded in the fabric of daily life and act as powerful shaping forces in women's and men's lives, forces which cannot be readily or easily dismissed, they still should not be used as an excuse to condone the reality of suffering and disempowerment that these practices may carry with them. But whether such practices are perceived by the women themselves as sources of suffering and disempowerment may be very difficult to establish. For Zenebu, circumcision or genital surgery is a source of cultural acceptability, even of pride in herself as a woman. Many African women argue that some forms of female genital surgeries are in fact empowering, defining their status as women within their communities.

In Sudan, for example, a girl or woman would have few prospects of getting married if she remained uncircumcised. Marriage in these societies, beyond the satisfaction of emotional and psychological needs, is an essential career move. In Sudan, even an educated woman is only able to engage in a handful of different types of economic activity outside of the home. Even with a market-oriented job, women cannot own property; her husband or male relative (if unmarried) does this for her. In other societies, a woman who might otherwise be able to inherit and own money or property could not if she was uncircumcised; and in others it is known that any offspring of the uncircumcised woman will be killed... These economic pressures are, of course, intertwined with social pressures. Preserving one's chastity and giving sexual pleasure to one's husband are related to the emotional needs to acquire and keep a husband and family. If one is not 'properly' circumcised and resutured after childbirth, one risks losing him as he resorts to prostitutes, additional wives, or even divorce... Finally, ...the surgeries are

²⁹ *Ibid.*, at pp.80-81.

³⁰ *Ibid.*, at p.75.

³¹ *Ibid.*, at p.71.

³² See for example the condemnation of such practices in the UN Declaration on the Elimination of Violence Against Women and the Beijing Final Platform of Action.

³³ Gunning, Isabelle R. "Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries" (1992) 23 *Columbia Human Rights Law Review* 189, at p.191.

widely believed to have health benefits....³⁴

In addition we can easily forget that our own cultures are also powerful in shaping our views of femininity, particularly in relation to appearance and body size. Cultural practices in relation to women's bodies in the West include dieting, "fitness" training and weight-loss, massive expenditures of time and money in the fashion industries, and "cosmetic" surgeries leading, sometimes, to illness and long term suffering, or even death. In addition, those who believe that genital surgeries are only performed in Africa, or other supposedly benighted parts of the developing world, obviously do not read women's magazines. The May, 1998 issue of the Australian edition of *Cosmopolitan* reveals "genital makeovers at a glance" and their burgeoning appeal in Western countries. This is in "The Oh-My-God Sealed Section" of the magazine entitled "Genital Makeovers: Plastic Surgery for Sexual Pleasure". Explicit descriptions, photographs and even prices are given for operations such as liposuction to the pubic mound, hymen reconstruction, labioplasty (or the removal of "excess skin from the inner vaginal lips... so they don't protrude past the outer lips of the vulva"), perineorrhaphy (repairs to tears usually occurring during childbirth) and clitoroplasty (or, as it is described, "[p]art of the clitoral hood is nipped away under general anaesthetic"). This last procedure is described as "currently unavailable in Australia".³⁵ The procedures of labioplasty and clitoroplasty are remarkably similar to clitorodectomies and labial incisions commonly performed elsewhere in the world and frequently condemned by feminists and human rights activists. Despite the tone of this article, most of these procedures have been commonly, even routinely, performed in European and North American countries for many years. Should these practices be condemned as human rights abuses?

Female genital surgeries are often cited as among the most difficult of examples of human rights in conflict with cultural practices. But this is itself revealing. Women's roles in the representation and reproduction of cultural practices make them extremely vulnerable to arguments which place culture over women's rights. Men's rights are rarely seen as so clearly in conflict with cultural or religious differences.³⁶ At the very least, a serious analysis of the role of gender in conjunction with other differences must be taken into account.³⁷ But even here the answers can be very difficult. Can one simply say that Zenebu cannot really be happy, or if she is then it must be due to ignorance or a failure to recognise a more enlightened view? Zenebu is aware of the concepts of equality and women's rights, but rejects them as irrelevant to her own life and happiness. Perhaps we need to take a wider view. What would it mean for this woman to be removed from her culture? Is living on the streets of Addis Ababa eeking out an existence as a prostitute any better? She would appear to have few other options. The problems lie deeper than any simplistic application of human rights standards, or arguments based on cultural relativism. Constructive change for Zenebu and her daughters requires the reduction of poverty, increased opportunities for education and work and, above all, recognition of the value of the work that these women already do. Choices for women like Zenebu need to be expanded, but respect for the choices they ultimately make is also necessary. Zenebu says that in her country when a girl is born "...people do not celebrate like they do with a boy." She recognises that women do not enjoy the same respect as men do. That seems to be the core of the problem—inequality, not of opportunity or even of result, but inequality of respect—a difference in the joy and celebration felt on bringing a new life into the world on the basis of whether the child is a boy or a girl.

The role of colonialism in introducing new cultural forms and expectations, or in shaping or reshaping Indigenous patterns of belief and behaviour, cannot be ignored. Female genital surgeries have, at least in Africa, a very close connection to the politics of colonial morality. In British dependencies, such as in East Africa, legislated prohibition of longstanding cultural practices deemed barbaric by colonial standards was common.³⁸ Part of the anti-colonial struggle has included the reinstatement or revival of outlawed practices in

³⁴ *Ibid.*, at pp.215-216 (footnotes omitted).

³⁵ Wilson, Andrew and Wright, Ylla "Genital Makeovers: Plastic Surgery for Sexual Pleasure" (May 1998) *Cosmopolitan* 91, at p.95.

³⁶ Binion, Gayle...

³⁷ Gunning, *supra*.

³⁸ Brennan,...

order to rediscover and maintain the uniqueness of African culture.³⁹ In this battle, women become the bearers of religious and community values in the fight against colonising practices, while frequently being given little real voice or opportunity to choose for themselves what they want.

A parallel can be drawn with other efforts to eradicate traditional practices, Indigenous ceremonies, languages and culture in the interests of what was perceived by governments, both colonial and post-colonial, as higher and more humane forms of civilised conduct. Examples from North America are the banning of Sun (Thirst) Dance ceremonies and the Potlatch. The Potlatch, a form of ceremonial distribution of property practiced by many Indigenous peoples of the Pacific Northwest, was banned by the Canadian government in 1885 under amendments to the Indian Act, 1876.⁴⁰ Other ceremonies of religious, economic, political or cultural significance, including the Sun (Thirst) Dance, were banned with further amendments to the Indian Act passed in 1895.⁴¹ These bans were not lifted until significant reforms to the Indian Act were passed in 1951.⁴² The Sun (Thirst) Dance ceremony, like female genital surgeries, usually involves physical suffering including flesh piercing and tearing. It may be of some significance that this is a ceremony usually reserved for men, although women also participate in differing ways depending on the particular group. Other ceremonies involving physical mutilation, but not genital mutilation, are rarely discussed as part of human rights. Arguments over practices of genital mutilation inevitably focus on women and girls, yet some forms of male genital mutilation, as practiced for example by Central Australian Aboriginal groups on young boys, can also be quite extreme. Cultural difference can be used as a screen, or as a bone of contention, depending on both gender and race. In fact, the difficulties lie much deeper than this. Colonialism in some form or other is almost always a major complicating factor.

The Importance of European Culture and Religion in Forming Human Rights

Why are human rights so often inadequate in dealing with issues raised by women or by Indigenous people, or so unsatisfactory in cases of cultural difference? One reason for the marginalisation in relation to women is the dichotomy between production and reproduction so central to Eurocentric economic structures. Production is given value in economic terms while reproduction tends to be sequestered in the private sphere of the family. The family itself is given central significance in human rights as the bearer of traditional cultural values, as if such values cannot be found elsewhere. The Universal Declaration states in Article 16(3) that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” Article 10 of the ICESCR puts this in more detail: The States Parties to the present Covenant recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the nature and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

This privileging of the family is also repeated in the African Charter, the American Convention and the European Social Charter.⁴³ The different conventions take different approaches. For example, Article 18(2) of the African Charter emphasises the family’s purpose as “the custodian of morals and traditional values recognised by the community”, whereas the European Social Charter in Article 16 says little about why the

³⁹ See statements by Jomo Kenyatta reprinted in Alston, Philip...

⁴⁰ Indian Act,...

⁴¹ See Pettipas, Katherine *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (University of Manitoba Press, Winnipeg, 1994) at p.3.

⁴² *Ibid.*, at p.209.

⁴³ See UDHR Article 16, ICCPR Articles 17 and 23, ICESCR Article 10, African Charter Article 18, American Convention Article 17 and the European Social Charter Article 16.

family is the “fundamental unit of society”, but rather emphasises the need “to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.” It is only within or near these provisions relating to the family that women, in their roles as wives and mothers, are specifically mentioned as requiring protection under these Conventions.⁴⁴

The practical consequence of this would appear to be the devaluation of women’s work as reproductive or as subsistence production without economic or other significance while at the same time placing on women the primary burden of transmitting social, cultural and human values to their children, and safeguarding these values within the private sphere, itself a product of Eurocentric thinking. Despite significant cultural differences in how the family is viewed in different human rights conventions, there is a similar pattern regarding women’s roles. This is at least partly a result of the export of human rights in their present form from a European cultural context to the rest of the world. However, the fact that this emphasis is not solely European can be seen in the continuation of such concepts in instruments and institutions devised by non-Western groups since decolonisation, such as in Africa. However, the effect of colonialism and decolonisation on the adoption of human rights standards is a complicated story in which it may be very difficult to identify what is primarily European in origin and what is coming from other cultural traditions.

The modern capacity of individuals and groups, such as Indigenous peoples, to claim for their needs and desires the status of “rights” having juridical value in national and international law is an historically and culturally bounded process that did not exist in any recognisable form prior to the seventeenth century in Europe. There was discussion of human rights prior to this, and means of recognising forms of human dignity and respect in all cultures since humans as a species first developed in small social groups, probably in Africa. However, our modern concept of human rights has taken specific forms and gives rise to specific problems. A precursor to our modern notion of how “rights” are defined and protected lies in the concept of “property” going back to pre-Christian social structures. Prior to the modern period in Europe, some women enjoyed property rights and privileges either as the daughters, wives or widows of property-owning men or, occasionally, in their own “right”. Since most men at this time were also excluded from property ownership or, like women, were property themselves through slavery or serfdom, it is not possible to clearly distinguish property rights on a gendered basis until “property” became disengaged from previously existing social relationships. During the seventeenth century in Europe these earlier concepts of property were transformed into a broad-based definition of “property rights” and, eventually, human rights applicable to middle-class white men, but not to women, children, slaves and others.

The development of human rights also owes its peculiarly European inheritance to the history of the individual within Judeo-Christianity, especially the inherent value of each individual soul as subject to God’s justice and mercy both in this life and beyond. This is a tradition shared with the Islamic world and other religious systems. But as European cultures lost their reliance on a religious framework (unlike Islam) the value of the individual soul was transferred to the secular “self” or subject, based on a distinction between mind and body not dissimilar to pre-existing Christian or Platonic distinctions between the soul or spiritual essence and the physical or corporeal realm. Descartes and his heirs may be said to have transformed an older religious and classical philosophy into the founding secular ideology of Western Europe. Again however this transformation largely excluded women and non-European men.

As a consequence of the secularisation and masculinisation of older concepts of property and the value of the individual, the reformation of Western Europe towards modernity effectively privileged white men over women and other men in ways which had not been deeply entrenched until then. The development of human rights as “white men’s rights” was part of this transformation. Therefore it is not enough to simply add women’s rights or the human rights of children, Indigenous peoples or non-Europeans to the existing discourse without also examining deeper structural inequalities which seem to be intrinsic to human rights as they are presently formulated.

⁴⁴ See UDHR Article 16(1), ICESCR Article 10(2), ICCPR Article 23(2), American Convention Article 17(2) and African Charter Article 18(3). The exception is the European Social Charter which says nothing about women specifically in relation to the family, but does provide in Article 8 for the rights of employed women to protection.

The Public/Private Dichotomy

One important field of analysis has been the examination of the dichotomy between the public and private realms, and the relation this seemingly intrinsic division has on the invisibility or marginalisation of women, children and other groups within “mainstream” political discourses.⁴⁵ As has been pointed out by Katherine O’Donovan, Frances Olsen and others, the “private” realm has never been free from “public” regulation through laws relating to the family, inheritance, ownership of property, social welfare, taxation, and the definition of criminality or deviance in such areas as homosexuality, birth control, abortion, sexual assault, domestic violence, pornography, incest, adultery, prostitution and so on.⁴⁶ The “private” is necessarily circumscribed by the “public”, just as the “public” realm is partially defined by those areas of “private” rights which are excluded from it. A major task of human rights law from the eighteenth century onwards has been to deepen and justify this separation.

The language of public versus private is generally seen as part of the development of discourses on political power, economic relations and socialisation focusing on the role of the State and its relationship to individuals. But the public/private dichotomy is also crucial to the extension of power from the State to other centres of authority usually assigned to the “private” side of the division—namely the family, medicine, education, advertising and personal consumption, the mass media and popular culture. Above all it assists in the domination of economic and, increasingly, political decision-making by and through multinational corporations and the sphere of “private” business relations. By clearly distinguishing a private sphere it becomes possible to reorganise the exercise of power between recognised and legitimate sources of public authority centreing on the State and “self-regulating” or private power structures within the economic sphere or marketplace. At the same time new areas can be constructed within the private sphere relatively free from public surveillance where the exercise of power is masked within personal, professional or “caring” relationships such as in the family, home, neighbourhood, school, hospital, clinic, counselling service, welfare office, workplace, and sexual relationship. These face-to-face areas of daily encounter are precisely those where women as well as men and children are most likely to feel the actual effects of power. At the most basic level, these are spheres of power which focus on the human body. These disciplinary structures are not peculiar to Western cultures, but are successfully implemented in many different cultural contexts, although again they may be deeply effected by colonial or neo-colonial practices past and present. The quintessential example of one of the most insidious and subversive forms of colonialism is the imposition of the Western nuclear family as the “norm” in all societies, imposing patriarchy and individualism on cultures which cannot accommodate these structures without serious damage. Ironically this form of colonialism rests on social structures of the family which are themselves recent developments and which are now breaking down even in the West.

Although non-European cultures may contain divisions between apparently “public” and “private” spheres (such as in many Asian societies), the modern formulation of the dichotomy between the public and the private is an invention of European social structures, particularly in the division between the political and the

⁴⁵ There is a large literature in this area. See Charlesworth, H. “The Public/Private Distinction and the Right to Development in International Law” (1992) 12 *Australian Yearbook of International Law* 190; Charlesworth, H., Chinkin, C. and Wright, S. “Feminist Approaches to International Law” (1991) 85 *American Journal of International Law* 613 (and sources cited therein); Clark, Lorenne M.G. and Lange, Lynda *The Sexism of Social and Political Theory: Women and Reproduction from Plato to Nietzsche* (1979); Eisenstein, Hester *Contemporary Feminist Thought* (1983); Elshtain, Jean Bethke *Public Man, Private Women: Women in Social and Political Thought* (1981); Jaggar, Alison M. *Feminist Politics and Human Nature* (1983); Okin, S.M. *Women in Western Political Thought* (1979); Olsen, F. “Feminism and Critical Legal Theory: An American Perspective” (1990) 18 *International Journal of Sociology and Law* 199; Pateman, Carole *The Disorder of Women: Democracy, Feminism and Political Theory* (1989); Thornton, M. “Feminist Jurisprudence: Illusion or Reality?” (1986) 3 *Australian Journal of Law And Society* 5; Zaretsky, Eli *Capitalism, the Family and Personal Life* (1976).

⁴⁶ O’Donovan, Katherine *Sexual Divisions in Law* (1985); Olsen, F. “The Family and the Market: A Study of Ideology and Legal Reform” (1983) 96 *Harvard Law Review* 1497; Olsen, F. “The Myth of State Intervention in the Family” (1985) 18 *University of Michigan Journal of Law Reform* 835; Graycar, Regina and Morgan, Jenny *The Hidden Gender of Law*, “The Public/Private Dichotomy” at pp.30-40 and sources cited therein; Pateman, Carole *The Sexual Contract* (1988).

economic or domestic spheres which fuelled early theories of capitalism, workplace regulation and the home. Through the enterprise of colonialism this distinction has been and is being replicated throughout most cultures and regions of the world. One of the consequences of economic globalisation is the extension of this distinction to all regions and areas of life. Where this version of the public/private dichotomy intrudes into cultural patterns which already have analogous divisions, such as in “Confucian” East Asia, the economic and social structures that accompany this division may not create radical problems for the colonised cultures, although this is not clear particularly in light of the diversity within this tradition and its deep cultural differences in other areas. It may be that part of the explanation of the “success” of East Asian economic development until the end of the 1990’s has to do with the adaptation of social structures which already relied on patriarchal family structures, systems of deference within hierarchies, and clear lines between activities engaged in within and outside the home, family, village or community. The slow collapse of economic structures within the region from the end of 1997 may also be related to their reliance on these social structures through patterns of “crony capitalism”, corruption, overly deferential populations and too rigid hierarchies in both the public and private worlds. Regardless of the adaptability of receiving cultures, the Eurocentric model of the private sphere (whether the division is between government and the marketplace, or the outside world and the family) is the infrastructure of world power without which the public spheres of the nation-state, law and international structures could not function. It can be argued that the public mechanisms of state power, political institutions, economic regulation and international relations are populated and regenerated through these hidden forms of “privatised” power of which the socialised individual, gendered as either male or female, is the basic constituent. Solidarity coalescing around group or community structures is deeply threatening to this ideology, thus making the rights of Indigenous peoples, ethnic communities, workers, women and others extremely problematic. Human rights, by providing an acceptable ideological framework which incorporates the public/private dichotomy and the primacy of the individual, arguably has made possible the spread and entrenchment of these less visible power structures. If this is so, then the results should be deeply disturbing for any proponent or activist of international human rights.

Contradictions within Human Rights

It is often claimed that civil and political rights form the “first generation” of rights and economic, social and cultural rights are the “second generation”. If this is so, then it is necessary to add a “third generation” of rights, peoples’ rights; and a “fourth”, which can be described as the rights of Indigenous peoples, women, children and others who have difficulty claiming for themselves the status of “peoples” and for whom individual rights are also inadequate or inappropriate. Both of these new “generations” of rights radically challenge the idea of individuality and the relationship of human rights within State structures and international law governing the conduct of states. As Shestack says:

Civil and political rights, and economic and social rights, have been called respectively the first and second generation of rights. In recent years, claims have been made for recognition of a third generation of rights of peace, rights of development, and rights of solidarity [and rights of self-determination]...⁴⁷

Oscar Schachter recognises four major antinomies or contradictions in relation to human rights. These are:

the relation of human rights to international peace;

1. “the conflict between the basic tenet of the State system—the right of a State to determine its own political and social affairs free from external interference—and the limits on that right imposed by the international principles of human rights”;
2. the conflict between “rights” and “goals” (as in for example the progressive development of social and economic rights); and

⁴⁷ Shestack “Undeveloped Theories: New Generations of Rights” as quoted in Dixon and McCorquodale *Cases and Materials on International Law* (Blackstone Press, London, 1991) at p.167.

3. an antinomy “at the heart of many controversies in the field of human rights ... between individual and collective rights”.⁴⁸

I would add a fifth contradiction, and that is the failure of international law or international human rights law to adequately address the power held by non-State actors, in particular multinational corporations, which directly and indirectly effects human rights. The actions of major corporate players in areas directly affecting the implementation of basic human rights is rarely given sufficient attention in human rights discourse.

By placing rights in hierarchical and often conflicting relationships with each other, we divide and confuse the meaning of “human” in international human rights. By placing the individual in a dichotomous relationship with the collective or group, the meaning of “human” becomes even more fragmented. This causes problems no matter how we prioritise rights or allocate resources to the development of different rights. Civil and political rights tend to carry with them underlying assumptions based on their early history of European social, political and economic changes which focussed on the adult white male as an individual citizen/soldier/labourer. This individual was constructed and disciplined through increasingly invasive State mechanisms of surveillance and control over the use of force, participating in social life as an essentially alienated economic unit. Economic and social rights, though often created and implemented by or on behalf of women, have tended to entrench the subordinate relationship of women to men within the private sphere, while making the extension of citizenship to women and other disenfranchised groups, such as non-Europeans and the working class, problematic. While using the discourse of rights they in fact appear as needs fulfilled (or not fulfilled) by a benevolently paternalistic State. In international law, this translates into a less firm commitment towards economic and social rights as real “rights”. Their association with women, children and the poor is both a cause and a result of the marginalisation of these rights within the mainstream discourse. Carole Pateman describes this as part of the development of modern liberal political theory where power was wrested from the patriarchal State (gendered as either male or female, but categorised as authoritarian) and reordered on the basis of individual male citizenship. Women and children were sequestered in the private sphere, which was increasingly divided from the sources and the implementation of economic and political power. Working class European men could eventually be incorporated into this new liberal order, particularly where some concessions were made to socialist demands for economic and social justice. Women, Indigenous peoples, men of colour (in particular former slaves) and children had a much more difficult time in gaining any standing within the new discourse of “rights” on which liberal theory was based.⁴⁹ Peoples’ rights, growing out of the decolonisation process after the Second World War, focus on nation-building and the creation of European-style State structures in which other human rights can be protected. But self-determination in particular is often treated as sharply distinct from “real” rights, especially civil and political rights, which are granted to the individual.⁵⁰

Within human rights discourse, individual human beings can be either alienated political units operating within market or State-driven economic and social systems, essentially isolated from all other social organisations, or they can be undifferentiated parts of a collective entity defined by race, language, culture and, ultimately, nationality. The language of international human rights makes it very difficult for people to be perceived as both, or neither, or much more. Living human beings, created out of sexual, familial, communal, national, global and uniquely personal circumstances, become divided fragmented collections of often conflicted and incompatible pieces. Living human experience becomes a splintered puzzle, almost irrelevant to this most “human” area of international law.

Human Rights in a Colonial World

Despite their basis in patriarchy, early mercantilist and capitalist economic structures, Western political traditions and modern European social structures such as the nuclear family, the military, the nation-state and the corporation, human rights have proven remarkably fruitful in providing the rhetorical and juridical fire by

⁴⁸ Schachter, Oscar *International Law in Theory and Practice* (Martinus Nijhoff, Dordrecht, 1991) at pp.331-335.

⁴⁹ See Pateman, Carole *The Sexual Contract*, *supra*.

⁵⁰ See *Lovelace* and *Lubicon Lake* cases of the UN Human Rights Committee.

which feminist, anti-colonial and other forms of subversion and resistance have gained strength and credibility. Feminist analyses of human rights have already questioned some of the basic assumptions on which international human rights rest.⁵¹ But the problems in the area go much deeper than the exclusion of women's human rights, or lacunae in the protection of the rights of other people. The rights discourse of international law itself provides boundaries which limit the meaning of respect for human dignity and integrity. Perhaps on an even more fundamental level, it is difficult to establish what "human" is within human rights. What is the "individual" who is the subject of so much of human rights? In reference to peoples' rights, what is a "people"? Subjectivity and identity are themselves under serious attack within postmodern critiques of humanism and the Enlightenment. It is these dominant European discourses from which so much of our ideas about human rights seem to spring. If the nature of human subjectivity is tied to a recent historical period within Western Europe called "the modern" (itself closely associated with and dependent on colonialism), then which human rights can continue to exist, and how "universal" can they be, when "the modern" is significantly undermined or disappears?

The answers, such as they might be, must involve an understanding of the intense complexity of the colonial experience for both the colonised and the coloniser, and the realisation that groups, individuals, even whole nationalities have experienced colonisation both as victim and perpetrator. Examples include the Celtic peoples of Scotland, Ireland, Wales and northwestern France; the French in Canada before and after the English conquest of North America; and the minority populations of the Iberian Peninsula both before and after the *Reconquista* by Christian Spain, the last stages of which coincided with early Portuguese and Spanish colonial ventures in Africa and the Americas. In all these cases the people themselves were both colonisers and colonised during some or all of their history, sometimes both at the same time.

Examples, perhaps more controversial, also lie outside Europe. Cree elders of the province of Saskatchewan in Canada themselves will sometimes ask about the territorial movements of their own people into Blackfoot or Assiniboine territory on the Western Canadian plains some three or four generations prior to white settlement. Algonquin and Sioux speaking peoples were moving from one part of North America to another throughout the eighteenth and nineteenth centuries, sometimes as a result of being pushed out by European settlers in the east, but usually also involving conflict with other Indigenous peoples over territory and natural resources. The introduction of the horse to North America in the early sixteenth century, as a direct result of Spanish colonial efforts in Mexico and what is now the southwestern United States, created a major technological innovation readily adopted by Indigenous peoples either on, or moving onto, the Great Plains. The ability to move quickly over large distances arguably accelerated the rate of conflict and dispossession experienced by Indigenous peoples in North America as a result of their own internal warfare, and the divisiveness which made it difficult to defend themselves against European intruders. On the other hand, the horse was a major cultural transformation of enormous and positive benefit for many of these same peoples, providing technological, military and practical power to match the incoming settlers and to hold off being overrun for some years, as well as to maintain a militant presence useful in wringing concessions from the newcomers. Another major movement of peoples in North America in recent history which does not appear to be related to European settlement is the migration of Athabascan speaking peoples from what is now the Northern Territories of Canada into the American Southwest, where they are now settled as Navaho and Apache peoples. In the process of moving they displaced Hopi peoples resident in this area for thousands of years previous. There are significant tensions between these two groups to this day. The migration appears to have taken place well before significant European incursion into any part of western North America.

Europe itself was arguably "Europeanised" only from the tenth to the fourteenth centuries. During this time large parts of Europe itself were "colonised" in ways reminiscent of later offshore efforts. Prussia, originally pagan and Slavic speaking, became German; Lithuania, resolutely pagan until well into the fifteenth century, finally succumbed to Germanic and Catholic pressure from Prussia and Poland (remaining outside the orbit of Slavic Orthodox Russia which was also aggressively expanding at this period); Muslim Spain and Portugal were Christianised and "Europeanised"; Celtic Christian Ireland was infiltrated and eventually overrun by Anglo-Norman noblemen from England. Out of a Central Corridor stretching from southeast England through central France, the Rhine region of Germany, northern Italy and northeastern Spain came what are now

⁵¹ See for example ...

recognised as distinctly European institutions, including early monarchical and State structures; feudal land tenure; Western or Latin Christianity (as opposed to Orthodox Christianity which multiplied under Byzantine and later Russian imperial influence in the East); manifestations of medieval town and city structures and institutions; European military patterns of conquest and control; literacy (in Latin); and Western European versions of anti-Semitism, religious fundamentalism, as well as mercantilist economic structures, early expressions of political democracy and liberties through royal and urban charters; Roman and local legal forms; university structures; monasticism; and so on. These institutions were forcefully imposed on the rest of Europe from the Central Corridor outwards as far as southwestern Spain and Portugal, north to Ireland, Scotland and Scandinavia and east to the shifting borders of Imperial Russia and Ottoman Turkey.

This “Europeanisation” built on and against the Islamic presence in Europe, competing with even older imperial traditions of Roman and Muslim origins. This colonisation, including the Christianisation of peripheral Europe by other Europeans, was largely accomplished by the end of the fifteenth century.⁵² The movement of these newly colonised peripheral areas (Portugal, Spain, the British Isles, Russia, France, the Netherlands) across the oceans (Atlantic, Indian, Pacific and Arctic) surrounding the Eurasian landmass was both a radical leap into a new phase of colonisation, and a continuation of a very old one. It is important to remember that the sailors, soldiers, missionaries, traders, administrators and settlers who formed the front line of these colonial ventures were often themselves recently colonised and dispossessed peoples.

Colonialism involves deep cultural and psychological penetration of both colonisers and colonised as well as profound economic, political and legal changes. As Edward Said has reminded us about the later imperial part of this history:

...little notice [has been] taken of the fact that the extraordinary global reach of classical nineteenth and early twentieth-century European imperialism still casts a considerable shadow over our own times. Hardly any North American, African, European, Latin American, Indian, Caribbean, Australian individual—the list is very long—who is alive today has not been touched by the empires of the past... This pattern of dominion or possession laid the groundwork for what is in effect now a fully global world. Electronic communications, the global extent of trade, of availability of resources, of travel, of information about weather patterns and ecological change have joined together even the most distant corners of the world. This set of patterns, I believe, was first established and made possible by the modern empires.⁵³

Decolonisation must therefore go well beyond the creation of new nation-states, or even the reformation of neo-colonial economic structures.

The cynical popular reading of decolonization went: once white sahib, now brown sahib. This sentiment is part of what we may term ‘internal decolonization’. Social forces who earlier followed the nationalist flag, or whose voice was not registered in the anticolonialist confrontations, may challenge the nationalist project in the name of class, gender, ethnicity, region or religion.⁵⁴

There is literally not one inch of this planet, nor one living person or indeed living thing on it, which has not been effected by the project of European colonisation and imperial expansion commenced outside of Europe in the fifteenth century, and within Europe itself much earlier.⁵⁵ Decolonisation will require much more than the granting of the external trappings of political independence to former colonial territories and populations. It will require us to become something most of us cannot at present be—human. Partly this is a result of the standards that international human rights themselves impose on the meaning of human. At present, despite the efforts of feminists, Indigenous peoples and Third World activists to decolonise this area of international law,

⁵² See Bartlett, Robert *The Making of Europe: Conquest, Colonization and Cultural Change 950-1350*, *supra*.

⁵³ Said, Edward *Culture and Imperialism* (Chatto & Windus, London, 1993) at pp.3-4.

⁵⁴ Pieterse, J.N. and Parekh, B. “Shifting Imaginaries: Decolonization, Internal Decolonization, Postcoloniality” in Pieterse, Jan Nederveen and Parekh, Bhikhu, editors *The Decolonization of Imagination: Culture, Knowledge and Power* (Zed Books, London, 1995) at p.7.

⁵⁵ Bartlett, *supra*.

human rights are still, historically and in their present definition and implementation, largely “white men’s rights”.

Australia's International Human Rights Policy Around the Time of the UDHR

Annemarie Devereux *

Introduction

In 1948, Dr Evatt as President of the General Assembly welcomed the adoption of the Universal Declaration of Human Rights (UDHR) as a remarkable achievement, a step forward in a great evolutionary process, a document to which men, women and children would turn to for 'help, guidance and inspiration'.¹ His speech is not only important for reflecting the contemporary significance of the UDHR, but it also reflects the strength of the Australian commitment in the late 1940s to the development of binding international human rights norms and their enforcement at an international level. At a time when Australia's responsiveness to international scrutiny might be said to be declining, with energies being focused on regional rather than international dialogues, it is illuminating to revisit Australia's early role in the drafting of the International Bill of Human Rights.² Given the limitations of time, I will limit my discussion to three notable policies pursued by Australia's delegates at meetings of the Commission on Human Rights during the 1946-1949 time period:

- firstly, implementation of human rights, in particular the proposal of an international court of human rights and the imposition of fundamental law obligations,
- secondly, the recognition and enforcement of economic and social rights;³ and
- thirdly (if time permits), the question of federal-state relations, an issue which continues to influence Australia's approach to international human rights issues.

The time period (1946-1949) wraps around the adoption of the UDHR in 1948 and coincides with Dr Evatt's term in office as Attorney General and Minister for External Affairs. It thus allows a study of international relations during the immediate post-war period without involving the complications of a change in domestic political governance. Without wishing to portray this period as some sort of 'magical era' for international human rights, it would seem in looking at these three policies, the Australian approach to international human rights was marked by idealism, bravery and a belief in the international system.

Before I proceed any further, allow me to acknowledge some of the limitations of the resources utilised in developing this account. Primarily reliance has been placed on reports, letters and memorandums within contemporary files of the then External Affairs, Attorney-General's and Prime Minister's Departments. As not

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¹ Quoted in Department of External Affairs internal memo, 'International Instruments on Human Rights', p 4; circa 1952, AA A1838/1; Item 856/13 Pt 11.

² The Commission on Human Rights was directed by the Economic and Social Council (ECOSOC) to prepare a draft International Bill of Human Rights. During the San Francisco Conference, there had been attempts by Panama, Chile, South Africa and Mexico to have included in the UN Charter a Bill of Rights. However, their efforts were unsuccessful: see D McGoldrick, *The Human Rights Committee: Its Role in the Development on Civil and Political Rights*, Clarendon Press, Oxford, 1991, at 3-4; J P Humphrey, 'The UN Charter and the Universal Declaration of Human Rights' in E Luard (ed), *The International Protection of Human Rights*, Thames and Hudson, London, 1967, at 46; P Meyer, 'The International Bill: A Brief History' in P Williams (ed), *The International Bill of Human Rights*, Entwistle Books, California, 1981; J Huston, 'Human Rights Enforcement Issues at the UN Conference on International Organization' (1967) 53 *Iowa LR* 272.

³ The perceived primacy of international implementation and economic and social rights in Australia's stance was highlighted by the Australian delegates speech in welcoming the adoption of the UDHR: See Draft of Speech on Declaration of Human Rights, AA A1838/1, Item 856/13/7 Pt 2.

all exchanges between officials, let alone Ministers and officials were recorded for perpetuity,⁴ it is likely that there are gaps to the story revealed therein. Furthermore, the recollection of officials as to 'Australian influence' on international affairs may not be identical to other actors and one has to be aware of the tendency of most individuals, including bureaucrats, to highlight considered achievements and 'gloss over' less glorious incidents. In order to compensate for some of these flaws, I have sought to cross-reference Australian reports with the Official Reports of the Commission on Human Rights to the Economic and Social Council and to consider accounts published at a later date, including the autobiographical accounts of John Humphrey, the first and long-term Director of the Human Rights Division of the UN Secretariat,⁵ Paul Hasluck,⁶ and Alan Watt.⁷ Secondly, whilst the title of this paper focuses on Australia's approach to the UDHR, most of the material presented today will in fact relate to the drafting of the 'Covenant on Human Rights' (as it was then termed). Each instrument was being developed simultaneously under the auspices of the Commission on Human Rights.⁸ Debate was more extensive as to the content and style of the Covenant on Human Rights as it was known to relate to legally binding obligations. Thus, the instructions for Australian delegations on the Covenant provide more extensive and promising insights into Australia's attitudes towards international human rights.

I. Implementation

Perhaps the issue most closely connected with Australia during the early years of the Commission on Human Rights was its insistence on rigorous methods of international enforcement. The centrepiece of their proposals was the establishment of an International Court of Human Rights which would hear not only State-to-State complaints, but potentially the complaints of individuals and groups against their Governments. First raised in the context of the Paris Peace Conference of 1946, Australian representatives continued to press the importance of international mechanisms of enforcement despite the clear lack of support for such a judicial body. Whilst there would appear to have been an implicit recognition that the scope of the court would be limited to complaints concerning civil and political rights, the scheme was none the less ambitious in its terms. As Humphrey has conceded, when considered in the light of the establishment of the European Court of Human Rights in 1950 and the later establishment of the Inter-American Court of Human Rights, the idea seems a little less preposterous,⁹ even though most States considered the establishment of such a body premature. It stands as testimony, however, to Australia's openness to international scrutiny and its desire to play an active role in international human rights enforcement.

Drawing upon the example of the machinery in the Minority Treaties entered into after World War One, Dr Evatt's original proposal for a Court of Human Rights was raised in the context of the Paris Peace Conference, specifically in relation to the Finland Political Commission and the Political and Territorial Commission for

⁴ Evatt's propensity to avoid giving written directions has been commented on by P Hasluck, *Diplomatic Witness: Australian Foreign Affairs 1941-1947*, Melbourne University Press, Carlton, at 31.

⁵ J P Humphrey, *Human Rights and the United Nations: A Great Adventure*, Transnational Publishers, New York, 1984.

⁶ P Hasluck, *op cit* n 4. In the immediate post-war period, Sir Paul Hasluck was an official of the Department of External Affairs. He attended the San Francisco Conference as one of Dr Evatt's advisers and was later appointed as Counsellor to the Washington post.

⁷ AS Watt, *Australian Diplomat: Memoirs of Sir Alan Watt*, Australian Institute of International Affairs, Angus and Robertson, Sydney, 1972. Watt was one of the Australian delegation who attended the San Francisco Conference, and whilst Minister to the USSR, attended meetings of the Third Committee of the General Assembly, including the meetings in 1948 when the UDHR was debated.

⁸ The decision to proceed with simultaneous drafting of a Declaration of Human Rights and a multilateral Convention was taken during the second session of the Commission on Human Rights, following the significant level of dispute during the first session about the desirable form of the 'International Bill of Human Rights': noted in Drafting Committee—International Bill of Human Rights—Report of the Australian Representative, p 1: AA A1838/1, Item 856/13/2/1.

⁹ J P Humphrey, *op cit* n 5, at 26.

Italy.¹⁰ At this stage, the Court was envisaged as a body which would pronounce upon disputes and be open to individuals, groups and States in the relevant territories in an original and appellate capacity. States were to undertake at the time of signing the relevant treaty that they would enforce judgements of the Court. Furthermore, a judgment against a state for reparations was to be enforceable against the revenues or other property of the State. Diplomatic redress was derided as an insufficient form of enforcement since human rights were 'not things to be created or extinguished, to be granted or withheld, to be enlarged or restricted, according to the politics of governments and the workings of diplomatic processes.'¹¹ Instead, Dr Evatt declared that human rights were a matter of international concern to which Member States of the UN had already committed under Articles 55 and 56 of the UN Charter to implement. Pithily stated, international action was needed in respect of international law.¹² Sovereignty was not to be used as a reason for resisting such international developments, with the one delegate at the Conference going so far as to describe sovereignty as:

an outmoded conception, a fetishist survival whose worship should be anathema in the fact of economic and human inter-relationships of our one atomic world...gentlemen, every international agreement is a derogation of sovereignty.¹³

Whilst the proposal was defeated at the Paris Peace Conference,¹⁴ the Australian delegation raised the proposal within the forum of the first meeting of the Commission on Human Rights.¹⁵ A draft Statute of the International Court of Human Rights was prepared¹⁶ and strong statements were made in support of the court:

'The Australian proposals for an International Court of Human Rights have been put forward because we favour a continuous, effective, and just system of international supervision. In English law the remedy is to us as important as the right, for without the remedy there is no right. *Our basic thesis is that individuals and associations as well as states must have access to and full legal standing before some kind of international tribunal charged with the supervision and enforcement of the covenant. In our view either a full and effective*

¹⁰ The Paris Peace Conference of 1946 negotiated the peace treaties between the Allies and Roumania, Bulgaria, Hungary, Finland, Austria and Germany. For documents relating to the debate of these proposals, see AA A 1067/1, Item E/46/38/28, and A 10563/1 Item 19; Statement Concerning the formation of a European Court of Human Rights included in AA A 1838/1, Item 856/13 Pt 1.

¹¹ *ibid.*

¹² Human Rights were not to be subject to the arbitrary will of a majority: European Court of Human Rights, Statement by Delegate for Australia, undated, AA A 1838/1, Item 856/13 Pt 1.

¹³ Quoted in Internal Memo to Mr Watt re Court of Human Rights, undated, AA A 1838/278, Item 856/13/2. This position seems to have been somewhat at variance with the official briefing for the Paris Peace Conference which included an extensive note from Professor Bentwich stressing that human rights were a matter of international concern, such that no infringement of sovereignty was involved with respect to the establishment of a court: Annex D to Papers from the Peace Conference, contained in Memo 725, from Australian External Affairs Office, London to Secretary of External Affairs, dated 7/11/46, AA A 1067/1, Item E/46/38/28.

¹⁴ The justification for the rejection of the proposal at the Peace Conference was that the Security Council could already deal with serious breaches of human rights through its powers under Chapter VII of the Charter.

¹⁵ Cablegram of Hodgson to Minister, Dated 8/2/47, AA A 1838/1, Item 856/13 Pt 1; Report on First Session of Commission on Human Rights; AA A 1838/1, Item 856/13 Pt 1 : 'It was left to Australia to point out that no International Bill of Rights would have any effect unless there was provision for enforcement' (p 2). Australia submitted a draft Resolution for establishment of the International Court at the first meeting (E/CN.4/15) and spoke on the issue at the first, fifteenth and sixteenth sessions of the Commission session. A further indication of the personal importance of the Court to Dr Evatt is the fact that the proposal for the court is the only matter of substance raised in the Cablegram directing Hodgson to attend the First Session of the Commission on Human Rights: Cablegram from Department of External Affairs to Hodgson, dated 23/1/47, AA A 1838/1, Item 856/13 Pt 1.

¹⁶ The draft Statute can be found in AA A 1838/1, Item 856/13/7 Pt 1; and was included in the Report of the Working Group on Implementation's Report to the Commission on Human Rights. As a separate document, its UN cite is E/CN.4/AC.1/27

observance of human rights is sought, or it is not. If we do seek it, then the consequence must be admitted and the idea of compulsory judicial decisions accepted. The present International Court is unsuitable because of the limitations placed on it as regard individuals and associations. There is also the question of technical qualifications... However, the real crux of the matter is that a court is the only way of getting internationally enforceable protection of rights. Decisions of international courts in the past have been observed with very few exceptions, and any other system could only produce recommendations.' [emphasis added].¹⁷

A softer line on sovereignty was presented:

'If we believe in the idea of international bills of human rights we must necessarily accept these limitations [on sovereignty]... In the Charter we have already accepted the principles governing our actions in these fields, and there should be no objection to a system which seeks to keep us up to our obligations.'¹⁸

According to the draft Statute, the court was to be composed of six persons 'of high moral character' who possess the qualifications required for high judicial office. They were to be elected by the General Assembly on the recommendation of the ECOSOC, and State Members of the UN were to be entitled to nominate one candidate. Judges would be required to make a solemn declaration to exercise powers impartially and conscientiously and would have to abstain from exercising any political or administrative function, or engage in any other occupation of a professional nature. The seat of the Court was to be in the Hague. A wide range of categories of parties before the Court was provided for—States, individuals, groups of individuals, and associations, whether national or international. The Court was to be open to the States or nationals of States. Non-State parties might also be able to access the court under conditions to be established by ECOSOC. The Court was to have jurisdiction over:

- 1) All disputes arising out of the interpretation and application of the Covenant on Human Rights referred to it by any party to such Covenant;
- 2) All disputes arising out of the interpretation and application of Article concerning human rights in any treaty or convention between States referred to it by any party to such treaty or convention;
- 3) All matters concerning the observance of Human Rights by the parties to such Covenant or to any such treaty of Convention referred to it by the Commission on Human Rights

The Court was to have a power to refer the whole or part of a dispute to the Commission on Human Rights for investigation and report and might delegate to the Commission powers to carry out such investigations. In addition to applying international conventions, customs, general principles of law recognised by 'civilised nations, judicial decisions, teachings of publicists, the court was to apply equity and justice. The Court was also empowered to lay down rules for carrying out its functions. The President was to have a casting vote. The decision of the Court was to bind only the parties before it and the judgement was without appeal. The Court was also empowered to give advisory opinions on any question relating to human rights at the request of the Commission on Human Rights.

Two particular ways in which this proposal varied from the Peace Conference model are worthy of note. Firstly, in response to pressure related to the fear of a deluge of unsubstantiated complaints, a filtering role for the Commission on Human Rights was introduced in relation to complaints from individuals and groups was introduced. Secondly, the mechanism for dealing with recalcitrant States who refused to co-operate with judgements of the Court was refined—instead of providing for access to State revenues, the successful party was to have the capacity to raise the matter with the General Assembly for it to make a recommendation as to appropriate action.

¹⁷ Statement by Australian Representative on International Court of Human Rights, undated, pp 2-3, AA A 432/82, Item 1947/725 Pt 3.

¹⁸ *ibid.*

Fate of the Proposal? Whilst Australia's proposal was adopted by the Working Group on Implementation,¹⁹ and the report of the Working Group was accepted by the Plenary Meeting of the Commission on Human Rights,²⁰ it seems safe to say that even before the withdrawal of the proposal in 1950, there was little danger of its being adopted.²¹ As recognised by Departmental officials, the adoption by the Working Group represented a vote of only three to one, with strong support emanating only from Belgium. The Soviet Union,²² the United Kingdom²³ and the United States²⁴ remained implacably against the proposal, Chile described the scheme as 'utopian'²⁵ and whilst France offered some support, they regarded the moment for such a court as 'not yet ripe'²⁶ and preferred a Commission of Inquiry and Conciliation. Even the international jurist, Professor Lauterpacht, a strong proponent of developing an international human rights system, rejected the Australian proposal on the basis that it would encourage litigation, be controversial in terms of domestic jurisdiction and sovereignty issues and ineffective in being able to evaluate domestic law systems.²⁷

Although the reports by delegates and alternates contain some optimistic statements concerning the growing support for the proposal, and were buoyed by the developments in the Inter-American context,²⁸ the vast majority of comments recognise the slim prospects of the proposal receiving international acceptance. As early as December 1947, Hodgson was directed that the US proposal for a Commission might be useful supplement to the court, and should in any case be supported if there was no chance of receiving acceptance of the court proposal.²⁹ During the 1948 sessions, there was a movement towards the French proposals, and by 1949, it was doubted that even Australia would accept a court in such a world context.³⁰ Accordingly, the delegation were

¹⁹ Report of Working Group on Implementation, Annex C to Commission on Human Rights, 2nd Session Report to the Economic and Social Council, pp 36-54. Included in the Report is a summary of the debate on the Australian proposal. Opponents of the idea argued that the International Court of Justice was a sufficient body to provide opinions, that the new court would unduly increase the number of international organisations and that States would be reluctant to ratify a Covenant which included recourse to such a court, particularly if individuals were permitted to petition the court (p 49).

²⁰ Colonel Hodgson considered the acceptance of the Report in the Plenary Session to be a 'signal victory for Australian proposal for Court of Human Rights'. He reported that the proposal was 'widely commended and even Governments previously in opposition namely United States and United Kingdom agreed scheme merited consideration by their Governments and voted for its transmission': Cablegram of Hodgson to Department of External Affairs, dated 16/12/47, AA A 1838/1, Item 856/13/2.

²¹ Harper and Sissons report that Australia faced almost continuous opposition from the great powers: N Harper and D Sissons, *Australia and the United Nations*, Manhattan Publishing Co, NY, 1959, at 252.

²² The Soviet Union were opposed to any form of international enforcement: see JP Humphrey, *op cit* n 5, at 54.

²³ The United Kingdom considered it premature to consider enforcement before finalising the precise content of the Covenant: for early reports of the United Kingdom's opposition, see Cablegram of Hodgson to the Minister for External Affairs, dated 8/2/47, AA A 1838/1, Item 856/13 Pt 1.

²⁴ The United States favoured a small Commission which would examine violations, act as conciliators with the Government, and in the event of failure, report to the United Nations.

²⁵ Drafting Committee -International Bill of Human Rights: Report of Australian Representative, p 5; AA A 1838/1, Item 856/13/2/1.

²⁶ *ibid.* Re French proposal, see E/CN.4/82/Add.10/Rev 1, and E/CN.4/147; described in Memorandum No 80, from the Mission to the UN to the Secretary of External Affairs, dated 16/2/49: AA A 1838/1, Item 856/13/7 Pt 2.

²⁷ H Lauterpacht, *An International Bill of The Rights of Man*, 1946; Quoted and discussed in Memorandum No 80 from the Mission of the UN (Hood) to the Secretary of External Affairs, dated 16/2/49, AA A 1838/1; 856/13/7 Pt 2.

²⁸ See Second Report of Australian Alternate on Human Rights Drafting Committee, 2nd Session, May 3-21 1948, AA A 1838/1, Item 856/13/7 Pt 1.

²⁹ Cablegram from Department of External Affairs to Hodgson, dated 5/12/47, AA A 1838/278, Item 856/13/2.

³⁰ Letter from Secretary of External Affairs (signed by Glasheen) to Secretary of Attorney-General's Department, dated 14/4/49, AA A 432/82, Item 1947/725 Pt 3. Note that there were also internal misgivings about the ability to balance the need to avoid embarrassing national courts with the need to avoid irresponsible complaints being lodged with the court: see Internal Memorandum, *op cit* n 13.

instructed to maintain support for the court for 'tactical reasons', but to work towards the establishment of a conciliation and inquiry submission.³¹ Significantly, however, is that even in shifting away from a court, Australia did not resile from its emphasis on the international rule of law and redress for individuals. Even whilst accepting a Commission proposal, Australian delegates supported a right of petition for individuals³² and the Commission's capacity to seek advisory opinions from the International Court of Justice.³³

Fundamental Law

Australia's initial second plank of its implementation scheme was its submission that international covenant should mandate that human rights be made a part of the fundamental law of State Parties. Once again, first raised in the context of the Paris Peace Conference,³⁴ the Australian delegation desired human rights to be written into domestic law in such a way that they could not be repealed by ordinary means and could be relied upon by persons wishing to challenge administrative or legislative action. Where courts had the power to review the constitutionality of Acts of the legislature, human rights should be part of the constitution and be a basis for invalidating legislation. In systems where the legislature was supreme, two possibilities were foreshadowed—either the court could refuse to give effect to a subsequent law which appeared to be inconsistent with the fundamental law unless the intention to abrogate or modify it was express and undoubted, or the courts, even whilst having to apply the later inconsistent law, could and should have the right and duty to formally declare disconformity with the law in such a way to bring the disconformity to the attention of the Legislature and the United Nations. Australia's enthusiasm for this proposal was not particularly long-lived once the difficulties of ensuring compliance in Australia (though constitutional change) were considered. Whilst the proposal received the endorsement of the Working Group on Implementation in 1947,³⁵ the Australian alternate deliberately did not raise the matter with the Drafting Committee for the Covenant during its second session in 1948³⁶ and in 1949 the Mission were directed not to push the issue. The letter to the Mission explained that the idea, appropriate in the context of the Peace treaties, 'seemed less appropriate now where the contracting parties are well-established States with long-operating written or unwritten constitutions'.³⁷ Thus, the idea was not resurrected.

II. Economic and Social Rights

During the last 1940s, Australia was in the forefront of efforts to recognise and protect social and economic

³¹ Memorandum No 148, to Australian Mission of the UN from the a/g Secretary of External Affairs, dated 28/4/49, AA A 1838/1, Item 856/13/7 Pt 3. Similarly, in the draft answer to the Secretary-General's Questionnaire on Implementation prepared before the change of government, the development of a two stage process incorporating a Commission and a Court represented a significant shift in Australia's stance on the working of the Court: AA A 1838/278, Item 856/13/7 Pt 5.

³² See Memorandum No 148, *op cit* n 31; and Australia's vote in the crucial Commission on Human Rights debate concerning individual petitions: McGoldrick, *op cit* n 2, 5-6; E/CN.4/SR 118.

³³ Memorandum No 148, *op cit* n 31.

³⁴ In the Italian treaty, for instance, the Australian delegation proposed the insertion of a clause stating: "Italy undertakes that, in order to fulfil its obligations under paragraph 1 of this article, those obligations shall be recognised as fundamental laws and that no law, regulations or official action shall conflict or interfere with those obligations, nor shall any law, regulation or official action prevail over them." For an exposition of the Australian proposal, see Paper entitled "Fundamental Law", Annex H, to Brief to Paris Conference, A 1067/1, Item E46/38/28.

³⁵ Report of Working Group on Implementation, Annex C to Commission on Human Rights, 2nd Session Report to the Economic and Social Council, p 36, UN Doc E/600, ECOSOC OR, 6th Sess, Supp 1 (1948).

³⁶ Report of the Australian Alternate on Human Rights Drafting Committee, 2nd Session, May 3-21 1948, p 7; AA A 1838/1, Item 856/13/7 Pt 1. The constitutional difficulties with the proposal from the Australian point of view and the extent of opposition from the United States were recognised in a memorandum by an official, Loomes, to the Secretary of the Department of External Affairs, dated 29/6/48, AA A 1838/1, Item 856/13/7 Pt 1.

³⁷ Memo No 148, *op cit* n 31.

rights. Although the inclusion of such rights in the UDHR was relatively uncontroversial,³⁸ the debate about the status and economic and social rights began in earnest with the decision whether or not economic and social rights should be included in the one covenant with civil and political rights. Notwithstanding the consistent opposition of the United Kingdom and the United States to undertaking binding legal obligations with respect to these rights, the Australian delegation affirmed the interdependence of rights and the fundamental importance of affirmative measures to ensure individual's enjoyment of social and economic rights. In proposing the recognition of what it considered six 'basic rights', the Australian delegation were aware of the difficulties with respect to implementation of rights, but were not dissuaded that conciliation or report-writing would not make some contribution to implementation of such rights.

Australia's support for economic and social rights, which in an embryonic form was demonstrated during its push for the full employment pledge in the UN Charter,³⁹ emerged in full strength during the early debate on the desirable scope of the Covenant on Human Rights. The earliest drafts of the Covenant, prepared by a Working Group of the Commission on Human Rights, omitted any reference to such rights. Australia, together with Yugoslavia and the USSR in particular, protested such selectiveness and put forward concrete proposals for the recognition of basic rights. Its original proposal involved the sponsoring of six basic rights: namely:

1. 'Every person shall have the *right to work*, and each State shall take such measures as may be within its power to ensure that all persons ordinarily resident in its territory have an opportunity for useful work.'⁴⁰
2. In order to ensure *fair and reasonable wages and working conditions*, in occupations where wages and conditions are not determined by collective bargaining, or other arrangements are not available against exceptionally low wages, the State shall establish and maintain machinery for fixing minimum wages and conditions.
3. Everyone shall have the *right to social security* through medical care and to safeguards against absence of livelihood through unemployment, illness or disability, old age, or other reasons beyond his control.
4. Each State shall ensure by law that there shall be *reasonable limitations on working hours*.
5. Everyone has the *right to education*. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be equally accessible to all on the basis of merit.
6. No one shall be deprived of his *nationality* by way of punishment [arbitrarily] or denied the right to change his nationality.' (emphasis added)

Australia, when it originally proposed inclusion of all rights within the UDHR, had its proposals for economic

³⁸ A Cablegram of 12/5/48 from the Australian Delegation to the Department of External Affairs noted that whilst there was disagreement as to the inclusion of economic and social rights in the Covenant on Human Rights, 'Everyone thought that economic and social principles should be written in to the declaration': AA A1838/278; Item 856/13 Pt 3. Even in the context of the UDHR, Australia demonstrated its particular concern with economic and social rights, supporting with Belgium, the insertion of prefatory words before the Articles on economic and social rights 'to give recognition to present day feeling that individuals, as members of organised society, are entitled to economic and social security' and to affirm that rights should be effected through positive measures: Report of the Australian Representative on the Commission of Human Rights, Third Session, 1948, AA A 1838/278, Item 856/13 Pt 3.

³⁹ As to this stance, see W J Hudson, *Australia and the New World Order: Evatt at San Francisco, 1945*, Australian Foreign Policy Papers, ANU, 1993, ch 10; JDE Plant, *The Origins and Development of Australia's Policy and Posture at the UN Conference on International Organization, San Francisco, 1945*, PhD Thesis, ANU, 1967.

⁴⁰ With respect to the right to work, the Australian delegation were instructed to bear in mind the 'consistent desire of Government to include full employment obligations in international organizations' with specific reference made to the ITO Charter and the UN Charter: Cablegram from Department of External Affairs to Delegation, dated 30/5/49, AA A 1838/1, Item 856/13/7 Pt 3.

and social rights voted out en bloc⁴¹ during the third session of the Commission on Human Rights, and failed to gain much support for the six points when put to the fifth session of the Human Rights Commission in 1949. Following consultations in 1949, including the holding of a pivotal inter-departmental committee in July 1949,⁴² Australia withdrew two of its economic and social rights, namely: the obligation on the State to restrict working hours and the prohibition on taking away nationality as a punishment. According to the minutes of the meeting, the feeling was that the obligation with respect to working hours might 'deprive persons of their freedom of action (particularly self-employed persons)', but that in any case the protection of working conditions was sufficiently covered by paragraph 2.⁴³ The nationality provision was withdrawn since there was ongoing debate concerning the distinction between nationality and citizenship, Australian legislation included the power to revoke citizenship and that the ILO was also considering the question of nationality.⁴⁴

It is also interesting to examine what rights were not included or supported. The right to an adequate standard of living was not included in the list of basic rights, though it was subsequently supported. Other rights such as the right to property, the freedom from forced labour and the equal pay guarantee were the subject of more adverse criticism. The Department of Labour and National Service, a consistent voice of dissent on the question of inclusion of economic rights led the opposition to the forced labour and equal pay provisions. On the former, their concern was that the exception for 'minor communal services' might not sufficiently provide for wartime conscription,⁴⁵ whilst on the latter, the concern was with the capacity of Australia to provide implementation given constitutional and political difficulties.⁴⁶ With respect to the right to property, a right advanced consistently by the United States, Australia was lukewarm. It tended to abstain from any vote on the issue, and privately spoke of regarding the right to property as not a 'fundamental human right'.⁴⁷ Notwithstanding these particular areas of contention, Australia saw itself and was identified by others as being in the forefront of efforts to protect social and economic rights.

Australia's forwarding of these proposals was undertaken only after considerable discussion internally of the merits of inclusion of economic and social rights. A letter of 11 June 1948, for instance, from the Australian Mission to the UN to the Secretary of External Affairs detailed the diversity of opinion within the Mission and in the UN community as to the inclusion of economic and social rights.⁴⁸ Whilst proposing a set of rights

⁴¹ Noted in Letter of A/g Secretary of Department of External Affairs to Mission to the UN, dated 28/4/49, AA A 1838/1, Item 856/13/7 Pt 3.

⁴² Minutes of Inter-Departmental Meeting to Consider Text of Draft Covenant on Human Rights, Department of External Affairs, 12/13th September 1949, AA A 1838/278 , Item 856/13/7 Pt5.

⁴³ *ibid*, p 10.

⁴⁴ *ibid*, pp 10-11.

⁴⁵ 1948 document compiling comments of Departments: AA A 1838/1, Item 856/13/7 Pt 1

⁴⁶ Funnell (Secretary of Department of Labour and National Service) accepted that Australia would wish to accept the principle, but considered that it would wish to avoid an immediate legal obligation. He referred to the way in which Australia had supported the principle in the preamble to the ILO Constitution, but was supporting further ILO study with respect to implementation: AA A 1838/1, Item 856/13/7 Pt 1, letter of Funnell, to Secretary EA, 8/4/48. The Department of Labour and National Service's consistent line was that such matters should be left to the specialist bodies such as the ILO and that attempting to incorporate them into human rights documents was 'futile'. The concern with respect to the Commonwealth's ability to implement the provision was shared by the Attorney-General's Department: see AA A 432, Item 54/3779 Pt 6. Interestingly though, the Department of Labour and National Services maintained that if, despite its view that the inclusion of economic and social rights was unrealistic and should best be left to the specialised bodies, Australia were to proceed with proposing the inclusion of such rights, the equal pay right should be included: Letter from W Funnell, Secretary, Department of Labour and National Service, 26 July 1948, to Secretary, EA, AA A 1838/1 , Item 856/13/7 Pt 3.

⁴⁷ Internal Memo, signed by Loomes, to the Secretary of EA, 9/7/48, pt 3. Note though that Loomes saw some benefit in the provision dealing with 'arbitrary deprivation of property'. This was later to be the focus of Australia's hostility towards the clause.

⁴⁸ Letter from Australian Mission to the UN (Heyward) to the Secretary of External Affairs, dated 11/6/48, AA A 1838/1, Item 856/13/7 Pt 3.

which were to form the basis of the six rights subsequently put forward by Australia,⁴⁹ it identified a variety of factors in favour of the inclusion and a number of obstacles and arguments against inclusion. Most of the factors are similar to those cited in modern debates. In favour of the inclusion, the Mission were able to point to, for example, what they termed the 'stage of development of industrial society'. Whilst civil rights had been secured during the 17th and 18th centuries by the bourgeois sectors who obtained political power through their economic strength—thus having enough economic security to enjoy those rights. The rest of society at that time were seen as dependent mostly on agriculture and handicrafts, and not subject to the social risks of large-scale unemployment and inability to grow one's food which occur in the specialised economy of today. Social and economic rights were recognised as most important to 'the common man' and the interdependence of the rights were noted. Germany was quoted as an example where the loss of economic and social rights leads to a loss of civil rights—with unemployment contributing to totalitarianism. The risk of overthrow to governments was greater given that the war demonstrated to people that governments can produce full employment. Finally, the advantage of integrating economic and social rights was that it would avoid a document which appeared 'an affair purely for the Western world'.

Opposing these arguments, the Mission pointed to the fact that inclusion of economic and social rights might make it difficult for some countries to adhere to the Convention, and the rights could not be implemented by the Court of Human Rights. Resistance by countries such as Lebanon and the UK (in relation to its non-self-governing territories) was interpreted as relating to economies which were in the agriculture and handicraft stage, where the economy could not support a higher standard of living. This was not seen as an insurmountable barrier since 'lacking a highly specialised economy, these countries have not the same need for a guarantee of economic and social rights, and the rights they do need would be rather different.' This latter justification is interesting in so far as it suggests that the Australian understanding of economic and social rights was that their content would vary according to the stage of development of the economy and country. That such was the understanding of the Australian contingent seems confirmed by the lengthy quotation in the 1949 statement of a section from Lauterpacht's 'An International Bill of Rights' which speaks of the obligations being 'elastic and circumscribed by the internal conditions and the general economic development of the State.'⁵⁰

Although aware of the level of international opposition, the Australian Mission displayed some optimism that in time such opposition would waver. They thus considered that it 'might be possible to create a situation in which countries would find it difficult for prestige reasons to object to economic and social rights.'⁵¹ Similarly, whilst the United Kingdom's opposition was seen as quite trenchant, it was considered that the United States might be more malleable—since their opposition seemed to be on the basis of concern that they would not be able to implement the rights, such a ground might not be completely insurmountable since the basis of their objection applied equally to the implementation of civil rights in the Southern States.⁵²

There is no record of the Minister's response when the issue of economic and social rights was put to him. Later External Affairs memorandums attribute the likely responsibility for Australia's programme directly to Dr Evatt,⁵³ and given the Mission's ambivalence and the then Crown Solicitor, Whitlam's opposition to inclusion,⁵⁴ it seems likely that Dr Evatt took a personal role in supporting inclusion of such rights. When presented to the Commission on Human Rights, the Australian representative delivered an impassioned speech⁵⁵ in favour of the equality and importance of economic and social rights and the State's responsibility

⁴⁹ *ibid.*

⁵⁰ AA A 1838/1, Item 856/13/7 Pt 3.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ An internal memorandum prepared in the Department of External Affairs in 1951 admitted that its files do not reveal when the policy was first initiated, but concluded that it was likely to be as a result of the social democratic and Marxist theories of the Australian Labour Movement and the policies of Dr Evatt.

⁵⁴ Filenote of Meeting between Department of External Affairs official and Whitlam, undated, circa June 1948, AA A 1838/1, Item 856/13/7 Pt 1.

⁵⁵ AA A 1838/1, Item 856/13/7 Pt 4, document undated, included as Annex to Report of the Australian Delegate of the Fifth Session of the Human Rights Commission, 1949.

for the economic and social well-being of individuals. Its relevance to contemporary debates make it worthy of quoting at some length:

“The question that we have to answer now is whether this development towards the idea of the social service state, and the rights of individuals therein, has reached the stage where the protection of the State in many circumstances is the duty of the State and the right of the individual. It is the view of the Australian Government that we have reached that stage, and that the significant moment in the recognition of this fact was when the battle over Article 55 of the Charter was finally decided at San Francisco...

Civil rights are themselves the means to an end --a full and decent life. Without economic and social rights hand in hand with them they are largely meaningless. Without education man will not properly comprehend or enjoy his rights. Without work he will degenerate. Without protection in times of sickness and other hardship his life, and that of his family may easily be ruined. We believe that the world has developed sufficiently for the realisation of these truths to be spelled out as rights of men in the Covenant of Human Rights. Man has, in other words, reached the stage where he has the right to expect from the community all measures necessary to establish the minimum for decent life, or the right to the opportunity for decent life.⁵⁶

Even in this early period, however, there was acceptance from the Australian contingent that economic and social rights might well require a different form of implementation that civil and political rights, that is an alternative to juridical and police machinery.⁵⁷ Whilst criticising those who used the question of implementation to evade economic and social rights, the Department of External Affairs conceded the need to look for alternatives to the Court of Human Rights. The most frequently discussed alternative was the use of a complaint system to specialised bodies such as the ILO and UNESCO.⁵⁸ Other possibilities canvassed included the French style Commission of Inquiry and Conciliation.⁵⁹ However, rather than become sidetracked into the detail of a particular implementation scheme, the priority for the Australian delegation at this stage remained to gain acceptance for the principle of protecting economic and social rights. Thus, in the international arena, Australia resisted crystallising its proposals for implementation, emphasising the primacy of State's responsibility for implementation and the need for further consideration of international implementation 'at the proper time'.⁶⁰

III. Federalism—Federal/State Clause and Implementation

The final area I wish to cover is that of federalism—in particular the extent to which the Evatt administration viewed itself as limited to undertake obligations which dealt with subject matters over which the Commonwealth had exclusive power or upon which the States had agreed to take legislative action. In the range of international negotiations being carried out during the late 1940s, Australia adopted varying approaches to the inclusion of a federal-state clause, accepting its need in the Revised ILO Constitution, but resisting its inclusion in the UNESCO Regulations, the WHO Convention and taking no stand on the issue in

⁵⁶ *ibid.*

⁵⁷ See Internal Memo, undated, circa June 1948, AA A 1838/1, Item 856/13/7 Pt 3.

⁵⁸ Letter of Mission to the UN to the Secretary of Ext Affairs, dated 28/4/49, AA A 1838/1, Item 856/13/7 Pt 3. The Department of Labour and National Services were, however, pessimistic about such a system. They considered that the ILO would be loathe to take on such responsibility without the support of the Soviet Union, which given the Soviet's opposition to all forms of international implementation was unlikely to be forthcoming. Furthermore, other specialised bodies would not necessarily be ideal forums for discussion given that they were comprised of government representatives which robbed the debates of any educative value: as an implementation body, the Department of Labour and National Services were pessimistic about the use of other specialised bodies. Furthermore, the Department of Labour and National Services considered there to be a danger that emphasis on implementation would mean that the legal sanction was 'outstripping the moral acceptance' of the provisions: Letter from W Funnell, Secretary, Department of Labour and National Service, 26 July 1948, to Secretary, EA, 856/13/7.

⁵⁹ Memorandum No 148, *op cit* n 31, p 4.

⁶⁰ AA A 1838/1, Item 856/13/7 Pt 4.

the Genocide Convention negotiations.⁶¹ In discussions of the issue in the Commission on Human Rights, though Australia supported the drafting of a federal-state clause, it took a low-key stance on the issue. In the IDC held in September 1949, Mr Glasheen of the Department of External Affairs explained that the main principle for Australia was to avoid the implication that the 'power of the Commonwealth is not comprehensive enough to cover the ratification of international conventions.'⁶² Thus Australia was happy not to initiate specific proposals for a Federal clause. However, of the alternative Federal Clauses then before the Commission, Australia was supportive of that giving the widest discretion to the Government to decide whether a matter was 'appropriate' for federal action.⁶³ Such a liberal clause contrasted with the attitude of the United States, for instance, who wished a clause to separate obligations according to constitutional separations of power.

Unlike today, and despite the High Court's decision in *King v Burgess; ex parte Henry*⁶⁴ in 1936 and the Department of Attorney-General's fairly consistent advice that the High Court was likely to find sufficient power to enable Commonwealth legislation implementing bona fide international obligations,⁶⁵ the Department of External Affairs and presumably Dr Evatt maintained concerns that the High Court would not necessarily uphold the liberal view of the external affairs power.⁶⁶ As a result, the approach of Australia seems to have been that Australia was best placed to support a restrictive federal-state clause which did not undermine the Commonwealth's powers, whilst protecting its interests if the High Court in fact adopted a restrictive test of valid implementing legislation under the external affairs power.

That Dr Evatt was concerned to maximise the power of the Commonwealth is not to indicate that the Commonwealth at this point was engaged in battle with the States and not consulting with them on possible problems with respect to the Covenant. Following the adoption of the Universal Declaration of Human Rights, for instance, States were forwarded a copy of the Declaration and the draft Covenant for their comment.⁶⁷ However, what does emerge from Australia's stance on the federal-state issue during this period, is that the Evatt administration foresaw the Commonwealth playing a major role in legislative implementation of human rights.

⁶¹ These examples are discussed in the Memorandum entitled 'Federal-State Clauses in International Agreements', undated, circa 1950, AA A 1838/1, Item 929/4/6 Pt 1. Apparently, the view taken with respect to the Genocide Convention was on the basis that Australian law was already in compliance with the Convention, and the stance on the WHO was dictated by Dr Evatt's instructions. This was explained in terms of not wishing to limit the Commonwealth's potential power under the external affairs power.

⁶² Minutes of IDC, *op cit* n 42, p 7.

⁶³ Note in Annotated Draft Covenant on Human Rights, 1949, in favour of form of federal-state clause proposing the fullest form of obligation for Federal States in relation to matters 'which the Federal Government regards as appropriate for Federal action': AA A 1838/1, Item 856/13/7 Pt 2.

⁶⁴ (1936) 55 CLR 608.

⁶⁵ During this time period, the Attorney-General's Department had provided advice along these lines with respect to the Maritime Convention on Wages, Hours on Board Ship and Manning, and in relation to the Draft Convention on Declaration of Death of Missing Persons: Memorandum on Federal State clauses, *op cit*, p 5, 9-10. The Department of External Affairs relayed to Hodgson that it was believed that the High Court would uphold the Commonwealth's power to legislate for implementation of a treaty 'where it took view that subject matter of same was genuinely one of international concern': Cablegram of Department of External Affairs to Hodgson, dated 5/12/47, AA A 1838/278, Item 856/13/2.

⁶⁶ Some feeling for the tentativeness of the view that the High Court would uphold a broad view of the external affairs power is gained through examination of KH Bailey (at that time Solicitor-General), 'Fifty Years of the Australian Constitution', (1951) 25 ALJ 314 at 322.

⁶⁷ See AA A 1838/278, Item 856/13/7 Pt 5.

Conclusion

From an investigation of these three aspects of Australia's human rights policies in the late 1940s, what emerges for me is a picture of an international relations policy dominated by initial idealism and a certain creativity and bravery. There was a desire to develop novel forms of international machinery, to effectively implement all forms of rights and for States to take concrete measures to guarantee rights. From an examination of other issues not presented today, such as policies with respect to the rights of indigenous people,⁶⁸ minority rights,⁶⁹ and immigrants rights,⁷⁰ it is not justifiable to present this period as a high watermark in terms of promotion of human rights.⁷¹ However, there is still an energy and enthusiasm for putting forward proposals which extend beyond what is considered immediately practical. Australian delegates were fully aware of the limited possibility of achieving their aims in full. However, their hope appears to have been to stretch the thinking and progress issues in the longer term. Many could (and will) debate what description most accurately reflects Australia's position with respect to international human rights today. The limited suggestion I wish to make today is that our history demonstrates the value of choosing idealism rather

⁶⁸ Government departments perceived problems with respect to the operation of the international human rights and indigenous peoples with respect to freedom of movement, social security, education, removal of children, marriage, but justified treatment on the basis of the stage of development of such persons and the tailoring of policies in their best interests: Document of Government Comments, undated, circa 1949, AA A 1838/1, Item 856/13/7 Pt 4; Brief Notes on Various Articles of Report of Commission on Human Rights as They Relate to Aborigines of Australia, undated, circa June 1948, AA A 1838/1, Item 856/13/7 Pt 1. Similar issues were identified with respect to inhabitants of the Territories, particularly Nauru and New Guinea, and led to Australia's support for a territorial limitation clause: see eg Letter from Secretary, Department of External Territories to Secretary, External Affairs, dated 17/3/49, AA A 1838/1, Item 856/13/7 Pt 2.

⁶⁹ The policy of assimilation meant that Australia opposed recognition of minority rights: eg Cablegram from Delegation to Department of External Affairs, dated 11/12/48, AA A 1838/1, Item 856/13 Pt 5.

⁷⁰ There was a perceived need to restrict the movement and employment of migrants: eg Government Comments, *op cit* n 68.

⁷¹ I am mindful of the warning of Jean Chesneaux: 'Whoever invents false revolutionary legends for the people, amuses them with lyrical tales, is no less guilty than a geographer who draws up misleading maps for navigators': *Past and Futures: or what is History for?* Thames and Hudson, London, 1978, at 30.

than pragmatism as a guiding force.*

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International Criminal Court

Is There an Obligation to Prosecute or Extradite Alleged International Criminals under Customary International Law?¹

Alberto Costi *

Introduction

The creation of the international *ad hoc* tribunals for the former Yugoslavia and for Rwanda has revived the idea, already forty years old, of establishing a permanent international criminal court to prosecute alleged perpetrators² of war crimes, acts of genocide, crimes against humanity and other serious breaches of international humanitarian law.³ The effective operation of such a judicial body, however, depends upon the political co-operation of the international community. Otherwise, the suspected criminals might remain free with full impunity in their home country or in a state of refuge. Unless a duty to prosecute or extradite an alleged criminal is recognised as part of general international law, states may regard any kind of international criminal process more as an intrusion into their sovereignty than as an important tool carrying out a necessary mission on behalf of the international community. It is submitted that the establishment of a permanent international criminal court by treaty will do little to change the situation as the worst offending countries might well refuse to ratify it, therefore, frustrating international efforts to bring alleged criminals to justice.

The aim of this paper is to examine whether, in the absence of a treaty obligation, there is a duty under international law for the state on whose territory the alleged criminal is located either to bring the latter to justice or to hand him over to another state or to an international tribunal. It will be important to establish whether such a duty exists at present under international law and to determine the impact of the creation of a permanent international criminal court in deterring impunity for violations of international humanitarian law. At the outset, the need to combat impunity for the perpetration of international crimes will be briefly sketched.

I. Is It Necessary to Bring Alleged International Criminals to Justice?

From a moral point of view, the question is important. The existence of a duty to bring to justice alleged perpetrators of international crimes would go a long way towards, on the one hand, preserving a common belief in the importance of implementing the international legal order by punishing those guilty of international crimes and, on the other, having a preventive impact on those planning to commit international crimes.

Three examples can be taken to illustrate this point. The Pol Pot regime in Cambodia saw the systematic killing of a quarter of the existing population. Yet, Pol Pot was never brought to account for his conduct: within Cambodia, the authorities did not attempt to arrest him while two other Khmer Rouge leaders, Nuon Chea and Ieng Say, were granted amnesty; outside Cambodia, Pol Pot visited China and Thailand on numerous occasions without ever being detained. Second, General Pinochet has retained the supreme command of the armed forces in Chile until recently and is still enjoying great influence in the direction of Chilean politics despite the widespread violations of human rights committed for over a decade under his rule. Obviously, democracy in Chile may, still to this day, only flourish with the support of the armed forces. Third, in the case of the *ad hoc* Tribunal for the Former Yugoslavia, despite the issuance of more than seventy arrest

¹ Written version of a paper delivered at the Sixth Annual Conference of the Australian and New Zealand Society of International Law on 19 June 1998, in Canberra. The paper does not address the discussions and developments that have taken place at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, between 15 June and 17 July 1998.

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² Hereafter referred to as criminals.

³ Hereafter referred to as international crimes.

warrants, only about ten have been executed. The vast majority of suspects remain free with full impunity. The most infamous of them, the two Bosnian Serb leaders who allegedly masterminded the ethnic cleansing of Muslims and Croats in Bosnia and Herzegovina, General Mladic and Dr. Karadzic, have not yet been brought to trial before the Tribunal in The Hague.

Sadly, without political will to prosecute alleged international criminals, impunity enables the latter to escape justice. The absence of a criminal process engenders a lack of historical survey of events. Forgetting or playing down atrocities send out a wrong message to those who might consider such a terrible course of action. This is illustrated by the well-documented response of Hitler to the question whether the planned mass execution of Jews, Slavs and many other categories of individuals was legitimate: "after all, who speaks today of the genocide of the Armenians?"⁴ Second, it can lead states to take the law into their own hands. A frustrated state might be tempted to send agents to another state without the latter's consent to arrest an alleged criminal, hence violating that state's sovereignty and endangering international peace and security.⁵ Third, victims and their relatives should have the right to see alleged criminals be prosecuted on an individual basis and to participate in the judicial process.⁶ This would, *inter alia*, dissipate the drive for revenge.⁷

The arguments in favour of the prosecution of alleged criminals must be kept in mind when the United Nations endorses the granting of amnesty or the setting up of reconciliation commissions as a means of restoring peace and democracy. While vengeance is not to be condoned, forgetting should not be allowed and nothing less than prosecution of international crimes should be favoured except where a society is too fragile to survive the destabilising effects of trials that are politically charged. Needless to say, the international community should take the time to examine how the most important obstacles to full accountability, political constraints and lack of international and national will to prosecute alleged criminals, might be eliminated, and make the effort to augment the resources required to arrest alleged criminals and compensate the victims.

To leave now the realm of policy and morality and to address the question from a legal viewpoint, the importance of establishing a legal duty to prosecute international crimes derives from the recommendation that the proposed International Criminal Court be instituted by international treaty. It is disappointing to see that the Court will not be set up by a resolution of the Security Council. For those states members of the United Nations, naturally, the Security Council may create binding obligations to bring individuals responsible for international crimes to account for their acts before national courts or international tribunals.⁸ Because the Court will be established by treaty, the latter will only be enforceable in those states that are parties to it, and it is most likely that potential offending states will not ratify the treaty.⁹ Moreover, only those crimes included in

⁴ See Cassese, "Is There a Need for International Criminal Justice?", Distinguished Lecture, European University Institute, Florence, 7 July 1997, <http://www.iue.it/AEL/cassese.html>, at p. 4.

⁵ Examples include the abduction of the Gestapo Chief Eichmann by Israeli agents in Argentina in 1960 and the recent plans of the United States to jointly organise with the Thai authorities the capture of Pol Pot in Western Cambodia.

⁶ See Resolution on Impunity, Resolution 1998/53 adopted without a vote, on 17 April 1998, by the United Nations Commission on Human Rights at its 52nd Meeting, par. 2, recognising that "for the victims of human rights violations, public knowledge of their suffering and the truth about perpetrators of these violations are essential steps towards rehabilitation and reconciliation", urging states "to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public", and encouraging "victims to participate in such a process".

⁷ See Cassese, *supra*, at pp. 3-4.

⁸ See Security Council Resolution 748 (1992) requiring Libya to surrender alleged terrorists charged with the bombing of Pan Am Flight 103; Security Council Resolution 827 (1993) creating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (hereafter Tribunal for the former Yugoslavia); Security Council Resolution 955 establishing the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 (hereafter Tribunal for Rwanda).

⁹ See Shestack, "A Review and Critique of the Statute of the International Tribunal", in Dinstein and Tabory (eds.), *War*

the final treaty will be subject to the jurisdiction of the Court. Finally, request for assistance will only be addressed to the state parties and demands to third states, where the alleged criminal might hide, will only be complied with by the latter on the basis of comity. Should it be possible to establish a duty imposed on all states not to allow an international crime to go unpunished, then treaty limitations would not relieve states of their obligation.

In this respect, an emerging trend in the legal literature contends that international law points to a number of general principles of *jus cogens*, not only prohibiting the commission of international crimes but also imposing upon all states an obligation to punish or extradite their instigators.¹⁰ Should the latter obligation become a part of *jus cogens*, states could not forego prosecution and punishment of those responsible for such serious crimes.¹¹ Hence, a state would find itself in flagrant violation of international law by granting refuge to an alleged international criminal within its jurisdiction. The same conclusion would also apply to the enactment of amnesty laws and other measures that would fall short of prosecution.¹² A survey of state practice is necessary in order to assess the strength of such a far-reaching argument.

II. Sources of a Possible Obligation to Prosecute or Extradite an Alleged Criminal

In the past century, the international legal order has increasingly tackled international crimes and states have found themselves ever more the target of duties to ensure protection of fundamental rights and of the integrity of the human being. The scope of this part of the paper is to explore whether states are at present under a duty under *jus cogens* to bring to justice an alleged criminal, and whether the absence of prosecution or extradition might entail the international responsibility of the state.

Treaties

Several treaties specifically regulate international crimes. For instance, the 1949 Geneva Conventions establish an obligation to search for, prosecute and punish perpetrators of grave breaches of the crimes provided therein unless the state chooses to hand over such persons for trial by another state party.¹³ Granting amnesty to persons responsible for committing crimes during armed conflicts would be seen as a violation of these Conventions. The problem is that states are left with the task of taking all necessary measures to determine appropriate penal provisions, and only in a very few cases have states prosecuted alleged criminals for a violation of a provision of the Geneva Conventions.¹⁴

The 1948 Genocide Convention stresses that perpetrators of acts of genocide shall be punished in, or extradited

Crimes in Yugoslavia, 1996, p. 197, at p. 198.

¹⁰ See Cassese, *supra*, at p. 6. Other writers who also believe that such a duty exists under international law include Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", (1991) 100 *Yale Law Journal* 2537; Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", (1990) 78 *California Law Review* 451. Compare Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", (1996) 59 *Law and Contemporary Problems* 41, who argues that such a duty does not exist yet.

¹¹ On the concept of *jus cogens*, see Shearer, *Starke's International Law*, 11th ed., 1994, at pp. 48-50.

¹² Such an argument would certainly cast doubt on the legality of truth and reconciliation commissions, plea-bargaining and selective trial of only a few high profile members of a government.

¹³ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, Article 51; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85, Article 52; Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, Article 131; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, Article 148.

¹⁴ See Wolfrum, "The Decentralized Prosecution of International Offences Through National Courts", in Dinstein and Tabory, *supra*, p. 233, at pp. 240-245.

to, the state in the territory of which the act was committed or to an international tribunal, and that states must provide effective penalties for persons found guilty.¹⁵ Protection of alleged criminals would certainly amount to a violation of these articles although Article 2 defines narrowly the crime of genocide¹⁶ and doubts have been raised as concerns the obligation of states to prosecute alleged criminals in their custody.¹⁷ The limited recourse to the Convention before international bodies until the recent Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide brought by Bosnia and Herzegovina against Yugoslavia is symptomatic of its limited practical impact.

Another important instrument, the 1984 Convention against Torture,¹⁸ contains three main provisions that might imply an obligation to prosecute or extradite an alleged offender. Article 4 provides that each state party shall ensure that all acts of torture are offences under domestic criminal law. Article 5 makes it a duty for each state party to establish its jurisdiction where the alleged offender is a national of that state. Finally, Article 7 explicitly refers to the obligation *aut dedere aut judicare*. It should, however, be noted that the obligation under the latter provision is limited to a duty for the state to "submit" the case to its competent authorities for the purpose of prosecution without necessarily closing the door to other less stringent penalties.¹⁹ It should be noted that in 1990, the Committee against Torture, established under the said Convention, stated in a decision concerning the legitimacy of the Argentinean amnesty laws that "there is a general rule of international law which *should* oblige all states to take effective measures to prevent torture and to punish acts of torture".²⁰ This passage stops short of imposing a binding obligation *de lege lata* to punish an alleged offender: amnesty or pecuniary compensation in lieu of prosecution are not excluded.

Looking now briefly at a few other global and regional human rights instruments, it seems that the obligation of states to ensure the rights enumerated therein falls short of a positive obligation to prosecute those responsible for their violation. The careful language used by the Human Rights Committee, created under the 1966 International Covenant on Civil and Political Rights,²¹ leaves little doubt as to the absence of correlation between the duty to ensure rights provided in the Covenant and a binding obligation on the part of the state to prosecute or extradite those individuals committing human rights violations, usually on its behalf. The Committee, asked to consider individual communications brought by individuals against state parties to the Optional Protocol, employs a rather soft language, "urging" governments to take effective steps or "asking" the authorities to bring violators to justice.²² In some cases, alternative measures such as dismissal or payment of damages have been deemed acceptable.²³ Further evidence of the lack of a duty to prosecute can be found in a General Comment of 1992, where the Committee stated that amnesties covering acts of torture "are *generally* incompatible with the duty of states to investigate such acts, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future."²⁴ The absence of a clear prohibition to the enactment of amnesty laws and to the recourse to alternative measures to prosecution make it difficult to raise the obligation to prosecute or extradite international criminals to the level of *jus cogens*.

In the Americas as well, neither the Inter-American Court of Human Rights nor the Inter-American Commission of Human Rights have acknowledged the existence of an absolute obligation to prosecute or

¹⁵ Convention on the Crime of Genocide, 78 UNTS 277, Article IV-VI.

¹⁶ See Scharf, *supra*, at p. 45.

¹⁷ See Joyner, "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability", (1996) 59 Law and Contemporary Problems 153, at p. 159.

¹⁸ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, reprinted in (1984) 23 ILM 1027.

¹⁹ See Orentlicher, *supra*, at p. 2604.

²⁰ Decision on Admissibility Regarding Communications No. 1/1988, 2/1988 and 3/1988 (*O.R., M.M. and M.S. v. Argentina*), Report of the Committee Against Torture, UN Doc. A/45/44, at 111 (1990) (emphasis added).

²¹ 999 UNTS 171.

²² See *Quinteros v. Uruguay*, Communication No. 107/1981, UN Doc. A/38/40 (1983).

²³ *Muteba v. Zaire*, Communication No. 124/1982, UN Doc. A/39/40 (1984).

²⁴ General Comment No. 20 (44), Article 7, UN Doc. CCPR/C21/Rev.1/Add.3, par. 15 (emphasis added).

extradite alleged offenders.²⁵ In the landmark case of *Velasquez Rodriguez*, an individual had been kidnapped, tortured and probably killed by Honduran security forces. The Court stated that because of the obligation to ensure rights contained in the Convention, states "must prevent, investigate and punish any violation of the rights ... and restore the rights violated and provide compensation".²⁶ The Court did not, however, order the Honduran government to institute criminal proceedings against those responsible for his disappearance but only to pay compensation to the victim's relatives.²⁷ Clearly, the duty of the authorities to prosecute the offender is not absolute and other forms of disciplinary action or punishment are possible. More recently, the Commission has stated, in relation to the amnesty by the democratically elected Chilean authorities of the members of the former military regime involved in cases of torture and extra-judicial executions that "the state has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuing adequate reparations for the victims".²⁸ The obligation of the state has been identified as limited to making an investigation in order to identify the perpetrators, hence granting the victims a right to a remedy and effective recourse to the judicial process, and imposing some form of punishment.²⁹

Customary International Law

As treaty practice fails to provide conclusive evidence of the existence of a positive obligation to prosecute international crimes, let us now turn to state practice and try to assert whether such an obligation could derive from general international law.

It is well recognised that states may, under the universal principle of jurisdiction, prosecute before their domestic courts individuals accused of perpetrating or participating in war crimes, crimes against humanity and other acts so declared by treaty.³⁰ These crimes are considered to be offensive to the international community as a whole and "all states are entitled to apprehend and punish the offenders".³¹ Unfortunately, this rule does not purport to impose constraints on states to prosecute international crimes unless it is provided by treaty. Instead, states can rely on the universal principle of jurisdiction as a permissive rule ensuring that a crime does not go unpunished.

If we turn to state practice, it is difficult to see the emergence of a customary rule. A few illustrations will suffice to prove this point. Immediately after the First World War, only a handful of alleged criminals were tried and Kaiser Wilhelm I did find refuge in the Netherlands without ever being prosecuted. The international community also agreed, in practice, to impunity for the Turkish officials responsible for the Armenian genocide in 1915. The Treaty of Sevres, designed to establish an international tribunal for that purpose, was never ratified, while a few years later, the Treaty of Lausanne in fact granted amnesty to those individuals. Very few of the persons responsible for the atrocities committed by German and Japanese forces during the Second World War were prosecuted by the Nuremberg and Tokyo tribunals. Moreover, the acts committed by Pakistani soldiers during the events surrounding the conflict that led to the independence of Bangladesh in 1971 and the atrocities carried out by the Pol Pot regime in Cambodia in the late seventies have largely gone unpunished. Finally, the recent establishment of truth and reconciliation commissions in several states in which agents of former authoritarian regimes with poor human rights records have been able to claim immunity from prosecution casts serious doubt on the obligation to prosecute or extradite alleged international criminals.

²⁵ See, however, Kokott, "No Impunity for Human Rights Violations in the Americas", (1993) 14 *Human Rights Law Journal* 153, at pp. 158-159, who believes that there is no impunity in the Americas for the violation of human rights and who does not see any contradiction between this principle and the acceptance that amnesty laws might be necessary in some circumstances.

²⁶ Reproduced in (1989) 28 ILM 291, par. 164.

²⁷ *Id.*, par. 194.

²⁸ *Gary Hermosilla et al.*, Case No. 10483, Inter-Am CHR (1988).

²⁹ See Scharf, *supra*, at pp. 51-52.

³⁰ See Brownlie, *Principles of Public International Law*, 4th ed., 1990, at pp. 304-305.

³¹ See Shearer, *supra*, at p. 212.

The impunity of many individuals on all sides during the conflict in the former Yugoslavia is only one more flagrant example revealing that the recent academic position mentioned above still relies more on wishful thinking than on reality. The creation of *ad hoc* tribunals to investigate crimes committed in the former Yugoslavia and in Rwanda and the discussions surrounding the establishment of a permanent International Criminal Court could, however, mark a shift towards greater accountability for international crimes.

III. Impact of Recent Initiatives on the Development of the International Criminal Process

The establishment of the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda has revived the hope that international crimes do not go unpunished and have been interpreted as an indication that the Security Council, by giving life to the concept of individual responsibility in the statutes of those two Tribunals,³² will not condone impunity. These Tribunals represented the first international attempt at prosecuting individuals for international crimes in almost fifty years. One of the main underlying reasons related to the fear that the states that enjoy personal jurisdiction over alleged criminals might be unwilling or would simply fail to prosecute them. It was thus important that these *ad hoc* Tribunals be given priority over domestic courts.³³ The obligation imposed on all states to co-operate in the investigation and prosecution of indicted criminals as well as to comply with any request for assistance, including the arrest, detention and surrender or transfer of the accused, were also positive signs.³⁴ The power for the prosecutor to start an investigation³⁵ was also aimed at giving the Tribunals a wide margin of discretion. In theory at least, the Security Council is entitled, in case of non-compliance with the decisions of the Tribunals, to impose penalties under Chapter VII of the United Nations Charter.³⁶

The achievements of, and the problems faced by, these Tribunals might serve as useful lessons in the elaboration of the statute of the International Criminal Court. The end of the Cold War saw the possibility of reviving the moribund idea of a permanent international body prosecuting individuals in the early days of the United Nations. This hope has been echoed in the works of the International Law Commission³⁷ and of the Preparatory Committee established by the General Assembly in order to draft a statute for the proposed Court. It has not been easy to reach a consensus so far and the latest draft of the statute contains over 100 articles, 200 options and 1700 brackets.³⁸

While the proclaimed aim of this Court is to enhance the effective prosecution and suppression of international crimes, the international community has been divided on the necessary means to achieve this goal.³⁹ Discussions so far indicate that national courts will have primacy to prosecute alleged criminals although the Court may review whether domestic courts have effectively prosecuted the alleged criminal. Moreover, the catalogue of crimes over which the Court will have jurisdiction seems to be increasingly limited. In addition, some of the permanent members of the Security Council have shown great reluctance in providing the prosecutor with *proprio motu* powers to undertake investigations.

³² Article 6 (Statute, Tribunal for Rwanda); Article 7 (Statute, Tribunal for the former Yugoslavia).

³³ Article 8 (Statute, Tribunal for Rwanda); Article 9 (Statute, Tribunal for the former Yugoslavia).

³⁴ Article 28 (Statute, Tribunal for Rwanda); Article 29 (Statute, Tribunal for the former Yugoslavia).

³⁵ Article 15(2) (Statute, Tribunal for Rwanda); Article 16(2) (Statute, Tribunal for the former Yugoslavia).

³⁶ See Shestack, *supra*, at p. 198.

³⁷ Draft Statute for an International Criminal Court, UN Doc. A/49/355, 1 September 1994, "Report of the International Law Commission on the Work of its Forty-Sixth Session", at pp. 3-31.

³⁸ Doc. A/CONF.183/2/Add.1.

³⁹ For an account of the problems facing the Diplomatic Conference in Rome and of the issues that need to be addressed in order to reach an agreement on the final text of the statute of the International Criminal Court, see Lawyers Committee for Human Rights, *Establishing an International Criminal Court. Major Unresolved Issues in the Draft Statute*, 1998; Lawyers Committee for Human Rights, *Basic Principles. For an Independent and Effective International Criminal Court*, 1998.

Despite all the problems and deficiencies plaguing the current draft statute of the Court, the mere fact of the creation of such a Court would represent a considerable step forward in order to improve the international system of criminal responsibility for violation of some fundamental rights and principles. It is important, though, that the prosecutor be empowered to initiate investigations based on information from any source, thus avoiding the unwillingness of states to co-operate, and that the Court be independent from the will of state parties and from its parent body, the United Nations, and, especially the Security Council.

Conclusion

While the international community acknowledges the gravity of international crimes and the obligation for all states to take action against alleged criminals, the obligation to prosecute or extradite an international criminal does not seem to have crystallised yet into a principle of *jus cogens*. Practice shows that states have little political will to bring to justice alleged criminals and granting amnesty or pecuniary compensation will not entail the responsibility of the state on the international plane.

Nevertheless, the momentum gained by the current development of an international criminal process and the more satisfactory status of international criminal law compared to the Cold War era must be seen as positive steps towards combating impunity for international crimes and recognising the concept of individual responsibility. As the Commission on Human Rights recently stated in the preamble to its Resolution on Impunity, "exposing violations of human rights, holding their perpetrators accountable, obtaining justice for their victims, as well as preserving historical records of such violations, will guide future societies and are integral to the promotion and implementation of human rights and fundamental freedoms and to the prevention of future violations".⁴⁰

An efficient system of human rights protection is unimaginable without effective mechanisms imposing responsibility and punishment for their violation. Thus one can only hope that combating impunity for international crimes will be a priority for the international community in the years to come.

⁴⁰ See Resolution 1998/53, *supra*.

The proposed International Criminal Court: Experiences of Human Rights Jurisprudence at the International Criminal Tribunal for Former Yugoslavia

Susan Coles¹

It is well known that the International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) are breaking new ground in international humanitarian and international criminal jurisprudence, and will provide precedents for a permanent International Criminal Court (ICC). However, during a brief period spent working within the Office of the Prosecutor at the ICTY earlier this year, I was also struck by the extent to which the existing Tribunals are developing the body of international human rights jurisprudence. The Trial Chambers are constantly ruling on pre-trial motions and have also delivered some significant trial decisions involving consideration of human rights standards contained in the International Covenant on Civil and Political Rights, ("ICCPR"), the European Convention of Human Rights (ECHR), and the Universal Declaration of Human Rights.

In this short paper I will consider an area where this aspect of ICTY jurisprudence has had its greatest impact, namely the rights of the accused and the rights of victims and witnesses. Similar issues will be faced by a the ICC. When the dust has settled in Rome and we have, it is to be hoped, a workable Statute as the foundation for a Court, the next challenge facing the architects of the new institution will be the development of rules of evidence and procedure, and rules covering pre-trial detention. Already, the draft Statute contains the basic guarantees in this area, but, as was the case with the ICTY and the ICTR, detailed codes will be developed to supplement the Statute on day-to-day procedures. It will be in the interpretation and practice of these rules that significant challenges will be posed to the rights of the accused to a fair trial, to due process and to suitable conditions of detention; and to the often competing rights of victims and witnesses to suitable protection of their interests.

I would not wish to be seen as an advocate for the human rights of accused war criminals, who may have violated the most fundamental rights of alleged victims, including the right to life. However, it is necessary to note that the guarantee of a fair trial before an international criminal tribunal is integral to the credibility of that tribunal and its ability to deliver justice. This really goes without saying. On her recent visit to Australia from the ICTY in The Hague, Chief Prosecutor Justice Arbour spoke of the significance of an indictee who in 1997, on surrendering himself to SFOR troops in Bosnia, spoke publicly of his confidence in receiving a fair trial before the Tribunal. In order that such implicit encouragement for indictees to come forward and submit themselves to international jurisdiction can stand firm, both Tribunals make every effort to ensure that the rights of accused are fully protected.

Article 21 of the ICTY Statute (Article 20 of the ICTR Statute) provides the principal guarantees of the rights of the accused:

- equality of all accused before the Tribunal
- the right to a fair and public hearing; and
- the presumption of innocence until proven guilty.

The Statute goes on to detail a range of procedural guarantees:

- prompt information of the nature of the charge;
- adequate time and facilities for preparation of the defence;

¹ Legal Office, Department of Foreign Affairs and Trade. The views expressed are those of the author only and not those of the Department.

- trial without undue delay;
- counsel of choice, paid for if accused cannot afford it;
- the right to examine prosecution witnesses and to call defence witnesses; and
- interpretation during the trial.

The Appeals Chamber (Judges Cassesse, Li, Deschenes, Abi-Saab and Sidhwa) has noted that “the fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim I Article 21 of the Statute.”² Article 67 of the current draft ICC statute contains similar guarantees.³

However, against the rights of the accused, the Tribunal must also have due regard for the protection of victims and witnesses who come to testify before the Tribunal, and it is here that tension can and does arise with the due process rights of the accused. Article 22 of the ICTY Statute (Art. 21 of the ICTR Statute) provides as follows:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.

Accordingly, the identity of witnesses for either side can be concealed, but the common situation is that of withholding the identity of prosecution witnesses, usually victims or family members, from the accused and defence counsel. In this situation, defence counsel face the difficulty of seeking to challenge the credibility of testimony from witnesses who cannot be named or identified. This was the subject of an early ruling by the Trial Chamber in the first case under the ICTY statute, the *Prosecutor v. Tadic*.⁴

Tadic was charged with multiple violations of international humanitarian law, including grave breaches of the Geneva Conventions of 1949, violations of the laws of war and crimes against humanity, all specified in Articles 2, 3 and 5 of the ICTY Statute as falling within the jurisdiction of the Tribunal. More specifically, Tadic was charged with rape, murder, torture, cruel treatment and other inhumane acts. Defence counsel challenged the Trial Chamber ruling that the identity of some victims and witnesses should remain both confidential (non-disclosure to the public) and be withheld from the accused and defence counsel (anonymity). Evidence was given in camera and over closed circuit television with image and voice altering devices.

With Justice Stephen in dissent, the Trial Chamber (Judges McDonald and Vohrah) ruled that these confidentiality and anonymity measures were justified in the face of witnesses’ genuine fear for their own and their families safety. Where such “exceptional circumstances” were found (the terror and trauma of the relevant armed conflict being held to representing exceptional circumstances “par excellence”⁵), the majority Judges found no violation of the guarantee to a fair trial contained in the Statute and as established in the ECHR and ICCPR. Indeed, the majority Judges noted,

It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees. (See Article 15 of the ECHR, Article 4 of the

² *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction in Prosecutor v. Tadic*, 2 October 1995 (IT-94-1-T)

³ Report of the Preparatory Committee on the Establishment of an International Criminal Court: Draft Statute A/Conf.183/2/Add.1 14 April, 1998.

⁴ *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses*, 10 August, 1995 (IT-94-1-T)

⁵ *supra*. para. 61

ICCPR and Article 27 of the American Convention on Human Rights.⁶

In relation to granting anonymity to witnesses, the majority Judges did acknowledge the very difficult balancing exercise involved, and set down strict guidelines, listing five criteria:

- real fear for the safety of the witness or family and therefore the strict necessity of such measures;
- the importance of the witness testimony to the case;
- satisfaction that no prima facie evidence exists that the witness is biased or untrustworthy; and
- consideration of whether or not a witness protection programme is available and could provide an adequate safeguard as an alternative to anonymity.

Justice Stephen, in dissent, took the view that anonymity was inconsistent with the Statute's guarantee of a fair trial, and that to allow anonymity is to accept the possibility of an unfair trial as the price for protecting the victims.

Prominent human rights academic Professor Christine Chinkin submitted an amicus curiae brief to the Trial Chamber on this issue in the case. Her brief, while recognising the right of the accused to a fair trial, addressed the question of how to balance this right with the rights of private individuals, the public interest in the proper administration of justice and the interests of the international community in seeing those accused of violations of international humanitarian law brought to trial. Professor Chinkin in particular discussed how non-disclosure of witness identity to the accused can be compatible with the right to a fair trial and is justified by policy considerations, particularly in sexual assault cases. Subsequent criticism of the decision in the *Tadic* case⁷ on the basis that anonymity of witnesses in these circumstances breaches due process standards has been challenged by Professor Chinkin in exchanges in the *American Journal of International Law*.⁸ She argues that the Chamber operates within the unique framework of the Tribunal, one of its unique characteristics being an affirmative obligation to protect witnesses and victims as mandated in the Statute and Rules of Procedure.

Chinkin cites the European Court of Human Rights decision *Kostovski v. The Netherlands*,⁹ which concluded that the disadvantages that an accused must face when addressing the evidence of an anonymous witness can be counterbalanced by safeguards elaborated by the trial court. And in *Tadic*, the Trial Chamber did indeed lay down procedural safeguards to ensure a fair trial in circumstances of anonymous witnesses. These included the following:

- the judges must be able to observe the demeanour of the witness;
- the judges must be aware of the identity of the witness in order to test their credibility; and
- the defence must be allowed ample opportunity to question the witness on issues other than those which would reveal identity, in order to test credibility.

While this debate about balancing rights is conducted at the academic and judicial levels, human rights issues can also arise in a more practical way. One of the unexplored assumptions implicit in this debate is that these issues can be argued in the Tribunal on an even playing field as between the defence and the prosecution. As noted above, the Statute guarantees the accused's right to counsel of choice or to have counsel assigned from the list kept by Registry, in consultation with the accused.¹⁰ The Rules of Procedure and Evidence of the ICTY

⁶ *supra*.

⁷ Monroe Leigh *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, AJIL Vol 90 at p234

⁸ Christine Chinkin *Due Process and Witness Anonymity* AJIL Vol. 90 at p75

⁹ 166 Eur.Ct.HR. (ser.A) at 3 (1989)

¹⁰ *Rules and Procedure of the International Criminal Tribunal for Former Yugoslavia ("Rules")* Revision 11, effective

make further detailed provision for the appointment and assignment of counsel. A trial lawyer from any jurisdiction can have their name placed on the list, so long as he or she is “admitted to the practice of law in any State, or is a University Professor of law.”¹¹

Understandably, given the divisions and sensitivities in the context of the Yugoslavia conflict, most accused choose a lawyer from their own ethnic or national group. However, as trial lawyers with criminal trial experience in their home jurisdiction, and in many cases without any international humanitarian law or international human rights specialist knowledge, I observed that opposing counsel were often ill matched in the Chamber. The trial attorneys on the prosecution team, usually experienced advocates in common law adversarial systems, also had at their disposal the international law advisory service of the Office of the Prosecutor. The Croatian or Serbian criminal lawyers, often unused to the adversarial system, did not have access to a specialised in-house international or humanitarian law advisory service and obviously had less experience of these complex international criminal law trials than the prosecution team. Sitting watching argument in the Chamber, the thought certainly sprang to mind that, while there is a right to counsel, it is not possible to guarantee a right to adequate counsel.

In the final analysis, the credibility of the Tribunals, and in turn the credibility of the new ICC, is inextricably linked to these bodies being truly fair and thereby earning the universal respect of indictees, victims and witnesses, Governments and non-government organisations. Mary Robinson, the United Nations High Commissioner for Human Rights, has expressed this view most succinctly:

This Court is about providing justice for the victims of crimes against humanity and war crimes. There are times when victims' search for justice is frustrated by the inability or unwillingness of a national justice system to take up their case. An International Criminal Court must be a safe and effective recourse for the victims of the most serious violations. Of course, it must also be fair and impartial: the court will fail if it does not ensure due process for the accused.¹²

25 July, 1997, Rule 44 and Rule 45

¹¹ *supra*. Rule 44(A)

¹² Quoted in: *Bringing Justice to the Victims* Background Documents for the Rome Diplomatic Conference, available on ICC Homepage at <http://www.un.org/icc>.

The Proposed International Criminal Court : Over What Crimes should it have Jurisdiction?

K J Keith *

Some history

I look back at developments concerning international criminal liability for a number of reasons, first to see what it is that states have committed themselves to over the centuries (for there are signs of back sliding in some of the current proposals), secondly to see what the world community more broadly has demanded in terms of the internationalisation of criminal liability, thirdly to identify some of the changing characteristics of the international community and international relationships and the consequent requirements in terms of international criminal law, and fourthly to indicate some of the more technical issues about the definition of the offences and their various components.

My first date is 1474 when Peter von Hagenbach faced an international tribunal consisting of 28 judges on charges of war crimes committed in the course of a military occupation. His defence was that he was doing no more than to follow the orders of his employer, the Duke of Burgundy. That defence failed and he was executed.

By the time Grotius was writing 150 years later he was able to record that pirates were enemies of humanity and were subject to universal criminal jurisdiction. That development, like the 1474 prosecution, appeared to depend on customary international law, to use an anachronistic term, and not on any treaty base.

By the next century the founders of the United States constitution conferred power on congress to “define and punish ... Offences against the law of Nations ...” as well as the power to define and punish piracies and felonies committed on the high seas. My compatriot, Roger Clark, has suggested that those words include a dynamic notion that such offences would develop over time as the “Law of Nations” evolved.

In that century and especially in the next, the slave trade was the subject of developing actions by executives, navies, legislatures and judges, as has been extremely well documented in the recent history of the slave trade by Hugh Thomas.

My next example shows the development of technology. Just over a century ago, a treaty was prepared to protect submarine cables and in particular the telegraphic messages that were passing through them at huge expense. It cost the current equivalent of \$50 a word to send a message from Sydney to London in 1876. The technology was plainly very vulnerable as well as very expensive and an 1885 Convention required state parties to make it an offence to negligently or deliberately damage a cable and required strict civil liability as well.

Yet another development appeared around the turn of this century when, with the establishment of an international association for the study of labour law, it was accepted that in some situations states would not be able, or at least would not be willing, to move to protect their workers unless other states, their competitors, were subject to an international obligation to introduce laws to the same effect. And so even before the International Labour Organisation was established after the First World War, two Conventions protecting labour were drafted and indeed are still in effect for a number of countries, including New Zealand.

The array of other crimes subject to treaty obligations includes the counterfeiting of currency, trafficking in drugs, trafficking in “white slaves”, the distribution of obscene publications, crimes against peace, crimes against humanity, genocide, crimes against aircraft and shipping, hostage taking, crimes against internationally protected personnel and United Nations and associated personnel, terrorism, and inflicting

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major environmental damage.

Some general characteristics

First, we see in all these actions a recognition by the world community that national authority exercised alone will not be enough to deal with the particular problem. As well, in some cases there is plainly an element of international condemnation involved.

A second point is that there is not one set of consequences of the international condemnation or characterisation of the activity in question. In some cases the treaty may be no more than facilitative, enabling the exercise of criminal jurisdiction by states. It may go further and may place States parties under an obligation to exercise that jurisdiction by way of prosecution or extradition. There may be, as well, obligations of mutual assistance. The treaty might provide for the possibility of an international criminal court.

These matters have often been the subject of more careful analysis, today by Professor Costi.

A third general point is that we see in these developments over the centuries changing attitudes to matters that should be condemned by national or international law, in response to changes in political philosophy and technological change. We also see a broader emphasis on the need to "fight impunity" if the basic rules are ever to have a chance of general compliance. That is a matter that has been emphasised for instance by Mary Robinson, the United Nations High Commissioner for Human Rights, in her statement to the International Criminal Court Conference this week and a short time ago by Antonio Cassese, a Judge of the International Criminal Tribunal for the former Yugoslavia, in his Chorley lecture given at the London School of Economics last year, *Reflections on International Criminal Justice* (1998) 61 Mod LR 1, particularly in his discussion of the question "why is justice better than revenge, forgetting or amnesty".

Some specific issues

I consider briefly aspects of a number of the substantive crimes which are the subject of dispute at the Rome Conference.

The first is crimes against peace or waging aggressive war. Benjamin B Ferencz, who prosecuted at Nuremberg, declared at the beginning of the Rome Conference that "ever since the judgment at Nuremberg, it has been undeniable that aggressive war is not a national right but an international crime". Over 50 years ago a notable United States international lawyer, Quincy Wright, in his article published soon after the delivery of judgment by the Nuremberg Tribunal ((1947) 41 AJIL, 38, 72) concluded that especially significant in the Tribunal decision was the clear pronouncement that aggressive war was an international crime. He quoted Judge Biddle, one of the Americans at the heart of the Nuremberg process, who said in his report of the results of the trial to President Truman:

War is not outlawed by such pronouncements, but men learn a little better to detest it when, as here, its horrors are told day after day, and its aggressive savagery is thus branded as criminal. Aggressive war was once romantic; now it is criminal. The nations have come to realise that it means the death not only of individual human beings, but of whole nations, not only with defeat, but in the slow degradation and decay of civilised life that follows that defeat.

Quincy Wright commented that the world shattered by two world wars needed to have its confidence in the law restored. Such confidence could only develop if people believe that formal law embodies justice and that it will be enforced. The Nuremberg trial was likely to contribute to both of these ends. The general opinion that aggressive war and mass massacre were crimes had been recognised in formal international law and that law had been sanctioned by trial and punishment of many of the guilty.

There has of course been much argument that aggression is too uncertain an offence to be the subject of individual criminal liability. That was not seen as an insurmountable problem 50 years ago. And since that time there has been the clarifying, codifying and developing work in the definition of aggression and the

friendly relations declaration both adopted by the United Nations General Assembly. In the broader sweep of history it would, I think, be remarkable were the world community to be seen to be going backwards in respect of this most basic international crime.

War crimes, it is agreed, are to be included. There is however much disagreement on the detail. I comment briefly on some of those matters. One is whether the reference to the Geneva Convention should be limited to the 1949 texts or should extend to the 1977 Protocols. The Protocols are now very widely accepted. The major holdouts in respect of the first Protocol are the United States and France. As I understand the matter, their reasons do not appear to be related to the definition of the grave breaches and other possible war crimes.

A second point concerns rape and enforced prostitution. The Conventions, along with the statutes of the Yugoslav and Rwanda Tribunals, expressly proscribed those atrocities in internal armed conflicts as well as international ones, to anticipate the third point about war crimes.

Given the facts of international life, and especially of the armed conflicts of the last 50 years, the world community would be moving backwards in a serious way were it not to include war crimes committed within internal armed conflict within the definition. As Mary Robinson said at the opening of the Rome Conference "obviously the court's role must not be restricted to international conflict. That would be a recipe for irrelevance and impotence in the face of the worst atrocities which nowadays take place in internal conflicts." Statements consistent with that have been made by the European Commissioner for Humanitarian Affairs, and the Australian Foreign Minister in his opening address expressly referred to the situations in Cambodia and Rwanda.

A final matter relating to war crimes is the inclusion of offences relating to the use of weaponry and in particular weapons of mass destruction, especially nuclear weapons. All the various options are based on the principle which has been accepted in treaty texts for a century, prohibiting the use of weapons which cause superfluous injury or unnecessary suffering. The briefest and most general text also includes a reference to weapons which are inherently indiscriminate. There can be no objection at the level of principle to that general language unless it is on the ground that individuals are being put in jeopardy of criminal prosecution and conviction by reference to a test which is too vague and accordingly contrary to the principles of criminal law. I return to that general concern later. Some of the options as well include specific weapons such as poison and asphyxiating gases. One general formula in the list in one of the options is "such other weapons or weapon systems which have become the subject of a comprehensive prohibition pursuant to customary or conventional international law". That formula recognises, as does the present law, that new weapons can become subject to the prohibitions and that existing weapons might also be brought within the scope of a prohibition. Specific listing does of course help meet the point mentioned a moment ago but plainly, especially in the case of nuclear weapons, gives rise to major negotiating difficulties.

Although drug offences were at the heart of the concern that led the government of Trinidad and Tobago to bring the matter of the International Criminal Court onto the international agenda a few years ago, there is not wide support for the inclusion of those offences. That is notwithstanding the fact that according to the debates at the United Nations General Assembly Special Session on Drugs held just a week or two ago the world illicit drug trade is now worth \$400 billion a year, ranking just behind tourism and ahead of the sale of legitimate drugs. The lack of support is also striking when the principle of complementarity is applied to small or fragile governmental and criminal justice systems which may not be able to sustain serious efforts to stamp out drug dealing in their countries.

So far as terrorism is concerned there are the difficult definitional issues such as those which were identified in the negotiation of a terrorism convention last year, difficulties that run back, at least in terms of international drafting history, to the 1930s. That appears from the text before the Conference which in addition to including six existing particular conventions relating to aircraft, hostages, international and protected persons and maritime matters, has a definition which is limited to acts against another state (a formula that would not include for instance the Rainbow Warrior bombing) but then includes this passage:

An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or

populations or serious damage to property.

Depending on how the word indiscriminate is understood that provision could apply to an extraordinarily wide range of matters that regularly come before national criminal courts.

General law of international crimes

The Conference proposals relating to terrorism, like those relating to aggression and weaponry, raise a question of principle and a question of the approach to be adopted. So far as the latter is concerned, Sir Franklin Berman, the Head of the United Kingdom delegation at the Conference, in his opening statement, made what appears to me to be a very important and encouraging statement. He said that the negotiations should focus on what is necessary and should look for reasonable compromise. He said this was not an occasion to rewrite international humanitarian law. "The essential rules and principles we need are already there. The focus of our attention will be to create a system of jurisdiction to vindicate those rules, a system of jurisdiction that works."

That is to say the substantive law is essentially settled. Perhaps it is possible to read into that statement the proposition that not too much attention has to be given to the detailed drafting of the substantive crimes. Might they not be largely taken as read and their detailed application be left to the process of investigation, the framing of indictments, the calling of evidence by prosecution and defence and the refinement in the circumstances of particular cases by the judges applying rather broad statements of the law? We here face a recurring issue in the writing and administration of the law, an issue which takes on a particular sharpness in the area of criminal law.

The long established principle is that individuals should not be put in jeopardy of criminal conviction and consequent loss of their freedom by reference to uncertain criminal law. We have an outstanding judgment of the International Court in support of that proposition. In 1935 the Permanent Court of International Justice was asked to advise on the constitutionality of certain legislative decrees made in Danzig which was then under the control of the German National Socialist party. The decree said that if there were no penal laws governing an act which according to the "fundamental concepts of penal law and sound popular feeling" should be punished then that act should. The International Court held that provision unconstitutional on the sole basis that since Danzig was a state governed by the rule of law (a "Rechtstaat"), the law alone could determine and define an offence. The criminal law was not to be applied by analogy in the same way as the common law.

Lord Wright in his foreword to a volume of the Law Reports of Trials of War Criminals published in 1949 (vol XV, pvii) addressed this matter, in part by using the judgment of the United States Supreme Court in the Yamashita case. That Court pointed out that Congress, in exercise of the constitutional power mentioned earlier, had adopted the system of military common law applied by military tribunals so far as it should be recognised and deemed applicable by the courts and as further defined and supplemented by the Hague Convention to which the United States and the Axis powers were parties. The lack of precise definition or indeed any legislative definition did not stand in the way of criminal prosecution, conviction and punishment, including capital punishment. And yet Lord Wright, after referring positively to the general standard of the de Martens clause ("the whole animating and motivating principle of the law of war, and indeed of all law"), expressed doubts similar to those of the International Court in the Danzig case:

[The expression, the law of nature or natural law,] has been used during so many centuries from the days of the Romans and in so many different connotations and also has been invoked for the purposes of maintaining so many evil and disastrous practices and rules, that its use may perhaps be better abandoned. ... The reader of this volume will not fail to reflect on the number of important principles which still need to be defined. (xiii)

But much has of course been done since March 1949 to provide greater definition: for instance in the 1949 conventions adopted five months later and their 1977 Protocols, the UN General Assembly definition of aggression and declaration on friendly relations, and the 1980 conventional weapons convention, along with national military codes and manuals and court decisions and much commentary.

A second matter, connected to that of relative precision, is the principle of non-retroactivity. The Rome draft has two provisions limiting its application to conduct committed after its entry into force. If the proposed Statute is essentially concerned with institutional and procedural matters and the allocation of jurisdiction, rather than with the already established substantive law, the principle of non-retroactivity does not appear significant. It has had no part of course at Nuremberg, Tokyo or in the former Yugoslav and Rwanda tribunals. Similarly extradition treaties are routinely applied to earlier events.

Such an emphasis, which is, I think, consistent with the statement I quoted earlier for Sir Franklin Berman, would also question the value of attempting to get agreement on the whole range of “general principles of criminal law”, including some which have defeated earlier codification efforts such as superior orders. Years ago, Professor (later Judge) Richard Baxter by reference to aspects of the law of war wisely advised against ill conceived (and unnecessary) attempts at codification. Some national criminal codes do not yet include a full general part, and of course some jurisdictions including some in this country, do not even have a criminal code. The formal written law (whether in treaty or legislative form) will almost always require further elaboration, clarification and development in practice as appears from the problems with anonymous witnesses—a matter which has been before my court and also the New Zealand Parliament and in which we were helped by the exchanges in the American Journal in which Christine Chinkin participated relating to the same matter in the former Yugoslav tribunal, *R v Hines* [1997] 3 NZLR 529; Law Commission, *Evidence Law : Witness Anonymity* (1997 NZLR R42); and Evidence (Witness Anonymity) Amendment Act 1997. That process shows as well the impact of international developments on national ones.

The judgment to be made

I can do no better than quote from an address by given Dr Paul Bonard, the Head of the International Committee of the Red Cross Regional Delegation for the Pacific, at this University last month:

The ICRC believes that the fundamental principle which should guide the negotiations in Rome should be that it would be better to give up completely on the creation of an international criminal court, than to establish a tribunal without any real power, an institution of pretence which would serve to assuage the bad conscience of certain States, rather than to prevent or punish the most odious crimes.

In opening the Rome Conference, Kofi Annan expressly acknowledged the critical role of the ICRC in the lead up to the conference. Its vast experience over the last 130 years both in the field and in the preparation and implementation of the law, its grasp of principle and its firm political sense mean that great weight should be given to its assessment.

The Proposed International Criminal Court: An Overview of the Issues Facing the Rome Conference

Ivan Shearer¹

I rather too lightly accepted the task of presenting, in 15 minutes, an overview of the issues facing the Rome Conference on the International Criminal Court. Settling down to the task, I have found it all but impossible.

The chief reason for the difficulty will be apparent to anyone who has seen the negotiating text which is before the Rome Conference, which began its work last Monday. The official UN document A/CONF.183/2/Add.1 dated 14 April 1998, is 173 pages long, and contains 116 draft articles, nearly all of which are expressed in multiple alternative versions. Square brackets are more numerous than commas. Reading it is like trying to decipher an ancient Sumerian papyrus, or listening to a broadcast of the first cricket match played on Mars through heavy interplanetary static. At a recent Red Cross Seminar on the ICC, Professor Tim McCormack estimated that there were some 1700 pieces of square-bracketed text, and thus as many unresolved issues before the Conference. Of course, not all of these issues are equally difficult; and in some cases a decision on one piece of bracketed text will remove another 20 or 30 as a consequence. But there must be doubt whether the Conference will complete its work in the allotted time. Ironically, just about alone in unbracketed simplicity are the clear and unambiguous concluding words of the document: "DONE at Rome, this 17th day of July 1998."

If I thus give myself the excuse of not attempting to enter in detail into the issues at the Conference, I cannot avoid—in the short time available—touching upon what I see as the main issues. These and others will be dealt with more fully and knowledgeably by my fellow speakers.

The first is not really an issue, but a reflection. In what I am about say I do not mean to doubt the value of the work that has been done in drafting a statute for a permanent international criminal court; nor do I wish to question the desirability of its establishment. I merely wish to sound a strong note of caution against setting expectations of what is being undertaken too high.

A permanent international criminal court was first proposed in the early years of the UN. It was to have been part of the Code of Offences Against the Peace and Security of Mankind. The Genocide Convention of 1948 anticipated it by providing that jurisdiction over that offence could be exercised either by the state on whose territory the offence was committed or by such international penal tribunal as might be established. Most of this audience will remember the argument raised by Eichmann in the Israeli courts that this provision precluded the exercise of jurisdiction by any state other than the territorial state. This was rejected by the Israeli courts, which relied upon the status of genocide, or more broadly crimes against humanity, as crimes carrying universality of jurisdiction. Nevertheless, there is an echo in the current negotiating texts of the special nature of genocide and of the peculiar appropriateness of the exercise of jurisdiction by an international rather than a national tribunal. The Draft Statute sets it apart from other international crimes.

The end of the Cold War has produced a climate in which the proposal for an international criminal court has been able to go forward, detached from the Code of Offences Against the Peace and Security of Mankind, which is proceeding separately. Yet, can one say that the world has not changed since 1950? The original proposals were drafted in the immediate aftermath of the Holocaust and of other crimes against humanity committed during the Second World War. The objective was to punish offenders against international criminal law whom no state wanted to protect, not even (indeed, especially not) the states in whose names or under whose auspices those crimes were committed. Today, virtually all crimes that shock the international conscience are committed either under the auspices of states that do wish to protect and excuse their perpetrators, or as part of a breakdown in national public orders in which ethnic or religious fears and hatreds have been savagely unleashed. As the experience of the Yugoslav Tribunal seems to indicate, while a few middle or low ranking individuals may be brought to account, the persons most responsible are the very people

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with whom the international community is forced to negotiate in order to bring about an end to the conflict or humanitarian disaster; or they are otherwise kept well out of reach.

The danger of allowing too much hope to ride on the success of the Conference is in imagining that a system of criminal justice, however progressive and elaborate, will itself blow away the spectre of massive violations of international humanitarian law and of other crimes against humanity. "An end to impunity" is a nice slogan; but does it not ring a little hollow? Is not more—much more—needed?

In our own society, the law and order model does not of itself reduce crime. We need to understand the causes of it and attack those also. My fear is that, in the excitement raised by the ICC proposals, we appear to have allowed the Agenda for Peace Proposals of 1992, promoted by the UN Secretary-General, to be overshadowed. I remind you also of the excellent response to that Agenda, prepared by Gareth Evans and a team at DFAT, "Cooperating for Peace" (Allen & Unwin, 1993). In that book the concepts of peace building and preventive diplomacy are imaginatively developed, and a new approach emphasising early prevention of situations endangering peace or threatening humanitarian disasters by the organs of the international community is proposed. The ICC offers little in these respects.

I turn now to the draft statute itself. One can run through the Table of Contents and discern the broad issues through the titles of the 13 Parts. Part 1 deals with the formal establishment of the Court. Nothing much controversial there. Part 2—Jurisdiction, Admissibility and Applicable Law—is a key part, in which the square brackets are heavily in evidence. It is here that the crimes are defined, the role of the Security Council set out, the principle of complementarity of national and international jurisdiction is worked through, the conditions of exercise of jurisdiction by the ICC are laid down, and the role of the Prosecutor defined. It is safe to say that no particular outcome on any of these issues can be predicted. I shall return to aspects of them shortly. Part 3 deals with General Principles of Criminal Law, to be applied by the Court. Part 4 sets out the Composition and Administration of the Court. It seems that most judges will not serve full-time but will be available when called upon, while continuing to serve in their national courts. Part 5 deals with the process of Investigation and Prosecution, Part 6 with the Trial itself, Part 7 with Penalties, and Part 8 with Appeal and Review proceedings. There is much meat in all of these, but more for the specialists in criminal law. Part 9 on International Cooperation and Judicial Assistance is another key part for international lawyers. It is here that the obligations of states to surrender or transfer accused persons and evidence to the Court are set out. Section 10 deals with the Enforcement of Sentences. Part 11 establishes an Assembly of States Parties to the Statute which has powers of supervision of the Court and of the Court's budget, among other things. Part 12 on Financing of the Court is not to be overlooked, having as it does considerable practical importance for the effectiveness of the Court. Although most of the judges will be part-time, the expenses will be considerable and may fluctuate from year to year as cases flow and recede. It is as yet undetermined whether States Parties will have to bear the cost, on the usual UN scale of assessments, or whether it should be financed out of the general UN budget, or a combination of both. If the United States becomes a party it would bear 25% of the total cost. If not, this portion will have to be borne by other States in accordance with the assessment scale (currently, e.g., Australia 1.48%; New Zealand 0.24%, Germany 9.06%, Japan 15.65%). Part 13 contains the Final Clauses. Reservations are not permitted, but States Parties do have choices to exercise in other Parts of the Convention, especially Part 2.

I see the most controversial issues arising under Part 2, on jurisdiction and admissibility.

- (a) "Complementarity". The Preamble and Article 1 both state that the powers of the ICC shall be complementary to national criminal jurisdictions. By this is meant, in general, that if a state has jurisdiction over the crimes to which the Statute applies, it may assume priority in the right to prosecute over the Court. A possible exception to that priority is where the national jurisdiction "is either not available or is ineffective". There is much room for interpretation of these two words.
- (b) The role of the Security Council. The original draft of the International Law Commission of 1993 gave a much greater and more clearly defined role to the powers of the Security Council. Under that draft, in broad terms, if the Security Council initiated a prosecution it could not be prevented through any concept of complementarity or by the lack of consent of the territorial or custodial states. These, however, are all now square-bracketed. Developing States, especially, are reluctant to surrender sovereignty, and there is some

sympathy for the situation of Libya in respect of the alleged Lockerbie bombers. The role of the Security Council must be regarded as an especially important and sensitive issue at the Conference.

- (c) Conditions for exercise of jurisdiction. A weakness of the ICC, compared with the Yugoslav and Rwanda Tribunals, is that only those states that become parties to the Statute will be bound by its provisions. The provisions of the Yugoslav and Rwanda Statutes, by contrast, are decisions of the Security Council binding on all UN members by virtue of article 25 of the Charter. Thus, the ICC Statute tends to be deferential to state sovereignty in order to persuade states to become parties. This is evidenced not only by the principle of complementarity but also by the need for the consent of affected states before the ICC can assume jurisdiction in a particular case. How far this deference will go remains to be seen. Should the consent only of the state in whose territory the offence was committed be required? Or should the consent also of the custodial state and of the state of nationality (assuming these to differ from the territorial state) be required? May a state refuse to extradite or transfer its own national to the ICC, analogously with the extradition laws of many countries? Can a state party transfer an accused to the ICC on the latter's request in preference to an extradition request for the same person under a binding bilateral extradition treaty from a non-Party?

These and many other issues arise. It seems that every possible provision is contained in an alternative bracketed formulation. Leadership has been shown by Germany in producing, on 12 May this year, an informal draft Statute indicating a balanced outcome in each disputed article through the use of bold type to indicate the preferred option. It is only in this way that one can gain a coherent sense of what the statute might ultimately look like.

But will balance and coherence prevail? Come to next year's ANZSIL and find out.

Practical Difficulties for the International Criminal Court to Overcome

Kriangsak Kittichaisaree*

Introduction

This ANZSIL is being held here in Canberra at the end of the first week of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which will last until 17 July 1998. The Rome Conference is entrusted with finalising the text of the Statute for the International Criminal Court (or the Convention on the Establishment of an International Criminal Court, hereinafter referred to as the "ICC Statute")¹ to be submitted to the U.N. General Assembly later this year for adoption. There are more than 1,000 brackets, options and alternative approaches remaining and numerous pending issues in the ICC Statute. These reflect divergent positions of States. Significantly, Australia, Britain, Canada, South Africa, Argentina and South Korea are among those in favour of a strong and independent ICC, whereas the United States, France, China and Russia lead the States wishing to give the Security Council the right to veto the ICC's proceedings. Besides, a few other States, including India, Pakistan, Egypt, Cuba, Colombia, Iran, Iraq and Algeria want a weak ICC or no ICC at all. In these circumstances, it would be a monumental achievement if the Rome Conference were able to accomplish its task in one session.

The main elements agreed upon so far include: (a) the relationship between the ICC and the U.N.; (b) the principle of independence and impartiality of the ICC; and (c) the principle of complementarity of the ICC to the national court according to which the ICC will exercise jurisdiction only where the national court or the national judicial system is ineffective, unwilling or unavailable in the case falling within the ICC's jurisdiction.

So far, States have failed to agree on the questions: (a) who can trigger the ICC's jurisdiction – the Security Council who refers matters to the ICC, States Parties who submit complaints, and/or the Prosecutor acting *ex officio*; and (b) whether States need to consent to the exercise of the ICC's jurisdiction, and, if they do, what type or types of State need(s) to consent – the territorial State, the custodial State, the requesting State, the State of nationality of the accused and/or victim, or any one or more or all of these States. In addition, there are diverging opinions whether the ICC has jurisdiction insofar as States consent to the jurisdiction by making a declaration, either of general or limited application ("opt-in, opt-out"); whether States' consent must be given on a "case-by-case" basis, or whether ratification of the ICC Convention entails automatic acceptance of the jurisdiction of the ICC. These are just a few examples of the pending issues for the Rome Conference to settle.

Scenario Presumed In This Paper

Like any multilateral conferences, the outcome of the Rome Conference will be the ICC Statute which reflects the lowest common denominators among the positions of States.

However, in order to better focus on the ICC's most likely latent practical difficulties, this paper will proceed on the presumption that the Rome Conference produces the ICC Statute that gives the broadest competence, jurisdiction and authority to the ICC and its Prosecutor – something desired by human rights activists and organisations like Human Rights Watch, the Lawyers Committee for Human Rights, and the Coalition for an International Criminal Court.

According to this scenario: -

- Ratification of the ICC Statute entails automatic acceptance of the ICC's jurisdiction and there is no further

* The views appearing herein are the author's and do not necessarily reflect the position of the Royal Thai Government.

¹ U.N. Doc. A/Conf.183/2/Add.1 of 14 April 1998.

requirement of State consent to either particular crimes or cases.

- The U.N. Security Council as well as any State can refer to the ICC a situation in which one or more crime within the ICC's jurisdiction appears to have been committed. More importantly, the Security Council cannot preclude the initiation of proceedings before the ICC or ask for suspension of the ICC's trial process on the grounds that the matter is a political one and the Security Council is dealing with it under Chapter VII of the U.N. Charter.
- The Prosecutor can trigger the ICC's jurisdiction, acting on his/her own motion, based on information from a variety of sources. The Prosecutor obtains the authorisation to proceed from the ICC's Pre-Trial Chamber by showing a "reasonable basis" to investigate, and the Prosecutor's actions will be reviewed by the Pre-Trial Chamber or another panel of judges when the indictment is ready for confirmation.
- Crimes falling within the ICC's jurisdiction encompass both crimes committed in international armed conflicts and those committed in non-international armed conflicts.
- Until the ICC can be sufficiently funded exclusively by assessed contributions of States Parties to the ICC Statute, the ICC is funded out of the regular budget of the United Nations so that stable financing is ensured, and that financial burdens will not fall on States that initiate proceedings before the ICC. The ICC may also receive voluntary contributions from various entities such as States, NGOs, and individuals.
- No reservations may be made to the ICC Statute.
- The ICC Statute enters into force upon the deposit of the 22nd instrument of ratification, being the lowest requisite number among the proposals at the Rome Conference.

Even in this most optimistic scenario, the ICC would still face certain fundamental practical difficulties.

Practical Difficulties

Primary Responsibility for National Courts and the Presumption That "Justice Expedites Peace and National Reconciliation"

The principle of complementarity allows the ICC to be seized of jurisdiction when criminal justice in the national court is ineffective or unavailable. In present reality, the most serious crimes of concern to the international community as a whole are usually committed within the territory of a single State and the accused have no reason to seek refuge elsewhere since they would lack influence or power to shield themselves from being apprehended. With respect to ethnic/religious minorities who are subject to oppression or atrocities, they normally possess the nationality of the State where they have lived for generations. Thus, the national court in such cases would be simultaneously the national court of the custodial State, the national court of the State of nationality of the victim as well as of the accused, and the court of the territorial State. In these circumstances, the national court may be circumvented from rendering criminal justice because there is no overriding interest to see to it that justice is to be done and seen to be done.

As recognised in the first preambular paragraph of the ICC Statute, establishing the ICC would fulfil the desire "to further international cooperation to enhance the effective suppression and prosecution of crimes of international concern." Likewise, U.N. Security Council Resolution 808 of 22 February 1993, which decided upon the establishment of an international tribunal for the Former Yugoslavia, expressed the determination of the Security Council "to put an end" to heinous crimes in the Former Yugoslavia and "to take effective measures to bring to justice the persons who are responsible for them." Pardon, parole and commutation of sentences in the interests of justice are recognised by the Statute of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the ICC Statute. Therefore, international criminal justice, like national criminal justice, has the main objectives of ending on-going crimes and punishing criminals so as to deter crimes from being committed in the future. It also endeavours to rehabilitate criminals. As a matter of fact, however, the objective of ending on-going crimes far outweigh all the other objectives.

The most prevalent obstacle to international criminal justice is the overriding national interest to ensure peace, stability and national reconciliation. An oft-repeated argument that punishment of criminals fosters national reconciliation is not always shared by people in the territory torn by internal strife. National reconciliation is often seen from different perspectives. The government in the country where human rights have been severely abused desires a quick ending to the matter, and granting a general amnesty to offenders in these cases is considered justifiable on the grounds of “national security, *ordre public* or other essential interests” which would be otherwise “seriously prejudiced.” On the other hand, the United Nations and human rights activists perceive that such national reconciliation will be achieved through punishment of wrong-doers.² This latter view can be right or wrong. For example, it is arguable that the indictment of Radovan Karadzic and Ratko Mladic, the former Bosnian Serb political and military leaders, has helped sidelined them and paved the way for reconciliation through the Dayton peace process. Yet, it is equally arguable that prosecution in the International Criminal Tribunal for the Former Yugoslavia has led to no such reconciliation because Serbs, Croats and Muslims have their own notions of truth and history and feel that actions taken by their groups were justifiable. For the Serbs, it was the fear of another genocide like the one committed by Muslims and Croats against their forefathers during WWII that drove them to commit an “anticipatory genocide” against these other ethnic groups, and, as such, many Serbs harbour the feeling that the International Criminal Tribunal for the Former Yugoslavia is an anti-Serb instrument.³ In Rwanda, despite the establishment of the International Criminal Tribunal for Rwanda to punish those responsible for the genocide in 1994, and despite the fact that at least 330 people have been tried in Rwanda’s national courts for their role in the 1994 genocide and more than 125,000 people are awaiting trial on the same charges, massacres have continued sporadically in Rwanda over the past year, including the massacre against 58 civilians in a single night last March.⁴

One strong factor in support of the need for a blanket amnesty is the fear that human rights oppressors who are still in power and who have no reason to believe that an amnesty would be automatically granted to them will harden their position and “fight to death” instead of yielding their grip on power. Such a fight would aggravate the sufferings already endured by the society concerned and would thus outweigh any interests in punishing offenders for their crimes. It is not surprising, therefore, that in many parts of the world, especially Latin America and the Caribbean, an amnesty is generally granted to oppressors.⁵ In Uruguay, a new government that came into power following the rule of an oppressive regime enacted Law 15,848 of 22 December 1986 that was supported by a plebiscite to grant a general amnesty without prosecutions and without efforts to unearth the truth of what had happened. The Uruguay Government cited “reconciliation”, “national pacification” and the “express will of the Uruguay people” as justifications.⁶ In Argentina, human rights violators under the previous oppressive regimes were prosecuted, but many of them were subsequently exonerated or pardoned to avoid divisive politics that might alienate the armed forces. In Chile, in February 1991 the National Commission for Truth and Reconciliation of 8 people presented a 1,800-page unanimous report to the President of Chile, who subsequently presented the Commission’s findings and, in his capacity as Head of State, atoned for the crimes committed by the agents of the State of Chile. In Haiti, in September 1993, the US

² For example, Security Council Resolution 955 of 8 November 1994 that creates the International Criminal Tribunal for Rwanda emphasises the Council’s conviction that prosecution of individuals responsible for atrocities would contribute to the process of national reconciliation and the restoration and maintenance of peace in Rwanda.

³ See Tina Rosenberg, “Defending the Indefensible”, *The New York Times Magazine*, 19 April, 1998, at 45-69.

⁴ Victoria Brittain, “’94 genocide weighs heavily on Rwandans: In culture of fear, killers walk streets”, *The Washington Times*, 2 April 1998, at A13; Stephen Buckley, “Rwanda Executes 22 for Genocide”, *The Washington Post*, 25 April 1998, at A1.

⁵ See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Laws, Politics, Morals: Texts and Materials*, Clarendon Press: Oxford (1996), at 1084-1109.

⁶ Inter-American Commission on Human Rights, Annual Report 1992-93, Report No. 29/92, Uruguay, 2 October 1992, para. 22. Reproduced in Steiner and Alston, *op. cit.*, at 1098-1102. See also the case of Jose Siderman, a naturalised American citizen who came from Argentina. He accused the government of Argentina of torturing him in 1976. Although the government has agreed to an out-of-court settlement with him, the person responsible for his torture is still at large and holds a high elective office in Argentina. (Tim Golden, “Argentina Settles Lawsuit By a Victim of Torture”, *The New York Times*, 14 September 1996, at 6; and also *id.*, “For First Time, U.S. Court to Weigh Claim of Rights Abuse in Foreign Land”, *The New York Times*, 2 Sept. 1996, at 9.)

President authorised his special envoys to negotiate with the Haitian army's high command that included an offer of a general amnesty for crimes committed by the top three coup leaders in exchange for their surrender of power to the new President-designate of Haiti. In South Africa, the Truth Commission was established by President Nelson Mandela in 1995 to probe apartheid era human rights abuse and promote reconciliation, but none of the "big fish" has been prosecuted so far.

In this light, even the offer to try offenders first and pardon them later is unlikely to be acceptable to them. What human rights violators who are still in power want is an immediate, unequivocal and unconditional We have seen that, short of waiting for a new regime to come into power and render justice—something that rarely happens, the most effective way to bring about justice in these situations is for the international community to enforce criminal justice in the State in whose territory crimes of international concern were committed, as in the cases of the Former Yugoslavia and Rwanda. The United Nations, especially the U.N. Security Council, is needed, but here comes another practical difficulty.

The United Nations' Failure to Act

Reliance on the United Nations, especially the Security Council, as the last resort to ensure compliance with international obligations is a fact of life. Article 94 of the U.N. Charter stipulates that if any party to a case before the International Court of Justice fails to perform the obligations incumbent upon it under a judgment rendered by the ICJ, the other party may have recourse to the Security Council. Likewise, Rules 7 *bis*, 11, 59(B), and 61(E) of the Rules of Procedures and Evidence of the International Criminal Tribunal for the Former Yugoslavia require the President of the Tribunal to notify the Security Council on non-compliance by States. Certain States would involve the U.N. Security Council in taking measures against States Parties as well as non-States Parties to the ICC Statute which fail to comply with the ICC's request for cooperation. Unfortunately, Article 27 of the U.N. Charter gives the permanent members of the Council the power of veto in non-procedural matters.

The widely accepted assumption that the end of the Cold War brings with it the end of conflicts among the five permanent members of the U.N. Security Council is not always correct. Self-interest, be it for the sake of good neighbourly relations or of economic gains, has given rise to differences of opinion among the Permanent Five. Even when all of the Permanent Five share altruistic interests, they may differ as to the ways and means of finding resolve. Their differences of opinion may no longer be as purely ideological as during the Cold War, but they do continue to exist, although to a much lesser extent. For instance, the United States' strong positions regarding Cuba, Iran, and Libya are in conflict with the positions of many members of the European Union, including France, a permanent member of the Security Council. Other examples of such differences of opinion abound, including the tension between negotiating a cease-fire with Saddam Hussein during the Gulf War and demanding his criminal responsibility, as well as the present difficulty in finding consensus among the Permanent Five with regard to possible enforcement actions to be taken against Yugoslavia's alleged on-going brutal ethnic cleansing of Albanians in the southern region of the Serbian province of Kosovo.⁷ On the whole, the enforcement action under Chapter VII of the U.N. Charter can still be paralysed.

Getting rid of the veto power in the Security Council may need a major reform of the U.N. system through the amendment of the U.N. Charter—something long discussed but still far from materialising. Tying the funding of the ICC to the regular budget of the United Nations will prevent this reform from ever happening since the major contributors to the budget who are also the permanent members of the Security Council would insist on the "weighed voting" principle to ensure that their veto power remain.

States May Not Be Sufficiently or Directly Interested In Seeking Justice

Some States insist that, with no penal code to guide the ICC, the ICC's *ratione materiae*, *ratione personae*, and *ratione temporis* must be spelt out definitively; otherwise it would violate the principle of legality or *Nullum crimen sine lege, nulla poena sine lege*: there can be no punishment of crime without a pre-existing law. As Justice Louise Arbour, Prosecutor for both the International Criminal Tribunal for the Former

⁷ In this latter case, see R. Jeffrey Smith, "West Seeks Kosovo Intervention", *The Washington Post*, 6 June 1998, at A1.

Yugoslavia and the International Criminal Tribunal for Rwanda, has pointed out, the ICC Statute must contain “precise offence provisions so that a potential accused knows what he may be charged with and, to the extent practicable, the elements of possible offences...that are well-established in international law and are related to the moral culpability of the accused”⁸ In other words, the scope and definitions of crimes within the ICC’s jurisdiction must be strictly construed and must not be extended by analogy to, or be interpreted to proscribe, conduct not clearly criminal under the relevant provisions of the ICC Statute.⁹

At this stage, there is broad consensus that the ICC’s jurisdiction should cover the “core crimes” of genocide, violation of the laws and customs of war, and crimes against humanity as stipulated in the Statute of the International Criminal Tribunal for the Former Yugoslavia and that of the International Criminal Tribunal for Rwanda, which are part of customary international law. There are diverging opinions, however, on the appropriateness of expanding the ICC’s jurisdiction to cover non-core crimes such as “aggression” whose legal definition is not yet settled, or crimes that are merely part of the *corpus* of conventional law and not customary law (the so-called “treaty-based crimes”). Waiting for States to finally agree whether to include non-core crimes within the ICC’s jurisdiction would delay the establishment of the ICC. Therefore, those wishing for an earliest establishment of the ICC would prefer that the ICC’s jurisdiction cover “core crimes” only while other crimes could be added later on.

Nevertheless, this would pose a practical problem. Adding non-core crimes after the ICC Statute enters into force would involve amending the ICC Statute and this would take time. While States may pay lip-service to the virtue of setting up the ICC, few of them would be directly interested in pursuing an *actio popularis*—the right residing in any member of a community to take legal action in vindication of a public interest, even if this right were available to them now. A “core crime” may be too geographically remote to threaten their own national security or interests, as in the case of what is going on in Kosovo. On the other hand, crimes with an international dimension that undermine the fabric of every society and are of direct, exceptionally serious concern to the international community as a whole, such as illicit traffic in narcotic drugs and psychotropic substance committed on a large scale and in a transboundary context, may elude inclusion in the list of crimes within the jurisdiction of the ICC simply because these crimes cannot be classified as one of the “core crimes”. This is despite the fact that the current momentum towards the creation of the ICC was started by the proposals made in the General Assembly in 1989 by Trinidad and Tobago and a coalition of Caribbean States. Ravaged by drug traffickers who terrorised their national criminal justice system and apparatus, these States called for an international court to deal with drug trafficking and other international crimes.¹⁰ Illicit drug trafficking threatens more States than any other “treaty-based crime” worth falling within the ICC’s jurisdiction. Relying on national criminal justice systems and mutual assistance and cooperation among States has largely failed to deter and punish systematic or large-scale drug trafficking organisations that threaten the political stability of a State and regional peace and stability, like the influential drug cartels in Colombia, and the United Wa State Army under Wei Hsueh-kang that has taken over the operation of Khun Sa and his Mong Tai Army in the Golden Triangle.

Lack of Universality of States Parties

The practical difficulties mentioned above would lead to a lack of universality in the acceptance of the ICC Statute. Although States express their strong desire to see to it that there be no more impunity for international criminals, their constituencies may think otherwise.¹¹ This possibility, together with the fact that the ICC might

⁸ Statement to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997.

⁹ See note 1, *supra*, at 47.

¹⁰ General Assembly Resolution 44/39 of 4 Dec. 1989 requested the International Law Commission “to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over ... persons engaged in illicit trafficking in narcotic drugs across national frontiers...” U.N. Doc. A/44/39.

¹¹ For example, as things stand now, the U.S. Government is unlikely to get the assent of two-thirds majority of the US Senate, as required by Art. II, Sec. 2 of the US Constitution, for it to ratify the ICC Statute. On 26 Jan. 1994, Section 170a of the Foreign Relations Authorisation Act for fiscal years 1994 and 1995, which expresses, *inter alia*, the sense of Congress that the U.S. would make every effort to have the United Nations establish an international court, was

be established after ratification by a small number of States, is hardly encouraging. In the absence of universality of participation by the international community at large, there would be more than one tier of international criminal justice and “international criminals” can “shop” for places where they can remain fugitives from justice until their host State accedes to the ICC Statute. This is especially so since the obligation to extradite or prosecute (*aut dedere aut judicare*) is imposed by treaties but it is not part of customary international law.¹² States should realise that, unless the U.N. Security Council or General Assembly can take appropriate measures to effect compliance by non-States Parties to the ICC Statute, cooperation with non-States Parties can be based only on comity, a unilateral declaration, and an *ad hoc* arrangement or other agreement with the ICC.

Inability to Provide a Remedy Commensurate to the Harm Inflicted

Frequently, the perpetrator of serious crimes has gained financially from his wrongs. However, in most societies severely torn by conflicts, reparations to victims, including compensation, rehabilitation, or even restitution of property or the proceeds thereof, are beyond the means of the perpetrator or even his State itself. In these circumstances, fines and assets collected by the ICC would not be of sufficient value to provide a remedy to victims, or to establish a trust fund for the benefit of victims and their families. Victims would be left to fend for themselves. Although commemoration of victims, or apology and public acknowledgment of the facts surrounding the crimes may be of symbolic significance, they are unlikely to be sufficient to the victims and the healing process is likely to be prolonged.

Case Study: the Khmer Rouge

The aforesaid practical difficulties may be put to the test by using the Khmer Rouge as a case study. Even if the ICC has jurisdiction only in respect of crimes committed after the date of entry into force of the ICC Statute, the situations concerning the Khmer Rouge could still serve as a pertinent case study on potential practical difficulties the ICC would face.

Presumption of Facts

Until proven guilty by an independent and impartial judicial body, all the people involved in the following events are presumed innocent.¹³ However, for ease of our discussion, let us presume that the following “allegations” are true, that the following incidents happen after the establishment of the ICC, and that all the States involved have ratified the ICC Convention/Statute.

In the year 2000, the Khmer Rouge takes over Cambodia. The Khmer Rouge leaders, led by Pol Pot, commits large-scale “genocide” against their own Cambodian compatriots. In the Khmer Rouge’s campaign to purify Cambodia’s agrarian society and turn Cambodians into revolutionary workers-peasants, intellectuals, doctors and bureaucrats were killed, as were most people with skills and education. Buddhist monks were also executed to rid Cambodia of religions. Half of the Muslim Cham ethnic community was killed so that Cambodia could be “pure”. After a year, Mr. H, one of the Khmer Rouge leaders, escapes to Country V, a neighbouring country, either because he disagrees with the Khmer Rouge campaign of terror or because he has failed in his struggle for power. After the Khmer Rouge regime attacks Country V and tries to seize territory

approved by only 55 of the total 100 Senators.

¹² See Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th Ed., Vol. I: Peace, Parts 2 to 4, Longman: London (1992), at 948-954; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, Request for the Indication of Provisional Measures, ICJ Order of 14 April 1992 at 24, para. 2 of the Joint Declaration of Judges Evensen, Tarassov, Gillaume and Aguilar Mawsley.

¹³ See summaries about the Khmer Rouge movement in *The New York Times*, 17 April 1998, at A14, A15; *The Washington Post*, 17 April 1998, at A27. See also the testimony on Cambodia of Stanley O. Roth, Assistant Secretary of State for East Asian and Pacific Affairs, U.S. Department of State, before the Asia and the Pacific Subcommittee of the Foreign Relations Committee, U.S. Senate on 10 June 1998.

along their common frontier, Country V invades Cambodia, citing, among other things, the right of self-defence and the right of humanitarian intervention. Mr. H becomes Prime Minister of Cambodia and the Khmer Rouge becomes an insurgent. After the Cambodian Peace Conference is held in Paris, Country V withdraws its armed forces from Cambodia. A general election is held under the auspices of the United Nations and Mr. H is returned as Prime Minister while the Khmer Rouge, which boycotts the election, continues its armed struggle against the elected government. In order to expedite national peace, Mr. H uses the “divide and rule” tactic by granting a general amnesty to Khmer Rouge leaders and soldiers who defect to join the government. Some Khmer Rouge members accept this amnesty, including a few of Pol Pot’s lieutenants in the Khmer Rouge leadership.

What would happen if the international community, led by the United States, wants to prosecute the Khmer Rouge before the ICC?

Practical Difficulties

National reconciliation

In Cambodia, Mr. H announces that the Cambodians themselves would decide whether Khmer Rouge leaders would be tried by a municipal court or an international tribunal. In any case, Khmer Rouge leaders would not be brought to trial until after the next general election and after the Khmer Rouge no longer exists as an entity. Those Khmer Rouge leaders to be tried are Ta Mok, Nuon Chea and Khieu Sampan, whom the Cambodian government has not been able to apprehend, whereas Ke Pauk (a former Khmer Rouge leader who has now joined the Mr. H’s government) and Ieng Sary (former Foreign Minister under the Khmer Rouge regime), who have been granted an amnesty by the Cambodian government, are not in the Cambodian government’s “wanted” list although the U.S. Government wants them to be tried by the ICC.

The Prosecutor of the ICC might, on his/her own motion, seek to initiate the process of prosecuting all Khmer Rouge members in the ICC. However, this would meet with the Cambodian government’s objection, citing complementarity, and impossibility in the apprehension of the Khmer Rouge members still at large in the jungle. In the case of the Khmer Rouge leaders who have been granted an amnesty by the Cambodian government, they can never be effectively prosecuted in the Cambodian court. Yet, the Prosecutor would again meet the objection from the Cambodian government on the grounds that the Cambodian government has the sole prerogative to grant a general amnesty to these Khmer Rouge leaders, and that the amnesty helps expedite the process of national reconciliation which would be seriously prejudiced by the prosecution of these persons in the ICC. A question now arises: can a sovereign State grant an amnesty to someone who has committed a crime against its own nationals or within its own territory despite the fact that the crime is of such gravity that the international community wishes to see its perpetrator punished? But, who is to judge what is best for a particular State or society? As in the case of Uruguay, a national referendum may approve a general amnesty for human rights oppressors instead of subjecting them to punishment.

The United Nations’ Failure to Act

There would be no consensus in the Security Council to refer the matter to the ICC. One permanent member would likely cast a veto because it considers that punishment of the Khmer Rouge is a domestic matter of Cambodia to be dealt with by the Cambodians themselves.

In the General Assembly, a number of States support the idea of bringing the Khmer Rouge leaders before the ICC. After all, there is an obligation *erga omnes* for each State to prevent and punish the crime of genocide and this obligation is not territorially limited.¹⁴ However, these States would be deeply divided among themselves.

Some States might want Mr. H prosecuted as well because he was also a member of the Khmer Rouge. However, other States might argue against it since they cannot accept the idea of prosecuting someone for his

¹⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia) – Preliminary Objections*, ICJ Reports 1996, para. 31.

mere association with the Khmer Rouge without any prima facie evidence of complicity in, or conspiracy to commit, the genocide by the Khmer Rouge. Moreover, Mr. H is still in power as the rightfully elected Prime Minister of Cambodia.

To complicate this further, there are States that also want the leaders of Country V at the time of Country V's invasion of Cambodia prosecuted before the ICC for having waged a war of aggression.¹⁵ Some of these States might even consider prosecuting Country V as a *quid pro quo* for prosecuting the Khmer Rouge leaders. Nonetheless, a number of States would oppose prosecution under the heading "the crime of aggression", arguing that there has been no consensus on a legal definition of aggression which can be applied by an international criminal court.¹⁶

Lack of Universality of States Parties or Lack of Interest in Prosecuting the Khmer Rouge

Under our presumption of facts set out above, the practical difficulties associated with a lack of universality of States Parties to the ICC Statute or lack of interest in prosecuting the Khmer Rouge would not arise. Nonetheless, the various mechanisms to trigger the ICC proceedings would still be paralysed.

Hence, unless there is a State that risks going it alone against the Khmer Rouge leaders and the ICC is willing to try them *in absentia*—the idea that has met serious reservations from a number of States, the Khmer Rouge leaders can continue to spend the last days of their lives with impunity.

What could be done?

With regard to those Khmer Rouge members not granted an amnesty, it is not inconceivable that the Cambodian government might take the principle of complementarity too seriously and render what it considers to be its own version of justice. This has happened before in Rwanda. On 24 April 1998, the Government of Rwanda executed by firing squad 22 people convicted of organising and leading the genocide in Rwanda in 1994. The executions came after a worldwide effort to halt them out of concerns about the fairness of the trials that led to the death sentences. However, the Rwandan Government have ignored criticisms, saying that if foreign governments had responded quickly they could have stopped the genocide and, as such, the international community has no moral authority to criticise the Rwandan government for the executions.¹⁷ In

¹⁵ These States might cite the ICJ judgment in the *Case concerning Military and Paramilitary in and Against Nicaragua* (ICJ Reports 1984, p. 27) in their support. The ICJ held, *inter alia*, that unilateral use of force could not be the appropriate method to monitor or ensure respect for human rights.

¹⁶ This is the position of the People's Republic of China. See Statement of the Representative of the People's Republic of China to the Sixth Committee of the United Nations on the Establishment of An International Criminal Court, 30 October 1995. According to this view, General Assembly Resolution 3314 (XXIX) of 14 Dec. 1974 defining 'aggression' (GA/Official Records 29th Session, Supp. 21) elaborates only "political" definitions of aggression. Those supporting this view could cite the example of the Statute of the International Criminal Tribunal for the Former Yugoslavia which omits "crimes against peace" from the Tribunal's jurisdiction since it would involve the Tribunal in investigating the causes of and political issues surrounding international armed conflict.

However, Art. 23(2) of the International Law Commission's Draft Statute for an International Criminal Court (Doc. A/49/355 of 1 Sept. 1994) provides: "A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed an act of aggression which is to be the subject of the complaint." Article 10(4) of the ICC Statute being considered at the Rome Conference is in line with the ILC's aforesaid draft provision. It is therefore ironic that the Security Council, which is a political organ, would be entrusted with the sole authority to determine whether an act of aggression has been committed in law.

A lack of any definition of aggression did not deter the Nuremberg or Tokyo Tribunal. Article 6(a) of the Charter annexed to the London Agreement of 8 August 1945 provides individual responsibility for committing "crimes against peace" that include "planning, preparation, initiation or waging of a war of aggression". The Nuremberg Military Tribunal held that the state of international law in 1939 proscribed "aggressive wars", and that "resort to a war of aggression is not merely illegal, but is criminal." A crime of waging the war of aggression is also proscribed by Article 26 of the Basic Law of the Federal Republic of Germany and Sections 80 and 80a of the German Criminal Code.

¹⁷ *The Washington Post*, 25 April 1998, at A1.

other words, there is nothing left for an international criminal tribunal to do since the national court has rendered what it considers effective justice. If this could happen where both the national courts in Rwanda and the International Criminal Tribunal for Rwanda have concurrent jurisdiction with the Tribunal having primacy over the Rwandan national courts, then, *a fortiori*, it could happen to the situation where the ICC is merely complementary to national courts.

The State interested in going it alone against the Khmer Rouge leaders still at large might have to resort to State-sponsored kidnapping for this purpose. Domestic courts in certain countries, including the USA and Israel, have decided that the mere fact that the accused were brought before the court by unlawful means does not in and of itself provide a valid objection to the jurisdiction of the court to try and punish the accused.¹⁸ However, in these incidents the States in whose territory the accused were kidnapped took the position that such kidnapping violated their territorial sovereignty and was thus unlawful under international law. Some of the States that sponsored the kidnapping, like Israel in the case of Eichmann, acknowledged that they had committed unlawful acts and, as a result, agreed to provide satisfaction to the offended States. The question we now have is whether an international criminal tribunal like the ICC would follow the reasoning of these domestic courts. If the ICC would do so, it would lend credibility to the argument that in order to enforce international criminal law, the enforcer must be able to secure apprehension of offenders at will, as in the case of the Allies' complete control over the unconditional surrender of offenders in Germany and Japan after WWII. Yet, this possibility of State-sponsored kidnapping may transpire to be merely hypothetical. Why would any State want to bring the Khmer Rouge leaders to justice by any means while it has not done so in the case of, for instance, Radovan Karadzic and his military commander Ratko Mladic?

There may be other alternatives. In applying for a visitor visa to enter some countries (for example, Canada), the applicant is asked to answer the question: "In periods of either peace or war, have you ever been involved in the commission of a war crime or crimes against humanity? If you answered 'yes' to the above, please provide details." Some of the Khmer Rouge leaders may file such an application and reveal their true colours. However, this possibility is quite remote.

Reparations

Cambodia is virtually bankrupt. It is unlikely for the ICC to find any treasure hidden by the Khmer Rouge that is of sufficient value to pay reparations for the injury or damage caused to the person and property of their victims. Once again, it is the international community that will have to provide financial assistance to victims of internal conflicts in Cambodia.

Suggestions

The establishment of the ICC is at least a crucial symbolic gesture from the international community that there is no more impunity for those committing serious crimes of international concern. It should be established now before the momentum is lost.

At the initial stage, the ICC should have its jurisdiction confined to the most serious crimes of international concern in order to avoid trivialising its role and function and interfering with the jurisdiction of national courts. While the ICC had better start with the core crimes of genocide, crimes against humanity, and war crimes, if the ICC wishes to attract the universal interest of States, its subject-matter jurisdiction must be sufficiently wide to cover crimes of universal concern to the entire community of nations, as in the case of international narcotic drug trafficking. Definitions of crimes falling under the subject-matter jurisdiction of the ICC must also reflect the reality of contemporary armed conflicts. It is appropriate that crimes committed in internal armed conflicts deserve the same treatment as criminal acts committed in international armed conflicts, irrespective of their historical differences.¹⁹ Besides, use of soldiers under the age of 15 years should

¹⁸ See *Attorney-General of the Government of Israel v. Eichmann*, District Court of Jerusalem (1961) 36 *International Law Reports* 5; *United States v. Humberto Alvarez-Machain*, US Supreme Court judgment of 15 June 1992.

¹⁹ The Appeal Chambers of the International Criminal Tribunal for the Former Yugoslavia held: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed

be punishable by the ICC although it may not be a crime under customary international law, and any list that omits this crime does not reflect the grave reality of the armed conflicts being waged in the world today. Making it a war crime to recruit child soldiers or allow their participation in hostilities would save children who are future generations from getting directly involved in the atrocities of armed conflicts that would perpetuate hatred of fellow human-beings and prevent quick healing and reconciliation in their society.

After the ICC begins functioning for a few years and is successful, States may consider adding other offences to the ICC's subject-matter jurisdiction.

In order to strive for national reconciliation in States torn by internal conflicts, the ICC should demonstrate that prosecution is against individuals responsible for committing crimes, and not against whole groups. When society has become stable and needs truth to heal old wounds, those who have committed serious crimes when they still wielded power and influence should be brought to justice if, after a certain cooling-off period, there is no longer any threat arising from prosecuting them. Therefore, it would be wise not to impose any statute of limitations for those crimes within the ICC's jurisdiction.

A right balance can also be struck between national reconciliation and the demand of criminal justice which would give victims or their rightful heirs just and adequate compensation. The government concerned and/or the international community (in the manner to be discussed later) may have to provide just and adequate reparations to the victims first before prosecuting wrong-doers when the timing is right. If the accused are found guilty, and as far as possible, they will have to reimburse the government, as *parens patriae* for its nationals, and/or the international community for the reparations already given to the victims.

The vital enforcement power entrusted to the Security Council by Chapter VII of the U.N. Charter cannot be ignored, especially because Article 25 of the Charter compels Member States to carry out the Council's decisions. Article 24 of the Charter confers on the Security Council primary responsibility for the maintenance of international peace and security. Situations like Iraq's invasion of Kuwait, the genocide in Rwanda and that in the Former Yugoslavia clearly warrant the Security Council's enforcement power. This was the reason why the U.N. Secretary-General preferred that the International Tribunal for the Former Yugoslavia be established by a decision of the Security Council instead of an international treaty that would take time to conclude or by the General Assembly which has no enforcement authority akin to that entrusted to the Council. The Council's decision following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression would have the advantage of being expeditious and immediately effective.²⁰ On the other hand, when a threat to the international peace, breach of the international peace or act of aggression no longer exists but it is in the international community's compelling interests to end the vicious circle of impunity, like punishing the Khmer Rouge which is no longer a significant force in its own right, the Security Council has no legitimate justification to obstruct international criminal justice in the ICC. (In this context, even Singapore's compromise proposal that would require affirmative decision by the Security Council to ask the ICC to suspend any prosecutions if the Council believes this is necessary for the maintenance of peace and international security seems unjustifiable.) It should be noted that the International Court of Justice has not been deterred from exercising its jurisdiction in situations being dealt with by the Security Council. According to the ICJ, both the Security Council and the ICJ can perform their "separate but complementary functions with respect to the same events" since the Council's functions are of a political nature, whereas the ICJ's are purely judicial.²¹ *A fortiori*, the ICC which is not an organ of the United Nations should be able to exercise its judicial independence more freely than the ICJ.

When the Security Council fails to discharge its primary responsibility to maintain international peace and

conflict. Indeed, ...customary international law may not require a connection between crimes against humanity and any conflict at all..." *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-D, Decision of 2 Oct. 1995, at 73.

²⁰ Report of the U.N. Secretary-General, U.N. Doc. S/2504, 3 May 1993, paras. 18-30.

²¹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, ICJ Reports 1992, p. 3 at p. 22, citing previous ICJ decisions, including the *Case concerning Military and Paramilitary in and Against Nicaragua*, ICJ Reports 1984, p. 27 at pp. 434-5.

security and offences under the subject matter jurisdiction of the ICC are being committed, the General Assembly, which is also to be concerned with international peace and security, might take action to “secure and supervise the cessation of hostilities” with the consent of the territorial State. Such action has been held by the ICJ in the *Certain Expenses of the United Nations Case* to be constitutionally permissible under the U.N. Charter because it does not include a use of armed force against a State that is an enforcement measure falling under the exclusive competence of the Security Council.²² This leaves room for the General Assembly to act in the interest of international criminal justice.

The Assembly of States Parties to the ICC Statute and its Bureau may be unable to ensure that effective measures are taken to effect compliance because the recalcitrant State is not party to the ICC Statute. It is thus the U.N. Security Council or, in case the Security Council fails and to the extent permissible by the U.N. Charter, the U.N. General Assembly that should be entrusted with ensuring that recalcitrant States cooperate on the administration of justice by the ICC and the Prosecutor, including a surrender of the accused to the ICC if the national court is unable or unwilling to prosecute them, and unhindered access to all relevant evidence. This same body should be able to recommend or set up a source or sources of financing to provide adequate reparations to victims where there is impossibility of securing reparations from offenders or the State concerned. If the United Nations could spend billions of US dollars on organising a general election in Cambodia, then there seems no valid justification why it should not assume this role for victims of atrocities provided there is sufficient funding for this purpose. Such funding may come from a U.N. budget specifically earmarked for this purpose and/or from contributions from States Parties to the ICC Statute plus voluntary contributions from the international community. The possibility of creating a permanent trust fund for this particular purpose is worth exploring further.

A lack of universality of State Parties to the ICC Statute is not fatal to the ICC’s future, especially if, until the ICC can be sufficiently funded from other sources, the ICC is funded out of the regular budget of the U.N. to keep it in operation on a permanent basis. What is vital is that a sufficient number of States “whose interests are specially affected” accept the ICC. It is this category of States that creates customary rules through their extensive and virtually uniform State practice even within a short period of time.²³ It is also these States that will lobby for support in the U.N. Security Council and the U.N. General Assembly. Such States may not necessarily be one or more permanent members of the Security Council. For example, States neighbouring the State in whose territory atrocities are being committed are “specially affected” by the atrocities that drive refugees into their territory. Provided that such States accept the ICC, general, or at least local, customary international law may crystallise in troubled spots around the globe to help effectuate the administration of international criminal justice under the ICC.²⁴ Hence, universality is not an absolute necessity. What is needed is for the ICC to display fairness and independence in the cases brought before it so that its credibility can be gradually enhanced. The future of the ICC depends on the quality, and not the quantity, of its judgments. Once the ICC’s reputation grows, so will the number of States Parties to the ICC Statute and so will the effective administration of international criminal justice by the ICC.

²² ICJ Reports 1962, p. 151. The General Assembly’s *Uniting For Peace Resolution* (Resolution 377 (V) of 3 November 1950; UN/GA Official Records, 5th Sess., Supp. 20, p. 10) has been used as the basis for U.N. peace-keeping operations on many occasions.

²³ See the *North Sea Continental Shelf Cases*, ICJ Reports 1969, p. 3 at p. 42, para. 73.

²⁴ For the notion of local custom, see the *Right of Passage Case (Portugal v. India)*, ICJ Reports 1960, p. 6.

Are International Lawyers Myopic?

Discussion of P Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997)
8 *European Journal of International Law* 435.

“The Myopia of the Handmaidens: International Lawyers and Globalisation”: A Comment

Jeni Klugman¹

My remarks today on Philip Alston’s critique of the role of international law and international lawyers fall into two broad parts. First, I will focus on the accuracy or otherwise of the description and interpretation of the trends associated with globalisation, then second, examine the implications of this for the paper’s conclusions. The paper itself is rich and interesting, and these remarks are obviously selective in their scope.

Professor Alston’s description and interpretation of trends underlying globalisation includes a number of perceptive observations about changing values. He draws attention to the growing precedence of market values, and the increasing tendency to see means—such as deregulation and privatisation—as ends in themselves. And since international law is a system of values, it would follow that international law is inevitably affected.

But the notion that changes have been associated with globalisation in turn implies several assumptions about the way things were, that I think are problematic. Here are just two examples:

1. His thesis is based on a belief in the efficacy of state action. The idea is that the eradication of various ills that characterise the world today is simply a matter of political or state will. This is true with respect to many democratic and human rights and, to a large extent, access to basic social services such as schools and health care. But at the same time, there is a range of economic and other questions—from unemployment to gender and ethnic discrimination, where sustainable solutions are still pretty much outside direct state control. The social situation in the former Soviet Union prior to the transition, for example, shows that pervasive poverty, hidden unemployment and discrimination against women can persist even where the state had formally at least, sought to eradicate such ills (see, eg. Klugman 1997).
2. There is an assumption that the international agenda has contracted in scope. The author refers to the “transfer of social policy *back* from international organisations to the state” (italics added), and to the exclusion of poverty, malnutrition and illiteracy from their former places on the international agenda.

I would argue that these critical human development issues occupy international agencies to a greater extent now, in the mid 1990s, than ever before. The trend has tended to increase the prominence of social concerns since, at least McNamara’s reign at the World Bank and the publication of “Adjustment with a Human Face” by UNICEF in 1987. (Although of course the fact that these issues are on the agenda does not necessarily mean that they are being effectively addressed—the efficacy of action undertaken international agencies is limited, just like state actions.)

As examples of the increasing prominence of human development on the international agenda, we could note the Convention on the Rights of the Child (with which the author would of course be well familiar); increased attention to poverty and the social dimensions of adjustment in World Bank lending operations and policy advice; and increased international support for basic social services.

An example given by Alston to support the contention that social concerns have been thrown off the international agenda is lending by the World Bank for health and education in Africa. He cites figures suggesting that support fell by 65 and 43 percent respectively between 1995-1997. In fact, the general trend over the decade does not bear out his thesis. The overall story is that human development—health, population, nutrition, education, social protection and AIDS—is receiving increased amount of international support from the Bank. This year (FY99), human development will claim its largest ever share of World Bank lending in Africa: about 25 percent out of a total of \$3 billion (US).² There are now about 50 health projects, and the lending programme projects that there will be more than 100 by 2003.

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² Thanks to Keith Hansen, Office of the Vice President, Africa Region, The World Bank for access to these figures.

Figure 1

World Bank Lending Commitments, Africa (US\$m)

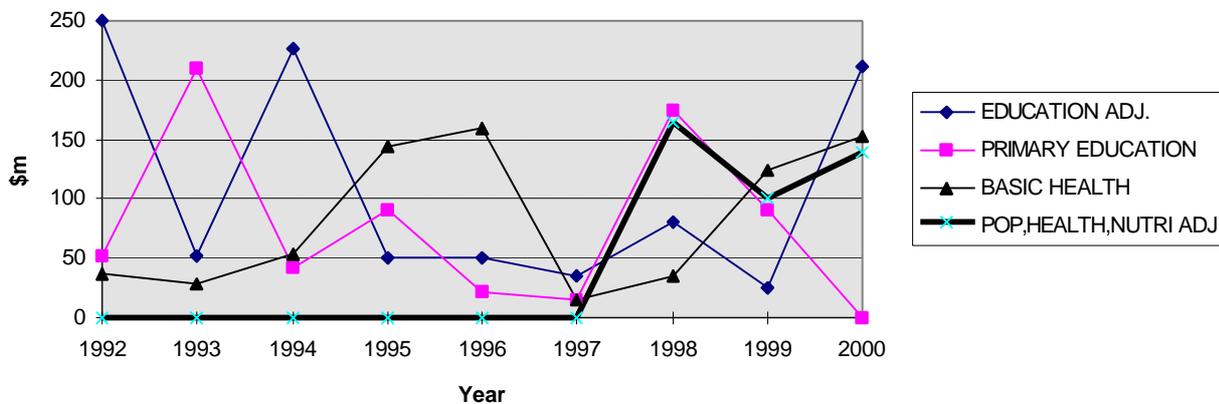


Figure 1 shows the trends in World Bank lending by sector over the period 1992-2000. The most obvious point is that the flows are very lumpy—this is especially because of the influence of a few large countries like Nigeria, Ghana and Ethiopia. Selective choosing of time periods would enable one to conclude what one wants about the trend! Still over the whole period there has not been a downward trend. There are also a number of new areas of social support, to enable participatory planning and implementation. Hence the number of Social Funds in Africa shows a rise from 19 to 80. If we looked at figures for the transition countries, we would see that the Bank is making its largest social sector loans ever to support human development: a recent social sector loan to Russia amounted to US\$800 million. In sum, it would be wrong to conclude that the World Bank has reduced its focus on human development, as Alston suggests. Although again it should be stressed that the fact that these issues are on the international agenda and receiving financial support does not mean that the critical underlying problems are being effectively addressed by the relevant governments and international agencies.

If these underlying assumptions about the nature and effects of globalisation are wrong, how does this affect the author's conclusions. In fact, not much, if at all. We can still embrace the changes advocated by the author. In particular:

- first, that the protection of human rights ought to occupy a more central role in the framework of international law;
- second, that efforts to combat poverty, illiteracy and malnutrition deserve higher priority; and
- third, that transparency, participation and accountability in setting the international agenda is desirable.

We can endorse these changes without necessarily coming to a view about the impact of globalisation, either generally, or with respect to international law.

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Are International Lawyers Myopic?

G.J.L. Coles*

Introduction

There is nothing new under the sun, as the ancient Jewish scriptures remind us.

So it is that *globalisation* is not a new phenomenon, as many of the thinkers that Philip Alston analyses seem to assume, but it is one that began to occur in times of unrecorded antiquity, after the initial dispersion of the human race, presumably from our aboriginal forefathers' place of origin in Southern Africa. It is a gradual process of the re-*establishment* of contacts between the dispersed human groups.

In our modern era, globalisation, in its fullest physical sense, can be said to have begun in 1522 with the first circumnavigation of the globe by the remnant of Magellan's original fleet of maritime explorers. These explorers, and their backers, were driven by broadly the same mixture of motives as today drives people to treat with the world outside their own particular *pieds a terre*.

At the outset, I shall assert that it is *vital* for an adequate understanding of the continuing process of globalisation to keep the historical dimension well in mind. There are forces at work which are as old as human nature itself and globalisation is a phenomenon whose long recorded history provides us with an almost inexhaustible source of experience and lessons. To ignore that history is necessarily to confine ourselves, at best, to the hazards of shallowness or, at worst, to a deeply distorted understanding of what is happening, thus condemning ourselves to repeating the grave and costly errors of the unremembered past. The understanding of current developments in the process of globalisation is thus not to be gleaned from a superficial analysis of recent events in the light of a fashionable and convenient contemporary perspective: it comes from a broad historical knowledge of this phenomenon *as a whole* where the true nature and quality of the process and its challenges can readily be seen.

The historical appreciation establishes that globalisation should be a *neutral* term to cover the complex process of ever widening human contact, ranging from the basic qualitative aspects of oppression and violence, so prominent in this process that one can even talk of globalisation as a power-condition process, to those of justice and solidarity, so elusive in the obtaining but nonetheless the constant yearning of many human beings. The term, therefore, should cover the history of the rejection of common humanity, implicit in oppression and violence, as well as that of its affirmation through justice and solidarity. The process of globalisation involves a mixture of all these elements, an aspect of the constant dialectic of human history of contrary values or aspirations which by way of resulting syntheses ensures *continuous* change and, hopefully, ultimate progress.

A major and common mistake, today, is to see globalisation as primarily an economic (or market-driven) process. This is a serious error, since, for one thing, it overlooks the significance of power as a major conditioning factor of that process. More comprehensively, globalisation is a much broader and deeper process than an economic one, for the human being is *not* just an economic being (*homo economicus*), wanting to buy and sell, and at issue, therefore, is not just the nature and structure of the global economy, an aspect of special contemporary interest which is brought out prominently in Philip Alston's article. The human being is a *social* being in the broadest sense of the word. Consequently, it is the nature and quality of human relations *as a whole* which is at issue.

The motivation for globalisation comes from the *deepest* level in the human psyche. It is more than the product of an acquisitive instinct. That is because it is only within another being that the individual human being discovers his or her own identity and is thus able to realise his or her potential. The instinct of socialisation is a basic drive for self identification and self realisation. That drive cannot reach its ultimate goal *until* the self identification is achieved in the human community *as a whole* and the self realisation is achieved in the whole

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gamut of human relations, be they civil, political, social, cultural or economic.

Even at the material level, globalisation occurs at its deepest and most solid point not through the movement of goods and capital, essential as that movement is as a necessary *initial* step towards globalisation, but ultimately through the movement of people, the *culminating* point of a process of globalisation. It is only by being together physically that human beings are able to form a *community* in any real sense of the word and, thus, to enrich one another in self understanding and self realisation to the fullest extent possible. Furthermore, as well as its material aspects, the process of globalisation has not only spiritual and moral origins but also *consequences* which far transcend purely commercial and financial confines. Globalisation is an integral part of the ultimate destiny of mankind.

The instinct for socialisation, however, can be thwarted, as it so often is, when the globalisation—or what passes for it—occurs *not* in conditions of freedom and mutual respect but in those of domination and disregard of the other. In this situation, it is self alienation which occurs, not self identification, and the self realisation is frustrated by the failure to create a real community. The consequences, inevitably, are conflict and anarchy; and the supposed process of globalisation proves instead to be one of *fragmentation*.

The process of globalisation is not only a willed one but, to a not insignificant extent, it also occurs through *unwilled* factors, where, for instance, people are coerced into movement by pressures beyond their control. It can also proceed, of course, from supposedly natural factors, principally climatic ones. (This may prove of special significance in a period of global warming or of severe environmental deterioration.) War, persecution, famine, poverty and other circumstances of *force majeure* and severe distress have always been major factors—if not *the* major factors—in the process of globalisation, forcing immense numbers of people to move not only from one country to another but also from one part of the globe to another. No continent has been untouched by this phenomenon.

The *primary* importance of migration in the process of globalisation should not be overlooked or minimised, nor should its *negative* aspects. In regard to the latter, it is a peculiarly modern error to see migration in the context of *controlled* strategic and economic policies and consequently in a wholly positive light, as a purely ‘humanitarian’ matter, ie. because it is perceived as politically or economically advantageous. (This error, however, is much less common today than it was in the immediate post-War world.) Migration can be uncontrolled and have highly negative aspects, where, for example, it occurs in the context of invasion, as it mostly has throughout the history of globalisation (so much so that the historian Gibbon spoke of ‘the spirit of migration and conquest’), or of such massive and disordered irregularity as to exacerbate gravely social tensions, as it is currently doing in Europe and elsewhere. In such negative cases, migration ensures, more effectively than anything else, that the process of globalisation is a violent and oppressive one contributing, initially at least, to division among people, not to their unification.

In its positive aspect, as a phenomenon expressing the human impulse to socialise, the process of globalisation is *unstoppable*, especially in a time of extraordinary scientific and technological development such as our own. Whether or not one considers globalisation desirable, and many today, not unreasonably, are fearful of it, it will certainly happen, sooner or later. The only sensible and realistic concern is that the process of globalisation goes ahead as justly and peacefully as possible and leads one day to the creation of a truly human *global* community. While a just and peaceful process in the foreseeable future may be against all the odds, judging at least from history, and the achievement of a truly human global community may seem a long way off, exactly *how* turbulent the process will be and *how* far off its completion will largely depend on whether we choose the Way of Life or the Way of Death.

This choice can be stated in such stark and dramatic terms as the world already possesses more than enough weapons of massive and indiscriminate destruction to wipe out all human life on the planet and, despite all the talk of *détente* following the end of the Cold War, nuclear missiles are still targeted on rival countries. And as most recent events have once again shown, the proliferation of these weapons, so feared by the rich, is inevitable.

As Andre Sakharov observed two decades ago, war can no longer be an instrument of policy in the Clausewitzian sense when the use of thermonuclear weapons entails assured mutual annihilation. In any sane

outlook, justice and peace cease to be only an *alternative* option to oppression and violence if they are the *essential* conditions for the survival of human life on this planet.

It is not the least merit of Philip Alston's article that he draws out, unlike not a few legal writers on globalisation, the broad moral implications of the process of globalisation, although the stark issue of human survival in this process is one that he, like almost every other international lawyer, does not allude to. In the conclusion of his article, he states that "the values implicit or explicit in the new order that is emerging need to be examined more systematically". In other words, he is saying, if somewhat mutedly, international lawyers must be more *vigilant* about that process and concerned, above all, to defend and promote "a corpus of human rights predicated upon a broad conception of human dignity."

In my humble opinion, this message, to say the least, is essential—and especially timely—in a period when factional power and wealth are placed by so many people above such fundamental values as peace and justice. As not a few are saying, however, 'the new order' which Philip Alston refers to is, in fact, 'the new disorder'. The call for greater vigilance can well be subsumed, therefore, in a much wider and more *pressing* demand for a greater sense of responsibility and far-sightedness in social relations. Given the present state of deterioration in these relations, it may well be asked if the word 'vigilance' is anywhere near adequate or appropriate.. May it not be, rather, a matter of *confronting* the state of affairs? Moreover, is it not only a question of human rights which should be defended and promoted but also that of social and economic development without which the respect of human rights is a difficult, even unobtainable, ideal. Also, is it not a question, too, of the rights of peoples? There are not only human individuals on this globe but also members of peoples and even wider bodies, each with their own history, beliefs and aspirations.

Whether or not it is convenient or comfortable for us, as international lawyers, to be the guardians of moral and truly human values, *that* is our inescapable duty if our art or science is to have any real value and is not to be, as the vanishing breed of Marxists have claimed with some justification, an instrument of class oppression. If we fail in that duty, as we have, so often and so lamentably, the whole of society can only suffer grievously from this *trahison des clercs*.

On this immensely important subject of the process of the gathering-in of the human family *within* a global community, I will speak with the bluntness which Philip Alston says should be as welcome as it is uncommon in the often semi-diplomatic arena of international law. In the last three years, I have retired so much from that arena that neither fear nor favour can influence me in what I say—or in what I do not say. The risks and opportunities of the inexorable process of globalisation are too fundamental and enormous to be treated with anything less than the complete openness and honesty which they require. It seems to me that it is an admirable aspect of the article of Philip Alston, who remains very much in the arena, that he is willing to mention, if somewhat diplomatically and, sometimes, obliquely, 'sensitive' and highly pertinent issues which many would not like to be mentioned at all. (While, in our own society, we are, on the whole, not censored by others, we are still expected to censor ourselves. Political correctness is, if anything, more *mandatory* today than it has ever been.) But my own life in diplomacy is over, so I no longer have the constraints of elementary prudence (ie. survival) to muzzle or restrain me. I am now, as it were, my own dog, no longer someone else's. So I would like to bark—and bite—as I feel moved to do.

For the international lawyer especially, I believe the great human drama which the process of globalisation unfolds *with such intensity* concerns, basically, the ruthless and perennial conflict in human affairs between the forces that desire power through violence and hegemony and see wealth as the reward or condition for power, and the forces that desire justice and peace and seek above all to bring about human solidarity. Ultimately, the conflict is literally over a choice between hell and heaven. As St. Augustine expressed it so well nearly fifteen hundred years ago, this age-old conflict is between the love of ruling and the service of one another in love. The question, therefore, poses itself: do we want a disordered world of cold and ruthless self-serving, such as we are increasingly getting, or do we want instead to build a civilisation of love, which many ordinary people yearn for?

Although, as many believe, this conflict is a *cosmic* one between principalities and powers, which far transcends the purely moral or human domain, being essentially a *spiritual* one, human beings are nonetheless the agents of that conflict and can thus freely choose their ultimate course and outcome. Frail and vulnerable as

they are, human beings can invoke against the forces of death and destruction *unlimited* power on the side of their struggle for justice and peace—at least that has been the profound belief in every human generation, the anthropocentric assumptions of the modern age of Rational Enlightenment, now far waning, notwithstanding.

In its negative aspect, therefore, the process of globalisation is *not* a manifestation of a fatal human defect or a purely natural phenomenon entirely outside human control, like that of floating and colliding land masses. It can be resisted by the assertion of contrary values and aspirations. Even its deepest manifestation, the movement of people, sometimes of large segments of population, can be significantly affected by human action. It is not outside all control. Laws and organisational arrangements can be fashioned to govern it and they can be effective, *provided* they are wise laws, just and directed towards peace—and honestly and responsibly carried out.

However, for law or organisation to be relevant, it is essential that *minimal* social and economic conditions exist for justice and peace. Law does not flourish in conditions of anarchy and chaos. In times of spreading anarchy and chaos, such as our own, where force is inevitably the dominant consideration, law, in so far as it is relevant at all, becomes mainly an euphemism for what is in reality oppression and violence and, as such, cannot contribute to peace, only to the perpetuation, even the increase, of violence and its concomitant death and destruction.

The History of Globalisation in the Modern Era

The process of globalisation following the European maritime developments in the late fifteenth and early sixteenth centuries was initially complex, increasingly driven by an insatiable lust for wealth but also driven for a time by such factors as the challenge posed by the unknown and, to a varying extent, by the desire to proselytise. Flight from persecution and misery became, too, a further and significant factor.

The quality of that process, however, was much affected *at the outset* by the great disparity in power between, on the one hand, the explorers and their followers and, on the other, those that were being *explored*. As a consequence, the latter soon discovered in most of the former *not* the visage of the true explorer of the modern era or of the loving Christ reaching out to the ends of the earth but that of the ancient murderous brother, Cain. The early commerce was rapidly succeeded by annexation, subjugation, expropriation and colonisation. Enslavement and genocide followed. Even those leaving persecution and misery, after first falling upon their knees, fell upon the aborigines. The history of globalisation became not that of the new creation of a just and peaceful community of the whole human family but that of a long and seemingly endless *Via Crucis* of the weak at the hands of the powerful.

At first, a tiny handful of theologians and canonists spoke out courageously against the unjust actions and the inhuman treatment of the first victims of the modern process of globalisation, the Indians of the Americas, but they, as all who love justice, were quickly isolated and abandoned by their fellows when they saw that the lust for wealth would brook no restraint. Myopia of the lawyers? Or abject surrender before the power of the basest instincts? Or sheer complicity even in blatant oppression and ruthless violence?

In truth, the timeless 'prerogative' of power to plunder and dominate was greatly facilitated by the jurists who, in the seventeenth century, allowed the deep and tragic division within Europe to corrode the moral and legal constraints on power. Despotism and individualism largely came to replace the concept of the rule of law as that of justice and the natural law principle of the common good as the object of law-making. In the international sphere, morality was excluded from the new emerging law of nations as war and conquest became matters for the *unfettered* discretion of the sovereign (even the just war doctrine disappearing altogether from secular moral and legal thinking). Reason and nature came to be no longer part of the basis of law as *consent* was increasingly asserted to be *the* basis of law. Likewise, the individual and peoples came to have no place in the new law of the powerful, where the sovereign was declared not answerable to anyone (except, putatively, to God) for the way they were treated. As a consequence, slavery and genocide became simple domestic issues. (In the theory of the Divine Right of Kings, however, these were not even domestic matters as the king was answerable to no one but God). Finally, the new law of nations was held by the jurists of the nineteenth century to apply only between the 'civilised' nations of Europe (a special and unique exception being made for the powerful but declining Ottoman Empire) and certain parts of the Americas, ie.

the more powerful ones, with the remaining nations or peoples, ie. the weak or 'uncivilised' parts, being considered outside the Pale and thus subject to the unfettered 'prerogatives' of power.

The consequences for the process of globalisation of the near absolute corruption of law by the near absolute power of the rich were dramatic *in the extreme*. No part of the world was spared arbitrary violence and subjugation in the pursuit of wealth. (One need only think of the Chinese Opium Wars.) A free hand was given to each colonizing power in its treatment of conquered people. Africa was carved up by the European powers at the Conference of Berlin in 1884 as *loot* to be freely divided among its conquering occupiers. In 1837, the aboriginal people of Australia were told by the British House of Commons that such was their barbarous state and so destitute were they even of the modest forms of civil polity that their claims, whether as sovereigns or proprietors of the soil, were to be utterly disregarded. (In other words, the new continent was *terra nullius* and thus completely open to occupation by the invader.)

The international lawyers in the 'civilised' nations were almost to a man (or woman) utterly servile in the process of globalisation. Most of them were unashamedly complicitous even as they codified their 'principles' of greed and 'prerogatives' of power in what they called the new law of the Family of Nations. (Here the word 'family' [or 'famiglia'] had a more 'mafioso' type connotation than any general human one.)

The tide of the open and naked pursuit of wealth and power in the first four centuries of the modern era of globalisation only began to turn in the latter part of the nineteenth century when the increasing number of victims (and their sympathisers) of the pursuit of wealth and power within the 'civilised' nations themselves began to rebel against the extent of oppression and violence in society. In a frightened bid to dissipate the growing—and menacing—sentiment of anti-imperialism, internationalism and pacifism in the nascent pan-European Socialist movement, the wealthy elites turned, in the approved Machiavellian manner, to deceit and hypocrisy so as to conceal their particular process of globalisation. They invented a cunning ploy to cover their ruthless pursuit of power, the notion of 'humanitarian'.

This notion was used, first, to present their increasingly large-scale and bloody wars as 'humanizable', with the pretence that 'political' and 'military' considerations could satisfactorily be separated from 'humanitarian' ones so that war could be made an acceptable kind of sport, although, admittedly, a rather vigorous and 'manly' one. The falsehood of these claims and of their protestations of concern for humanity were to be revealed time after time in the succeeding decades of increasingly *total* war, which made the twentieth century the most violent in human history, but this never prevented the vast majority of international lawyers from going along *unreservedly* with the humanitarian myth of the rich. Especially where the conduct of military operations was concerned, the 'humanitarian' made no sense at all, as most generals and admirals well knew and quite openly stated, for the primary object of war is not peace or benevolence but the destruction as quickly as possible of the enemy. Politically, however, this was scarcely important since *the primary concern for 'humanitarian' considerations was to legitimate violence, not to avoid injustice and human suffering*. In the succeeding years, the misgivings of the generals and admirals were mollified by the realisation that the new laws of war, if they were properly formulated, could usefully serve to facilitate the single minded pursuit of military operations, not to hamper it. As two Harvard scholars, Johnick and Normand, have convincingly shown in their recent study of the historical development of the laws of war, these laws, despite noble rhetoric to the contrary, were formulated deliberately *to privilege necessity at the cost of human values*. (Their demonstration, however, is not a new one. The same has been said consistently through the history of international humanitarian law thinking.)

The notion of 'humanitarian' was used, second, to facilitate the pursuit and protection of commercial and other interests by 'gunboat' diplomacy under the guise of 'humanitarian' intervention. (In recent years, this form of intervention, which was discredited by the end of the nineteenth century, has been revived with the quite spurious claim, again made by many lawyers and so-called 'humanitarians', that this is a new expression of 'benevolence'. It is not: it is only an old expression of malevolence.) The rich also made provision for international adjudication and arbitration to preserve what they called 'peace', but, understandably, few took it seriously, apart from many international lawyers. Behind the fog of the new 'humanitarian' sentiment and the empty lip service to peace, the lust for domination clearly remained paramount, although well concealed for some behind the facade of the new international law.

The lust was inexorably to lead to the catastrophe of the first global war. That War, as we all know, profoundly shocked the world, overthrowing empires. But behind the imposing facade of the resulting League of Nations, with all its pretended provisions for preserving peace and security and all the naive and dishonest rhetoric surrounding it, the desire to maintain or acquire power remained as basic as ever. Only, in the era of growing democracy, it was necessary to conceal it better. As the French writer, Georges Bernanos, observed at this time, the only difference between the dictator and the democrat where power was concerned was that the former was cynical and the latter hypocritical. The dominant purpose of the League of Nations Covenant was not to promote justice and peace as its promoters falsely claimed but to consecrate the *status quo* that was so favourable to two of the principal victorious allied powers, Great Britain and France. Naturally, this was unacceptable to the vanquished or disaffected powers, notably Germany, Italy and Japan, who soon detached themselves from the League and twenty or so years after its foundation renewed the violent power struggle, this time on a greater global scale. For having finally lost this new round of the struggle, their leaders, or those of them that survived, were prosecuted as war criminals.

The Second World War changed nothing of essence, despite its glib presentation to a gullible public as a war to end all wars. In fact, the power struggle following the war's conclusion intensified as the two super powers emerging from the war competed ever more strenuously to dominate the world. A period of so called Cold War ensued, although it was colder for some than for others. Vast arsenals of weapons of increasingly massive and indiscriminate destruction were built up, the number of nuclear bombs finally exceeding 50,000, and over one hundred major wars were fought, increasingly internal ones, or so it seemed, but in fact mostly either instigated or fuelled by one or both of the two super powers. Politically, the process of globalisation was predominantly one of a spreading struggle for power, ever more ruthless and total.

Although, outwardly, the colonisation of the weaker parts of the world had ceased after the War and had been succeeded by a period of rapid decolonisation, in reality the classical colonialism of the nineteenth century had been succeeded by modern neo-colonialism less direct than the former but scarcely less effective. Simply, a new form of colonialism had replaced the old. This new form of hegemony and dictation ensured that the poor continued to contribute generously to the wealth of the rich and that the maintenance of the disparity between the two safely secured the preponderance of the latter.

At one level, the pursuit of power became once again open and unashamed, the rhetoric of the new preamble of the United Nations Charter notwithstanding. Thus, *political realism* which saw power as the determinant of social relations, became the dominant theory in Western governmental and academic circles, much to the satisfaction of the vast military industrial complex. Its chief intellectual proponent, Hans Morgenthau, stated bluntly that 'we assume that statesmen (sic!) think and act in terms of interest defined as power', adding 'the evidence of history bears this assumption out'. He went even further and asserted that the pursuit of power above every other end was an objective law having its roots in human nature. No dictator could have expressed it better.

In the centrality given in their approach to power and violence, Western theoreticians, who readily fell in behind Morgenthau's grim view of the world, were no different from their Marxist counterparts who argued that a process of dialectical materialism would inevitably lead to changes in ideology in which, as Engels put it, "men (sic) become conscious of the underlying social conflict and fight it out to an issue." For both, the underlying conflict in 'society' was that of the world of the jungle. Even the later Communist theory of 'peaceful coexistence', subsequently transformed into an international policy of 'friendly relations', was no more than a provisional 'power calculation'—a temporary truce under the thin guise of friendliness adopted to allow time to work for a final victory.

The implication of this theory for international law as a derivative of a notion of justice and of an aspiration of peace was *drastic*. According to Morgenthau, the political scientist maintained the autonomy of the political sphere as, he said, the lawyer and the moralist maintained theirs. Law and morality were thus *completely* separated from political science, with the corollary, unspoken by Morgenthau, that his political theory was *realistic* whereas the legal and moral theories were not. Thus, international law was reduced to *unreality*, useful only as a figment at the service of power.

Despite this open challenge to their science or art, international lawyers in the main avoided an open

intellectual confrontation with the essentially anarchic and chaotic character of *political realism*, or at least were half hearted or pusillanimous in their refutation of it, preferring, in most instances, to take refuge in an increasingly isolated world of legal fantasy. Power was allowed to have its day, once again. In doing so, international lawyers were encouraged by the political realists, who like their modern intellectual forefather, the Florentine Niccolo Machiavelli, believed that while the Prince must give absolute primacy to 'maintaining himself' and be ready to learn not to be good, he must at least *seem* to be virtuous. For the political realists, the profession of respect for international obligations, never truly sincere but sufficient to dupe a public which was never vigilant in ensuring respect for these obligations, served that last consideration well enough. In not a few instances, the international lawyers became the abject servants of political realism, using law (or what passed for it) as a useful *mask* to conceal the ugly reality of the untrammelled pursuit of wealth and power as the *necessary* dominant 'principle' of international relations. Here, once again, the problem, basically, was not the myopia of international lawyers *but their capitulation or complicity almost en masse*.

At another level, the pursuit of wealth through power was concealed by the new theoreticians of international relations through recourse to a Machiavellian ruse in the form of a *developed* state theory of 'humanitarianism'. This ruse appeared in the post-War world and it involved the pretence, maintained against all the evidence of the last one hundred and fifty years, that war, even in its modern form, could be 'humanized' (and, thus, made acceptable) by the means of developed international 'humanitarian' instruments and institutions. It was asserted, furthermore, that even the worst political disasters, whose significance could be down-played by being called 'humanitarian' ones (a practice much resorted to in our day), could be satisfactorily 'contained' by *palliative* (ie. band aid) measures which did not need to address the underlying problems of injustice and violence, so awkward for the rich. The arbitrary and illogical character of this last view, essentially an incoherent one, was underscored by the aspect of 'effects' being considered, in the new theory of humanitarianism, an 'humanitarian' matter while that of 'causes' was considered a 'political' one which was not only separable from, but was also *incompatible* with, a purely 'humanitarian' concern.

The aim of this 'theory', which was a pure fabrication of deceit and hypocrisy, was to legitimate violence and to marginalise basic issues of justice and peace. As a doctrine, it had nothing to do with humanity. 'Humanitarianism' became an indispensable tactic in the modern pursuit of wealth and in its related power struggle, and international lawyers played a particularly prominent part in promoting this ruse, either through their naiveté or through their opportunism, *despite* the *overwhelming* evidence that, even from a 'pragmatic' perspective, 'humanitarian' measures were not only quite impractical *by themselves* in dealing with human 'disasters' but, worse, were actually counter productive.

Despite all the extraordinary scientific and technological developments in the post-War period, many of them of potentially immense value, the dominating and profoundly distorting factor remained the progression of greed through oppression and violence. This was constantly pointed out by the best experts who drew attention to the whole range of harmful effects of the great and increasing disparity in wealth between the rich and the poor. This progression reached the point where, only a few years ago, the then United Nations Secretary General, Boutros Boutros Ghali, declared on the eve of the Copenhagen Summit that society itself had begun to unravel. The Secretary General stated that they (ie. the heads of state and governments) would address a crisis, unimaginable a decade ago, that threatened the whole world as much as any weapon of mass destruction. (A few months later a move for his re-election was blocked by a super power.)

Evidence generally showed at this time that the process of globalisation was proving to be one of social *fracturing* on a scale greater than ever before. In this process of fracturing, too many international lawyers once again had clearly played a prominent role in efficaciously serving the rich *without any real critique of the latter's purposes and of the likely consequences*.

Recent Developments in International Law

United Nations Reform: A Very Brief Overview of Progress

Stephen Bouwhuis ¹

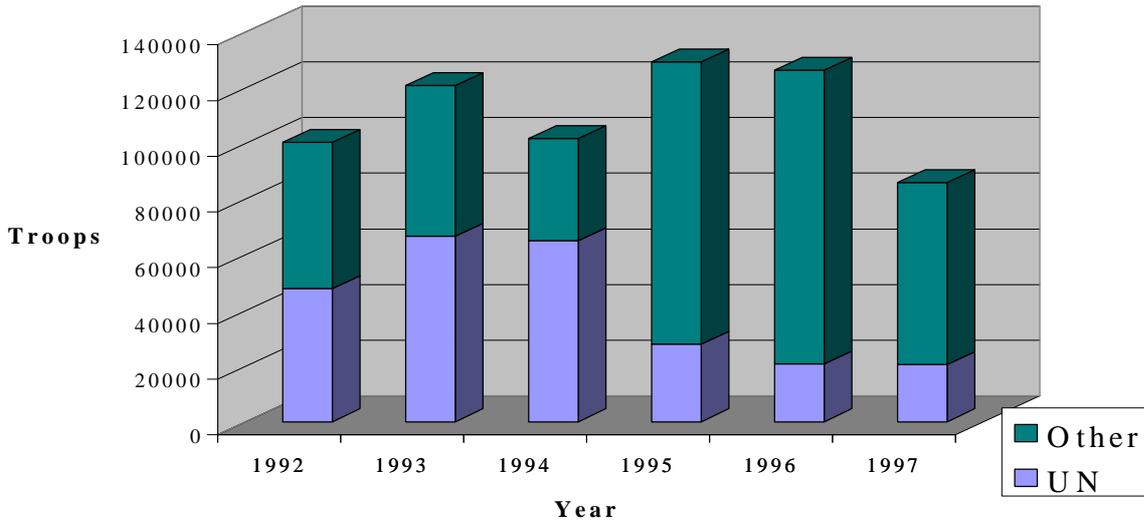
- In this presentation I want to very briefly outline three positive reform developments:
 - the creation of a post of Deputy Secretary-General;
 - reform of peacekeeping operations; and
 - a new communications strategy.
- I also want to outline 2 areas where reform is lacking:
 - no prizes for guessing that the financial crisis within the organisation is the first of these;
 - the second is structural reform.
- The first significant reform that I want to outline is the creation of a post of Deputy Secretary-General and the appointment of Louise Frenchette to this position.
- The roles of the Deputy Secretary-General include those of assisting in leading and managing the operations of the United Nations Secretariat, acting for the Secretary-General in his or her absence, and representing the Secretary-General at conferences and official functions.
 - The Deputy Secretary-General is also responsible for overseeing the UN reform effort
 - I should add that the appointment of Louise Frenchette to this position marks at least a symbolic attempt to redress some of the gender imbalance within the United Nations that prevails especially at the senior levels
 - Other notable appointments in this respect include Mary Robinson as the High Commission for Human Rights and Angela King as Special Adviser on Gender Issues
- A second area of significant reform is that of UN peacekeeping
 - Following criticism of its peacekeeping operations in recent years the United Nations has seen a fall in the number of peacekeepers that it deploys from around 73 000 in 1994 to around 19 000 today
 - This shouldn't necessarily be seen as being too negative a development as other bodies such as NATO, the Commonwealth of Independent States and the West African Cease-Fire Monitoring Group have moved in to fill the vacuum
 - This decline in support for UN peacekeeping operations has led the UN to take another serious look at its peacekeeping operations and to institute some well needed reforms
 - One initiative in this area has been the creation of a Mission Planning Service to survey potential operations and to initiate processes in anticipation of potential missions

¹ BA (hons) LLB (hons) (UWA) LLM (int.law) (ANU). Department of the Prime Minister and Cabinet. Views are expressed in a personal capacity and not an official capacity.

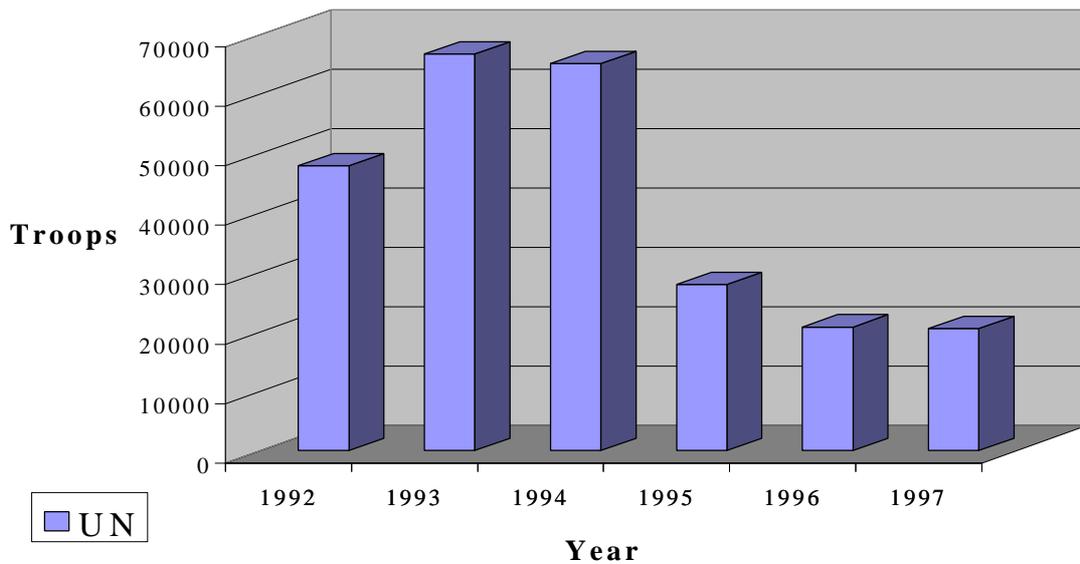
- A further development is the establishment of a logistics base in Italy to store reusable assets from previous field missions
- A rapidly deployable Mission Headquarters, to enable the United Nations to “set up shop”, so to speak, before peacekeepers arrive, is also being created
- There has also been improvements in the number of troops under the United Nations Standby Arrangements
 - These are forces that Member States indicate may be available for peacekeeping operations
 - As of 1 June 1998, 74 Member States had agreed to provide standby forces for UN operations totalling around 100 000 personnel
 - Proposals for the establishment of a High Readiness Brigade by the Nordic countries are also underway
 - Between 4 000 and 5 000 troops have been committed to the establishment of a brigade deployable in non-enforcement operations, to prevent or contain crises
- The width of UN operations with regard to peacekeeping is also reflected in the organisations focus on conflict prevention
- Conflict prevention encompasses a wide range of UN operations including early warning, preventative diplomacy, preventative deployment, humanitarian action, preventative disarmament, development and peace building
- Some other emerging themes include those of good governance, as a subset of the organisations general objectives towards “sustainable development, prosperity and peace”
- This theme of good governance also provides some indication of how wide the intervention role of the United Nations has become
 - To quote from the 1997 report of the organisation “good governance” comprises “the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political process of their countries and in decisions affecting their lives”
- Another significant reform effort has been aimed at establishing a more organised relationship between the organisation and the media
- The essence of the strategy formulated is one of showing how the United Nations relates to people at the individual, family or community level
 - The approach has included the establishment of radio and television programming in countries where the United Nations has field operations
- I have a slide showing “Peaceman” which is a cartoon character created to explain United Nations operations to local communities where peacekeeping activities are being carried out
- Ok, so those are some of the positive things
- What about areas of reform where things haven’t been going particularly well?

- First and foremost of these is the financial crisis that the organisation is facing
- The financial crisis is not particularly new and perhaps this leads to a perception that it isn't serious
 - The again the amount owed to the United Nations, at around 1.08 billion for the regular budget and 1.58 billion for peacekeeping operations exceeds the value of its annual budget at an estimated 2.53 billion for 1998-99
 - The organisation itself, through its own publicity material, refers to the financial crisis as threatening the organisations very existence
- I note that, partly in response, the organisation has embarked upon a process of staff reductions that when completed will see the organisation with twenty-five per cent fewer staff than over a decade ago
- I should add that I don't hold out much hope that the crisis will abate in the near future
 - I note, for example, that although the US Congress has authorised a plan for the payment of the bulk of this debt the linkage of this plan to a number of criteria such as restrictions on US aid going to international family planning programs means that this plan is almost certain to be vetoed by President Clinton
- There has also been a distinct lack of progress with regard to structural reform of the organisation
- The organisation has, for example, not been able to abolish the Trusteeship Council which suspended its operations in 1994 having no Trust Territories left to administer
- Other outstanding issues include questions like reform of the Security Council or greater co-operation between specialised agencies
- So where does the organisation go from here?
- First and foremost the organisation needs to address its public relations difficulties
 - After all, without public support the organisation is never going to gather the funds to address its financial Achilles heel
- Secondly, Member States need to co-operate in achieving more significant reforms
 - Indications in this respect have not been positive
 - Given this lack of will, more outstanding problems like the lack of co-operation between the specialised agencies have not even been attempted
- In conclusion, whether the organisation successfully addressees its own public relations deficit and whether Member States are interested in more meaningful reform will determine whether the organisation emerges from its present phase of consolidation or whether other mechanisms for achieving multilateral objectives will find greater prominence.

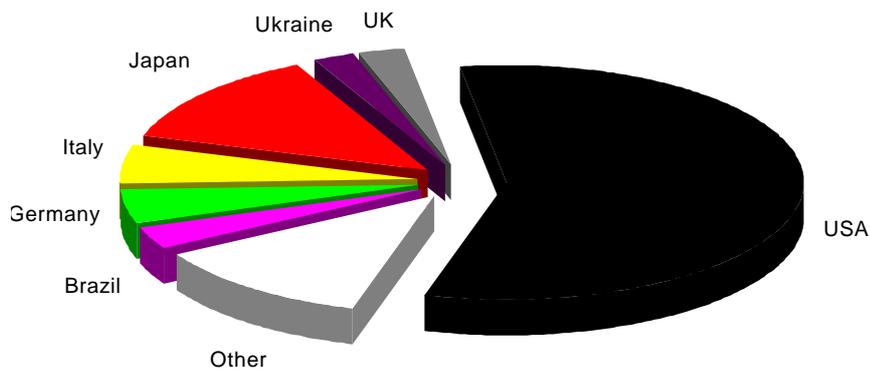
Peacekeepers

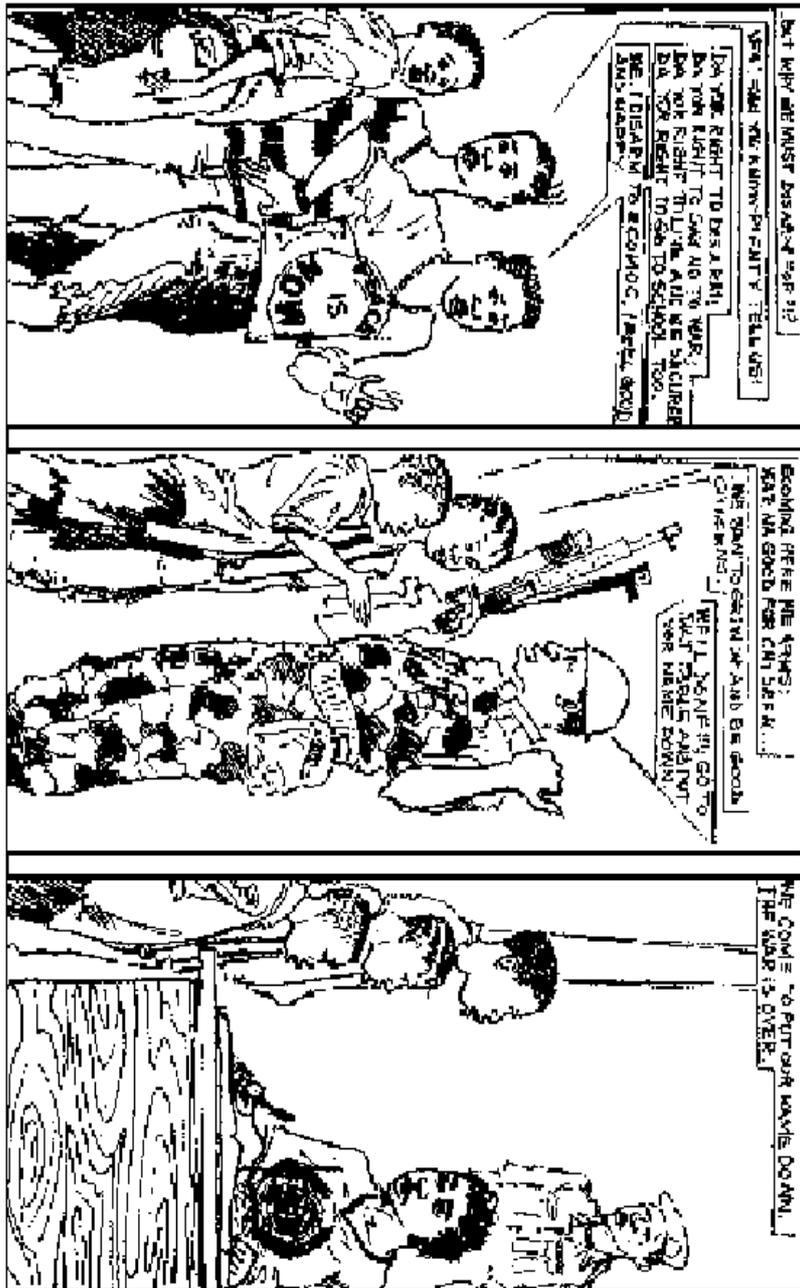


UN Peacekeepers



UN Arrears (Regular Budget) 31/03/98





Recent Developments in International Law: New Zealand

Penelope Ridings¹

Introduction

This paper presents a brief overview of the major developments in international law in New Zealand over the past year. There are a number of parallels which may be drawn between the developments in the law applied by New Zealand municipal courts and those applied in Australia. Both countries are facing the same issues concerning the interrelationship between domestic and international law, the role of Parliament and the wider public in the negotiation and implementation of treaties and other international legal instruments. This paper looks at these developments over the past year in the New Zealand context.

Recourse to international law by domestic courts

Judicial statements which highlight the relevance of international obligations are increasing in frequency in New Zealand courts. This is a demonstration of the thesis that the place of international law in municipal courts cases is today “a quiet and often unnoticed revolution in the nature and context of international law”.² The New Zealand Court of Appeal following the lead set by Lord Cooke of Thorndon,³ has continued to draw attention to the continued relevance of international law in the interpretation of common law and Statutes. This is a function in part of the fact that the contemporary international world is both more interdependent and more complex. The New Zealand Legislation Advisory Committee Report in 1996 noted that about one quarter of all public Acts appeared to raise international treaty issues.⁴ The presence on the Court of Appeal of a learned international law expert and Vice President of the Australia and New Zealand International Law Association, Sir Kenneth Keith, has contributed to these developments. A few recent cases warrant special mention.

The most significant decision with the most impact over the past year is the Court of Appeal decision in *Wellington District Legal Services Committee v Tangiora*.⁵ The respondent and others had lodged a communication with the United Nations Human Rights Committee claiming the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 violated her rights under the International Covenant on Civil and Political Rights.⁶ An application was made to the Wellington District Legal Services Committee for legal aid. This was declined. However the High Court granted a declaration that the Human Rights Committee was a “judicial authority” within the meaning of the Legal Services Act 1991. The Court of Appeal overturned this decision on appeal.

After examining the provisions regulating the Human Rights Committee, the Court of Appeal held that the Committee was not “an administrative tribunal or judicial authority” within the meaning of section 19(1)(e) of the Legal Services Act. In coming to this decision the Court of Appeal took full account of the nature of the Human Rights Committee, its procedures, and the (non-binding) character of its decisions. It also held that there was no relevant international obligation by reference to which the Act was to be interpreted. The Act did

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² Keith, KJ, “The International Law Commission’s Work and the Shaping of International Law”, paper presented at the Colloquium on Progressive Development and Codification of International Law, October 1997.

³ Formerly Sir Robin Cooke. See for example the leading case of *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.

⁴ See also New Zealand Law Commission, *A New Zealand Guide to International Law and its Sources*, (NZLR R34, 1996).

⁵ [1998] 1 NZLR 129.

⁶ New Zealand acceded to the Optional Protocol to the International Covenant on Civil and Political Rights in 1989.

not extend to Courts and tribunals established beyond New Zealand, except to the limited extent provided in respect of the Privy Council.

Overturing the High Court decision has major implications for the potential recourse to the Human Rights Committee. To illustrate the relevance of the decision, it is interesting that in the 10 years since New Zealand became party to the Optional Protocol, eight complaints against New Zealand have been brought to the Human Rights Committee. Of these, three were found by the Committee to be inadmissible and one communication was withdrawn by the author. Of the four communications that are still alive, the 1992 Sealords Fisheries Settlement, a group complaint, is one of the most important. If the High Court decision had been left to stand, one could have expected even greater recourse to individual and group complaints against New Zealand than have taken place to date. Group complaints in particular often involve key public policy or social issues of the day with potentially far-reaching implications not only for the individuals concerned, but also for the State. Legal aid for such complaints would have a significant impact on their number and on the way in which they are managed.

The issue is not, however, finally resolved. The respondent in the *Tangiara* case is now seeking legal aid to appeal the case to the Privy Council. Perhaps there will be more to report in next year's review of international law developments in New Zealand.

The *Tangiara* case was concerned in part with the interpretation of New Zealand international obligations. There have been a number of cases on which the Court of Appeal has confirmed a presumption of statutory interpretation that, so far as its wording allows, legislation should be read in a way consistent with New Zealand's international obligations. The most recent of these cases is *New Zealand Airline Pilots' Association v Attorney General*.⁷ That case concerned the access of Police by way of search warrant to the cockpit voice recorder held by the Transport Accident Investigation Commission and removed from the Ansett de Havilland DHC-8 twin engine aircraft which crashed near Palmerston North in June 1995.

The Court of Appeal had to consider the application of Annex 13 to the 1944 Chicago Convention on International Civil Aviation, entitled *Aircraft Accident and Incident Investigation*. The Court upheld the constitutional principle that in general treaties are not part of the law of New Zealand and if rights and duties under the law are to be altered legislation is required. It considered that the presumption of statutory interpretation applied whether or not the legislation was enacted with the purpose of implementing the relevant text. In the final result the Court held that paragraph 5.12 of Annex 13 to the Chicago Convention concerning disclosure of records did not prevent the issuing of a search warrant. In the first place the relevant paragraph was not part of New Zealand law. Neither did it limit the power to issue a search warrant under section 198 of the Summary Proceedings Act 1957.

In arriving at its decision the Court took cognisance of *inter alia* the limited binding force of the Annex both in general and in the particular situation because of the New Zealand statement of difference from the paragraph,⁸ its relative unimportance compared to some of the other Annexes, and the recognition in Annex 13 that police and related investigations may run in parallel with an air accident investigation.

The Court of Appeal has also recently made recourse to international human rights instruments in the context of determining common law. In *Lange v Atkinson and ACP NZ Ltd*,⁹ a defamation case brought by a former Prime Minister of New Zealand, the Court had regard to the European Convention on Human Rights and decisions of the European Court to assist it in determining the balance between freedom of expression and protection of reputation. The appellant has indicated an intention to appeal the ruling to the Privy Council due to the recognition which the Court gave to the defence of political discussion, as considered in the Australian High Court decision in the *Theophinus* case.

⁷ [1997] 3 NZLR 269.

⁸ This statement of difference provided that "there is no guarantee that the records will not be disclosed".

⁹ CA 52/97—judgment of 25 May 1998. See also [1997] 2 NZLR 22, 38-39.

In a different vein, the Court of Appeal in another recent case saw New Zealand's domestic legislation, founded on common law, as operating quite distinctly from international treaties. At issue in *Quilter v Attorney General*¹⁰ was whether the Marriage Act 1955 allowed for marriages between persons of the same sex. The relevant provision in the New Zealand Bill of Rights Act 1990 guarantees equality before the law and prohibits discrimination on the grounds of sex. The majority of the Court of Appeal held that the term "marriage" in the Act clearly carried its traditional common law meaning and included only marriages between persons of opposite sex. The enactment of the New Zealand Bill of Rights Act 1990, and in particular section 19 of that Act which provides for freedom from discrimination, did not alter this. If Parliament had intended to change the traditional common law approach, the intention would have been clearly stated.

This brief review of recent cases demonstrates that international law is increasingly relevant to New Zealand domestic law. Not only municipal courts but also the general public have an ongoing interest in the treaties to which New Zealand has or may become party.

Role of Parliament in the Treaty Making Process

The New Zealand Law Commission in a report in 1997 examined the issue of reform of the treaty making process and the role of Parliament.¹¹ In its recommendations the Law Commission considered that the value of notification and consultation with Parliament and interested or affected groups at the negotiating stage of the treaty-making process be recognised; that consideration be given to the introduction of a practice of timely tabling of treaties so that the members of the House of Representatives can determine whether they wish to consider the government's proposed action; and that consideration be given to the preparation of a treaty impact statement for all treaties to which New Zealand proposed to become a party.

On 17 December 1997 the Government announced that, for a trial period of the remainder of the present Parliamentary term, all treaties which are subject to ratification, accession, acceptance or approval will be presented to the House of Representatives before New Zealand becomes party to them. Essentially, this requirement will apply to multilateral treaties, but major bilateral treaties of particular significance may also be tabled at the discretion of Minister. The Government's announcement followed a report of the Foreign Affairs, Defence and Trade Select Committee and the new process largely follows the recommendations of the Select Committee.¹²

Under the new requirement, treaties will be presented to the House along with a National Interest Analysis outlining the reasons for New Zealand becoming party to a treaty and the consequences of such an action. This is to be prepared by the Department having the main policy interest in the treaty after consultation with the Legal Division of the Ministry of Foreign Affairs and Trade. The treaty, along with the National Interest Analysis, will be automatically referred to the Foreign Affairs, Defence and Trade Select Committee of the House. The Select Committee may inquire into the treaty, or refer it to a more appropriate Select Committee if it wishes. The House will have the opportunity to debate any Select Committee reports on treaties.

The Government will not take action to become party to a treaty until 35 calendar days have elapsed from the date of tabling, or the Select Committee has made its report, whichever occurs first. To take account of the Christmas break, the relevant time period will be 45 calendar days in the case of a treaty table after 15 December in any given year. In cases where the Government needs to take urgent action in the national interest in becoming party to a treaty before it has been presented to the House, the treaty will be presented to the House as soon as possible along with an explanation.

The new process has drawn on the recent Australian reforms. Unlike Australia, however, we have not created a special committee to consider treaties, principally for reasons of resources constraints. Neither have we

¹⁰ [1998] 1 NZLR 523.

¹¹ New Zealand Law Commission, *The Treaty Making Process: Reform and the Role of Parliament* (NZLR R45 1997).

¹² Report of the Foreign Affairs, Defence and Trade Committee on Parliament's Role in the International Treaty Process, 1997.

extended the tabling requirement to all bilateral treaties as most bilateral treaties are of a routine or technical nature and do not warrant the time of the House. The Minister of Foreign Affairs and Trade may, however, table major bilateral treaties of particular significance, on a case by case basis and after consultation with the relevant portfolio Minister.

Dissemination of Information on Treaties

As with the involvement of Parliament in the treaty-making process, the dissemination of information about treaties to which New Zealand is a party is recognised as an important role of Government. To this end the Ministry of Foreign Affairs and Trade has recently published the *New Zealand Consolidated Treaty List*—a comprehensive two volume compilation of Multilateral and Bilateral Treaties to which New Zealand is party. The compilation contains some 2000 treaties dating from colonial times¹³ to the end of 1996. And the list is growing.

Legislative Developments

Aside from developments in municipal courts, there are a number of Bills which have been introduced into Parliament to enable ratification of accession to international treaties. The Adoption (Intercountry) Act 1977 was passed in December 1997 and will enable accession to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993. This Convention is currently under consideration by the Foreign Affairs and Defence Select Committee.

The Maritime and Aviation Crimes Bill will create a new Maritime Crimes Act and will amend the existing Aviation Crimes Act. The legislation will bring New Zealand criminal law into line with international efforts to counter new forms of terrorism and enable ratification of:

- 1988 Convention for Suppression of Unlawful Acts Against the Safety of Maritime Navigation;
- 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;
- 1989 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation.

An amendment to the Crimes (Internationally Protected Persons and Hostages) Act 1980 will enable ratification of the 1994 Convention on the Safety of United Nations and Associated Personnel. This amendment will give better protection to United Nations peacekeeping personnel by making attacks on United Nations personnel international crimes and requiring States parties to extradite or prosecute alleged offenders within their jurisdictions.

Amendments to the Proceeds of Crimes Act 1991 are being made to enable ratification of the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This will create new offences relating to precursor substances, the new offence of drugs money laundering, and will adopt the extradite or prosecute rule. Amendments to the Maritime Transport Act 1994 and related regulations and marine protection orders under that Act and the Resource Management Act 1991 will enable New Zealand to become a party to the:

- 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971;
- 1992 Protocol to the International Convention on Civil Liability for Oil Damage 1969 ;
- 1978 Protocol to the International Convention for the Prevention of Pollution from Ships 1973, Annexes I, II, III, and V; and

¹³ The oldest multilateral treaty in the compilation dates from 1856: the Declaration Respecting Maritime Law done at Paris on 16 April 1856, signed by the United Kingdom and applied to New Zealand.

- 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972.

Further legislative amendments which are of interest to those working in the international law field include the Antarctic (Environmental Protection) Act 1994, certain provisions of which came into force with the entry into force of the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty. An amendment to the Mutual Assistance in Criminal Matters Act 1992 will enable New Zealand to give assistance in criminal matters to a wider range of foreign countries. This would include assistance given to parties to specified Conventions for proceedings arising under these Conventions.¹⁴ In addition the Attorney General will be able to grant assistance in certain circumstances to a country with which New Zealand does not have a formal mutual assistance relationship. This will allow greater flexibility in the provision of mutual assistance to international partners.

A new Extradition Bill which has been introduced into the House will resolve the former dual focus approach to extradition, depending on whether the country was a Commonwealth county or a country with which New Zealand had an extradition treaty. This will bring our extradition law closer to the Australian example.

Additional legislation with international implications on which work is underway is to be introduced in the very near future. This includes legislation to enable ratification of the Comprehensive Nuclear-Test-Ban Treaty 1996 and the Ottawa Landmines Convention 1997.¹⁵ Of further relevance is the *obiter dicta* of the Court of Appeal in *Butler v Attorney General*¹⁶ suggesting the need for legislation regulating refugee applications. The Government is looking to streamline its refugee application procedures. There may well be some movement in this area consistent with the views of the Court of Appeal.

Conclusion

This brief overview of developments in the last twelve months illustrates the growing importance of international law in the New Zealand legal system. This trend is unlikely to diminish in the near future as the complexity of international relationships and the rules which govern them increase. There are a number of developments which warrant close attention over the coming year, in particular communications under the Optional Protocol to the International Covenant on Civil and Political Rights and the recourse to international customary law in considering common law rules. These issues should be of interest to a broad spectrum of the legal profession in New Zealand and Australia.

¹⁴ For example the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

¹⁵ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997.

¹⁶ CA 181/97, 13 October 1997.

Human Rights and Trade

International Trade and the GATT/WTO Social Clause: Broadening the Debate

Johanna Sutherland *

By way of a somewhat extended but realistic introduction to the debate about whether human rights should be enforceable under the General Agreement on Tariffs and Trade (GATT) and World Trade Organisation (WTO) agreements,¹ it has to be said that the 'social clause' is *not* being actively negotiated by governments multilaterally. The social clause proposal aims to link the human rights standards found in some of the most highly ratified International Labour Organisation (ILO) Conventions, with the trade liberalisation agenda promoted by GATT and WTO. It envisages that the trade dispute resolution processes and ultimate threat of sanctions which are available through the GATT and WTO agreements could be used to pressure governments to ensure that selected human rights standards relating to trade are better met. But the proposal has faltered, despite a flurry of activity within the United Nations (UN) to mainstream human rights throughout the UN following the 1993 Vienna World Conference on Human Rights and the 1995 Fourth World Conference on Women.²

Debate about the social clause was effectively stymied by opposition from various G-77 States and the United Kingdom at the first WTO Ministerial Conference in Singapore in December 1996. The Governments of Indonesia, Malaysia, Brazil, Egypt, India and Pakistan, were amongst those which successfully opposed the social clause idea. Instead, Governments renewed their commitment to compliance with the international labour standards promoted by the ILO. They agreed that the WTO and ILO Secretariats should continue to collaborate on those standards. They also agreed that labour standards should not be used for protectionist purposes, and that countries with a comparative advantage, such as low-wage developing countries, should not lose that advantage.³ Although some developing countries opposed the inclusion of human rights matters in the declaration at all, the view that the issue should be raised, but left to the ILO, prevailed.

Before the September meeting, the chairpersons of the UN human rights treaty committees had also voiced their opposition to the social clause idea. They suggested that the United Nations' (UNs') system of human rights treaty supervision was adequate, or could be strengthened, and that these existing opportunities should be used rather than new processes be created. They called for greater cooperation amongst UN and treaty

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¹ The Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations was concluded on 15 December 1993 and signed by more than 120 States in Marrakesh, Morocco, in April 1994. The Final Act comprises the text of the Final Act, the Agreement establishing the World Trade Organization (the WTO Agreement) and agreements annexed to it, and also other Ministerial decisions and declarations. The Uruguay Round agreements came into force from 1 January 1995: General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (the Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, December 15, 1993, with introd. by A. Porges, *International Legal Materials*, vol. 33, 1994, pp.1-152 at p.2. The WTO had 132 members on 22 October 1997: <<http://www.wto.org>>.

² *Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System Related to the Coordinated Follow-up to and Implementation of the Vienna Declaration and Programme of Action: Report of the Secretary-General*, ECOSOC, 1 June 1998, UN Doc E/1998/60; *Follow-up to the Fourth World Conference on Women: Review of Mainstreaming in the Organizations of the United Nations System: Follow-up to and Implementation of the Beijing Declaration and Platform for Action: Report of the Secretary-General*., 20 January, 1998, UN Doc E/CN.6/1998/2.

³ World Trade Organization, Ministerial Conference, *Singapore Ministerial Declaration*, adopted 13 December 1996, WT/MIN(96)/DEC/W. See also: P. Waer, 'Social clauses in international trade: the debate in the European Union', *Journal of World Trade*, vol. 30, no. 4, 1996, pp.25-42.

bodies, and specialised agencies such as the World Bank, so as to enhance human rights protection.⁴

In 1995 receptivity to the social clause idea had also been limited. The Report of the Commission on Global Governance was critical of the idea, describing the suggested involvement of the WTO with labour standards as 'quite inappropriate and potentially damaging'.⁵ Two important multilateral conferences that year affirmed the importance of core labour standards but did not endorse their linkage to international trade law. Heads of State and Government at the World Social Summit in Copenhagen agreed that safeguarding and promoting workers' basic rights as defined by the ILO were necessary for the attainment of sustained economic growth and sustainable development, but they not express explicit support for a social clause. The Summit encouraged ratification and compliance with human rights instruments and agreed that the activities of the World Bank, the International Monetary Fund and the WTO ought to be better coordinated. It also invited the WTO to consider how it might contribute to the implementation of the Programme of Action, including activities in cooperation with the UN system.⁶ The 1995 conference of non-aligned and developing country Labour Ministers in New Delhi also endorsed core labour standards and the need to strengthen the ILO, but strongly criticised the linking of trade to ILO standards in international fora.⁷

In 1994 the ILO's Governing Body had established a Working Party on the Social Dimensions of the Liberalisation of International Trade to identify core labour conventions which could be linked to trade.⁸ Later the working party agreed to suspend discussions on trade, labour standards and WTO remedies, following opposition from employers and G-77 countries particularly. It agreed to examine instead, trade liberalisation and compliance with core standards and ILO's possible role in better promoting compliance.⁹ In 1997-8 the working party produced country studies on the impact of globalisation and trade liberalisation, and discussed the desirability of promoting social labelling particularly to promote trade not produced by child labour.¹⁰

Such broad opposition had not dissipated by this year. In June 1998 the ILO held its 86th International Labour Conference and there was little support in the Chairperson's report for further work on a social clause. A newly formed resolutions committee was expected to respond to the challenges of globalisation. A statement to the conference by the President of Brazil, Fernando Cardoso, warned against protectionist demands and suggested that punitive action through the GATT on labour standards was 'unjust and senseless' and would only aggravate situations. He said:

The multilateral treatment of the issue was, in any case, settled in 1996 by a decision adopted at Ministerial level in Singapore. ... The social question, which is so complex and urgent and which affects practically all countries, represents a fundamental challenge for international cooperation and demands increased and direct

⁴ United Nations, Human Rights Questions: Implementation of Human Rights Instruments: Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights: Note by the Secretary-General, General Assembly, Fifty-first session, Agenda item 110(a), 11 October 1996, Distr. General, A/51/482.

⁵ Commission on Global Governance, *Our Global Neighbourhood: Report*, Oxford University Press, New York, 1995, p.170.

⁶ United Nations, *Report of the World Summit for Social Development (Copenhagen, 6-12 March 1995)*, 19 April 1995, Distr. General, A/CONF.166/9, paras.51, 54-56, 98.

⁷ 'Delhi Declaration', summarised in Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia-Pacific Region*, Australian Government Publishing Service, Canberra, 1996, Annex D, p.95-6.

⁸ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, OECD, Paris, 1996, p.16.

⁹ GB.264/WP/SDL/1: Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at p.170.

¹⁰ Report on the work of the Governing Body, International Labour Conference, 86th Session, Geneva, June 1998, <<http://www.ilo.org/public/english/10ilc/ilc86/a-amawi.htm>>

action in the appropriate fora.¹¹

Representing one such alternative fora, and addressing the conference, the UN High Commissioner for Human Rights, Mary Robinson, stressed the interlinkages and close cooperative relationship between the work of the Human Rights Commission and the ILO. She acknowledged the importance of labour standards and the indivisibility of all human rights, but did not endorse a social clause.¹²

Our current Federal Government's position on the social clause debate is unequivocal. It opposes 'the WTO adopting positions that create divisions on the basis of divergent social or cultural values, and that are of doubtful or negative trade relevance.' It suggests that such rules 'would dilute the WTO's core business, and weaken its authority and credibility in the eyes of significant members'.¹³ The Federal Government prefers to concentrate on practical measures and to address human rights issues within bilateral relationships. This critical stance on the social clause was shared by a majority of the then Labor Government's Working Party on Labour Standards which also did not support the GATT social clause proposal. That Working Party recommended that more attention be given to core labour standards within Australia's overseas aid program and by international financial institutions. The Working Party also recommended that the Australian Government encourage APEC¹⁴ members to 'move towards a constructive dialogue on core labour standards within APEC'.¹⁵

Last but not least in this survey of critics, it should be noted too, that several academics are cynical about the motives behind the social clause proposal and argue the need for a reconceptualisation of institutions and strategies.¹⁶

Broadening the debate?

With so many influential stakeholders hardly warming to the social clause proposal, could it still have sufficient merit to warrant continuing debate about it? Tentatively, I suggest that the social clause idea should be explored further. I suggest that the scope of the clause should be broadened to include recognition of the rights of indigenous peoples and local communities, and be linked with the broader issues of sustainable development. The WTO currently has a work program on trade and the environment and this process could be broadened by including human rights considerations. The social clause debate may be more constructive and broadly supported if international environmental standards, and the rights of indigenous peoples are brought within it. A broader constituency to advocate for a social clause may increase its chances of being considered further. Moreover, international civil society, UN sustainable development organisations and many governments are increasingly concerned about worsening global environmental trends, the social costs of increasing globalisation and the non-realisation of many of the 1992 Rio Earth Summit aspirations.¹⁷

¹¹ 'Statement by H.E. Mr Fernando Henrique Cardoso', President of Brazil, in the Report of the Chairperson of the Governing Body, International Labour Conference, 86th Session, Geneva, June 1998, <<http://www.ilo.org/public/english/10ilc/ilc86/a-amawi.htm>>.

¹² 'Address by Mrs Mary Robinson, UN High Commissioner for Human Rights, 10 June 1998', in the Report of the Chairperson of the Governing Body, International Labour Conference, 86th Session, Geneva, June 1998, , <<http://www.ilo.org/public/english/10ilc/ilc86/a-robins.htm>>.

¹³ Australia, Department of Foreign Affairs and Trade, *In the National Interest: Australia's Foreign and Trade Policy White Paper*, DFAT, Canberra, 1997, p.44.

¹⁴ APEC is an organisation promoting Asia-Pacific Economic Cooperation.

¹⁵ Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia-Pacific Region*, pp.83-5.

¹⁶ P. Alston, 'Labor rights provisions in US trade law: 'aggressive unilateralism'?', *Human Rights Quarterly*, vol.15, 1993, pp.1-35; J.L. Dunoff, 'Institutional misfits: the GATT, the ICJ and trade-environment disputes', *Michigan Journal of International Law*, vol.15, 1994, pp.1043-1128.

¹⁷ See for example: United Nations, General Assembly, Programme for the Further Implementation of Agenda 21, Nineteenth special session, 11th plenary meeting, A/RES/S-19/2, 19 September 1997.

An underlying premise of the paper is that free trade discourse should not be paramount over human rights and sustainable development concerns, and that one of the limited exceptions provisions in the GATT (art. XX), as discussed below, needs to be reviewed and redrafted to invert its current prioritisation.¹⁸ I suggest also that the inclusion of the TRIPS agreement in the GATT/WTO regime is a useful precedent which demonstrates that rights protection – in that case intellectual property rights – can be a trade-related issue and be brought within the GATT/WTO dispute-resolution processes. I will first outline more fully what the social clause proposal involves, and its history. Then I will assess briefly the arguments being mounted for and against the social clause, and conclude that a broadened debate on the issues should continue.

What is the proposed social clause?

The inclusion of environmental and human rights articles in international trade agreements had been proposed as early as the Havana Charter which was intended to establish the International Trade Organisation. The ITO was not established though, with the GATT taking its place.¹⁹ Proposals to include a general article on workers' rights and on international environmental agreements in the GATT were not adopted.²⁰

More recent proposals for a social clause are being supported by the governments of the United States, France, Belgium, Mexico, the Netherlands, the European Parliament,²¹ Scandinavian Governments,²² and peak international trade unions organisations.²³ Various academics also support the idea.²⁴ The United States and the EU particularly, wish to expand the GATT/WTO agenda to include labour standards, competition policy and corruption, but G77 countries are resisting this on the grounds that increasingly globalised standards erode national sovereignty and comparative advantage in selected areas.²⁵

¹⁸ This view is shared by P.W. Birnie and A.E. Boyle, *International Law and the Environment*, Clarendon Press, Oxford, 1992, pp.132-133. David Pearce also notes the priority given to free trade in the GATT over the environmental exceptions: D. Pearce, *Blueprint 4: Capturing Global Environmental Value*, Earthscan Publications Ltd., London, 1995, p.82. Note also that the landmark Canadian case of *R. v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 385 held that government justifications for interfering with Aboriginal rights in Canada should be 1. conservation, 2. subsistence needs, and 3. commercial and recreational fishers' rights. A similar prioritisation could be applied in international trade law where human rights and the environment are at risk.

¹⁹ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at p.169.

²⁰ S. Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment', *Arizona Journal of International and Comparative Law*, vol.14, no.2, 1997, pp.341-379 at p.346; Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at p.173.

²¹ The incorporation of human rights standards within international trade law has been discussed in the European Parliament periodically since the early 1980s. See generally: Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp.207-8; N. Haworth and S. Hughes, 'Trade and international labour standards: issues and debates over a social clause', *The Journal of Industrial Relations*, vol. 39, no. 2, 1997, pp.179-195 at p.191. The European Parliament's Standing Committee on Foreign Affairs, Security and Defence Policy conducted a public hearing on the social clause in 1997.

²² V.A. Leary, 'The WTO and the social clause: post-Singapore', *European Journal of International Law*, vol.1, 1997, pp.118-122 at p.120.

²³ Including the International Confederation of Free Trade Unions (ICFTU), and the European Trade Union Confederation (ETUC). But some members of these umbrella organisations oppose the social clause, such as the Indian National Trade Union Congress: Haworth and Hughes, 'Trade and international labour standards: issues and debates over a social clause', at p.190.

²⁴ S. Charnovitz, 'The World Trade Organization and social issues', *Journal of World Trade*, vol. 28, 1994, pp.17-33; E. de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariffs and Trade/World Trade Organization', *Human Rights Quarterly*, vol.17, 1995, pp.443-462.

²⁵ Martin Khor for Third World Network, 'KL meeting brings south together on WTO', *Third World Network Features*,

In April 1994 at the GATT Ministerial Meeting in Marrakesh, States could not agree on ways to address the social implications of increasingly globalised trade. At that meeting the US and France suggested that a social clause should be included in the WTO Agreement, without success.²⁶ Labour standards were not mentioned in the Marrakesh Ministerial Declaration,²⁷ but were referred to in the Chairman's list of possible future items for the WTO programme.²⁸

The United States, supported by the EU, had tried unsuccessfully to include the issue in the Uruguay Round negotiations in 1986, and on the GATT Council agenda in 1990.

It is apparent however that the U.S. has not abandoned the issue. U.S. President Clinton at the second WTO Ministerial Meeting earlier this year called for the WTO to better integrate labour and environmental standards. This call reflects a principal trade negotiating objective of the U.S. Government, which is to promote respect for workers' rights and to secure a review of the relationship between workers' rights and the GATT and related instruments.²⁹ But as an interesting aside, it can be said that this U.S. commitment on workers' rights is a very partial one. The U.S. has not been strongly committed to the recognition and implementation of Farmers' Rights in the FAO's Commission on Plant Genetic Resources for Food and Agriculture (CPGRFA). Farmers' Rights are seen by some G-77 Governments as a human rights issue involving compensation and incentives for traditional farmers' skill and labour contribution to the conservation and development of plant genetic resources for food and agriculture, and its continuation. Recognition of Farmers' Rights is currently being negotiated as part of the harmonisation of the International Undertaking on Plant Genetic Resources with the Convention on Biological Diversity (CBD). But Farmers' Rights issues are still far from agreed.³⁰ Farmers' Rights and the recognition of the value of indigenous and local communities' knowledge, innovations and practices are pressing examples of the central linkages between human rights and sustainable development but to date they have not been brought squarely within the social clause debate.

The core standards which most supporters of the social clause agree should be linked with GATT and WTO processes and remedies are found in various ILO Conventions which have a high ratification rate. These Conventions promote:

- freedom of association, collective organisation and bargaining³¹
- freedom from forced and compulsory labour³²
- non-discrimination in employment,³³ and

<hrnet.development@Germany.EU.net>, 30 July.

²⁶ Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia-Pacific Region*, p.9.

²⁷ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at p.1169.

²⁸ Third World Network, 'Barking up the wrong tree: trade and social clause links', nd, <<http://www.southbound.com.my/souths/twn/title/tree-ch.htm>>

²⁹ *Omnibus Trade and Competitiveness Act of 1988* Pub L No 100-418 s1101, 102 Stat. 1107 (1988).

³⁰ The International Undertaking on Plant Genetic Resources, as constituted by FAO Conference Resolutions 8/83, 4/89, 5/89, and 3/91, is a non-binding agreement dealing with the collection, conservation, evaluation and utilisation of plant genetic resources. Farmers' Rights, 'arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources' were recognised in Res. 5/89.

³¹ ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 121 ratifications at 25 May 1998; ILO Convention 98, Right to Organise and Collective Bargaining Convention, 1949, 137 ratifications 25 May, 1998: <<http://ilolex.ilo.ch:1567/public/english/50normes/infleg/index.htm>>.

³² ILO Convention 29, Forced Labour Convention, 1930, 145 ratifications as at 25 May 1998; ILO Convention 105, Abolition of Forced Labour Convention 1957, 130 ratifications as at 25 May 1998: <<http://ilolex.ilo.ch:1567/public/english/50normes/infleg/index.htm>>.

- abolition of exploitative forms of child labour.³⁴

Proponents of a social clause sometimes include ILO occupational health and safety, and minimum wage fixing Conventions.³⁵ But note that this list of relevant Conventions does not include the ILO Convention concerning the rights of tribal and indigenous peoples, the twenty or so international environmental agreements which have trade provisions, or the International Undertaking on Plant Genetic Resources. Other international instruments which arguably might be considered for inclusion on the social clause trigger list are the Draft Declaration on the Rights of Indigenous Peoples and the Draft International Covenant on Environment and Development, when these are finalised and widely ratified. Customary law human rights could also be included.

There are precedents in current WTO Agreements for giving priority to existing international instruments in an area, and for linking extant agreements with a GATT/WTO agreement and its dispute resolution processes. For example the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS), provides that in respect of particular Parts of that Agreement, Members shall comply with identified Articles of other intellectual property Conventions.³⁶ The UN Convention on the Law of the Sea also has a forum clause which refers production subsidy disputes to the GATT.³⁷ It could be argued similarly in relation to identified provisions of human rights and environmental Conventions, that they must be complied with for the purposes of the WTO regime.

Proponents of the social clause argue that it should be included in the GATT. The International Confederation of Free Trade Unions (ICFTU) proposes that a joint WTO/ILO advisory committee be established to ensure that core labour standards are observed. The advisory committee would recommend remedial action and a timeframe to governments found to be in breach of those standards. Financial or technical aid from an international social fund and the ILO could be made available to encourage compliance. At the end of the period set, a further report would find compliance, or find progress and recommend an extension of time, or that reforms had not been implemented and that trade sanctions such as increased tariffs should be levied against the exporting state by all WTO members. The ICFTU also proposes that the advisory committee make recommendations to governments on trade adjustment measures in response to increased imports under the GATT/WTO trade regime.³⁸ Another commentator recommends joint ILO/WTO responsibility with the WTO dispute resolution process only becoming active after the failure of moral persuasion by the ILO.³⁹

One version of the ICFTU proposed social clause reads as follows:

The Contracting Parties agree to take steps to ensure the observance of the minimum labour standards specified by an advisory committee to be established by the GATT and the ILO, and including those on freedom of association and the right to collective bargaining, the minimum age for employment,

³³ ILO Convention 111, Discrimination (Employment and Occupation Convention), 1958, 130 ratifications as at 25 May 1998: <<http://ilolex.ilo.ch:1567/public/english/50normes/infleg/index.htm>>.

³⁴ ILO Convention 29, Minimum Age Convention 1973, 62 ratifications as at 25 May 1998: <<http://ilolex.ilo.ch:1567/public/english/50normes/infleg/index.htm>>. See generally: Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp. 33-34; Waer, 'Social clauses in international trade: the debate in the European Union', at p.36.

³⁵ de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization', at p. 453.

³⁶ See for example articles 1-3 of the TRIPS Agreement.

³⁷ Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment', at p.353.

³⁸ Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia-Pacific Region*, p.22.

³⁹ E. de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organisation', at pp.458-60, 456-7.

discrimination, equal remuneration and forced labour.⁴⁰

This clause is worded loosely and would seem to enable States to defend most charges of human rights violations by arguing that some steps have been taken to address core labour standards, however ineffective. But it could be strengthened. It could also be broadened to enable the GATT/WTO dispute resolutions processes to be invoked where identified human rights and environmental obligations are being breached. For example, international environmental lawyers have suggested a draft Article which accommodates unilateral responses to environmental concerns where multilateral remedies are unavailable or unsatisfactory. Art. 30 of the Draft International Covenant on Environment and Development for example, which could be brought within the social clause debate, provides that

‘Parties shall endeavour to ensure that:

- (d) unilateral trade measures by importing Parties in response to activities which are harmful or potentially harmful to the environment outside the jurisdiction of such Parties are avoided as far as possible or occur only after consultation with affected States and are implemented in a transparent manner’.⁴¹

This clause suggests that unilateral action is acceptable in some circumstances, and responds to environmentalists’ concerns about two GATT panel determinations on U.S. dolphin-protecting legislation which was found to be GATT-inconsistent, as discussed below. But even if such a draft article were to be limited to multilateral dispute resolution processes, there is a risk that such processes could sour trade relations and encourage retaliatory action. Awareness of this may however also encourage Contracting Parties to use the process only for serious and flagrant violations of human rights or environmental standards. In this context it is worth mentioning that various international trade agreements do already include commitments to human rights standards.⁴²

Proposals for reform of the GATT on environmental grounds have even been raised by a GATT panel. The dispute-resolution panel in the US-Mexico tuna dispute, for example, suggested in 1991 that while the current GATT exemptions did not allow States to restrict imports from other States which had disagreeable environmental policies, art. XX of the GATT could be amended or supplemented so as to ‘impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse’.⁴³ Suggestions have been also made within the WTO Committee on Trade and Environment (CTE), discussed below, that trade measures applied pursuant to multilateral environment agreements might be made permissible within the WTO regime where they are effective, no more restrictive of trade than necessary to achieve the environmental objective, do not constitute arbitrary or unjustifiable discrimination and address transboundary or global environmental problems. The European Union and New Zealand particularly, have

⁴⁰ ICFTU Department of Employment and International Labour Standards, ‘Labour Standards and Trade: What is the social clause?’, <<http://www.icftu.org/english/sclause/esclslst.html>>.

⁴¹ IUCN Commission on Environmental Law, *Draft International Covenant on Environment and Development*, Prepared in cooperation with the International Council of Environmental Law, Environmental Policy and Law Paper No. 31, IUCN, Gland and Cambridge, 1995, pp.92, 95.

⁴² Including the Lome Conventions of 1984 and 1989, the Caribbean Basin Initiative, the Generalized System of Preferences and a side-agreement to the North American Free Trade Agreement: E. de Wet, ‘Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organisation’, at pp.444-445. Art. 104 of the North American Free Trade Agreement, 17 December 1992 (reprinted in 32 *International Legal Materials* 289 and 605 (1993) permits some environmental treaties to override its provisions: IUCN Commission on Environmental Law, *Draft International Covenant on Environment and Development, of IUCN—prepared in cooperation with the International Council of Environmental Law*, Environmental Policy and Law Paper No. 31, IUCN, Gland and Cambridge, 1995 at p.94, fn246.

⁴³ GATT, ‘General Agreement on Tariffs and Trade -Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna’, *International Legal Materials*, vol. 30, 1991, pp.1594-1623 (unadopted report).

been recommending amendments to art. XX, without yet persuading most other members.⁴⁴

There are various mechanisms within the GATT/WTO agreements⁴⁵ which can be used to promote labour standards, but a broad social clause is of primary interest for this paper. The WTO dispute resolution processes include preliminary consultations, good offices conciliation and mediation, panel determinations, and rights of appeal to a standing Appellate Body or trade supercourt. The Appellate Body can issue binding determinations which are enforceable with trade sanctions.⁴⁶ It is this enforcement capacity, and the absence of due process guarantees and broad standing rules which has some critics of the WTO worried.⁴⁷ These are legitimate concerns, but if reformed, such as following the U.S. suggestion of broader standing rules and increased opportunity for NGO involvement, such dispute resolution processes could be used as a supplementary means of significantly strengthening current multilateral human rights and environment regimes.

The GATT/WTO Agreements and sustainable development discourse

Most advocates of the social clause suggest that it should be included in the GATT. The GATT⁴⁸ is a post-WWII multilateral agreement, which is intended to promote international economic cooperation, and prevent any continuation of the economic mercantilism, which exacerbated international tensions between World War I and II.⁴⁹ The economic discourse to which the GATT is most clearly indebted includes works by Adam Smith on trade specialisation, David Ricardo on comparative advantage, and Heckscher and Ohlin on relative factor endowments for comparative advantage. The U.S. framers of the GATT also espoused arguments against mercantilism and protectionism similar to those by economist C. Wilcox in *A Charter for World Trade* (1949).⁵⁰ This economic discourse suggests that market forces and free trade will do much to promote the efficiency and productivity of economies, and remove trade distortions. An open, non-discriminatory trading system is thought best able to promote growth and aid a transition to sustainable development for all economies.⁵¹ Social considerations have not been dominant in this discourse; the assumption being that growth

⁴⁴ World Trade Organisation, 'WTO Trade and Environment Committee discusses proposals on trade measures in multilateral environmental agreements and on eco-labelling', *PRESS/TE 008* <<http://www.wto.org>>, 29 April 1996; World Trade Organisation, 'WTO Trade and Environment Committee discusses proposals on MEAs, ecolabelling, transparency, market access, and domestically prohibited goods', *Press/TE/011* <<http://www.wto.org>>, 9 August 1996; Australia Department of Foreign Affairs and Trade GATT Projects Section, *The Relationship Between the Provisions of the Multilateral Trading System and Trade Measures Pursuant to Multilateral Environment Agreements: A Discussion Paper*, Department of Foreign Affairs and Trade, Canberra, 1995, WTO Committee on Trade and Environment: Item One of the World Program, an Issues Paper, para 16.

⁴⁵ Arts. 22 and 23 of the GATT promotes consultation amongst Contracting Parties about specific representations and art. 23 enables Contracting Parties to investigate allegations of non-compliance with the GATT, and in serious situations to authorise a Party to suspend concessions or other obligations under the GATT in relation to other Parties in breach.

⁴⁶ Art. 22: Understanding on Rules and Procedures Governing the Settlement of Disputes', *International Legal Materials*, 33, 1, 1994, pp. 112-135 at pp.126-9.

⁴⁷ G.E. Evans, 'Issues of legitimacy and the resolution of intellectual property disputes in the supercourt of the world trade organisation,' Paper presented at the National Intellectual Property Teachers Workshop, Australian National University, Canberra, 5-6 February, 1998, Typescript copy.

⁴⁸ The original was agreed to on 30 October 1947, and came into effect in 1948. This first GATT 'round' in 1947 was followed by Annecy (1949), Torquay (1950-1), Geneva (1955-6), 'Dillon round' in Geneva (1961-2), the 'Kennedy Round' in Geneva (1964-67), the Tokyo round in Geneva (1973-9) and the Uruguay Round (1986-94): GATT, *Trade Policies for a Better Future: The 'Leutwiler report', the GATT and the Uruguay Round*, Martinus Nijhoff Publishers, Dordrecht, 1987, at p.160.

⁴⁹ Mercantilism is a form of economic nationalism which promotes exports and discourages imports, often through measures such as tariff barriers.

⁵⁰ S. Strange, 'Protectionism and world politics', *International Organization*, vol. 39, no. 2, 1985, pp.233-259 at p.240.

⁵¹ 'Declaration on the contribution of the MTO to achieving greater coherence in global economic policymaking', in General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (the Uruguay Round): Ministerial Decisions and Declarations, December 15, 1993, *International Legal Materials*, Vol. 33, at pp.139-40.

will promote employment and improve social conditions, constrained only by narrow exceptions. Enforceable labour standards can also be seen within this perspective as an interference in market forces, and as inhibiting comparative advantage and competition amongst employers to retain labour.⁵²

The GATT requires of its States Parties several basic commitments. These include a willingness to negotiate tariff reductions, the same treatment of own-country and overseas nationals under trade laws and procedures,⁵³ equal treatment for imported and domestic goods,⁵⁴ transparency and notification, and the elimination of quantitative restrictions on imports and exports.⁵⁵ But since the early 1970s governance by the GATT has been broadened from a primary focus on trade liberalisation and trade in goods, to include issues such as subsidies, customs, services, agriculture, intellectual property, and foreign investment.⁵⁶ The Uruguay Round of multilateral trade negotiations which began in 1986⁵⁷ marked a high-point for the integration of intellectual property, trade-related investment measures and trade in services with the established GATT agenda. Many of the Uruguay Round instruments are to be administered by the new World Trade Organization (WTO) which was established on January 1, 1995.

Until recent years, sustainable development and human rights discourses have been relatively uninfluential within the GATT. The Uruguay Round negotiations did not address environmental issues directly, and the GATT has a poor record on such issues. The GATT 1971 Working Party on Trade and Environment had not met before 1991.⁵⁸ Between 1991 and 1994 a GATT Group on Environmental Measures in International Trade examined the consistency of the GATT with trade provisions in multilateral environmental agreements (MEAs) and concluded that inconsistency was unlikely provided the basic GATT principles of national treatment and most-favoured nation were observed.⁵⁹ The Agreement establishing the World Trade Organisation does include in its preamble a commitment to 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so...'.⁶⁰ After the Uruguay Round negotiations were concluded and before the Final Act had been signed by Ministers, the Trade Negotiations Committee agreed to prepare a broad work programme on trade, environment and sustainable development for signature with the Final Act in Marrakesh in April 1994. States agreed that at the first meeting of the WTO General Council, a Committee on Trade and Environment (CTE) would be established to begin a comprehensive work programme on trade and environment, with a sub-committee undertaking the work meanwhile.

The WTO CTE, established in January 1995, provides analyses of the links between trade and environmental measures, and makes recommendations on trade liberalisation and sustainable development. The CTE reports to the WTO Ministerial Conferences and to the WTO General Council.⁶¹ But some academics and NGOs have

⁵² de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization', at pp.446-7.

⁵³ Art 3: national treatment.

⁵⁴ Art. 1: most-favoured-nation treatment.

⁵⁵ Art. 11(1). See generally: T.J. Schoenbaum, 'Free international trade and protection of the environment: irreconcilable conflict?', *American Journal of International Law*, vol. 86, 1992, pp.700-727.

⁵⁶ B. Lindsay, 'GATT: development and intellectual property', *Arena Journal*, no. 3, 1994, pp.33-41 at p.35.

⁵⁷ A GATT Ministerial meeting in Punta del Este in 1986 issued a declaration which set the agenda for the Uruguay Round negotiations: R.P. Benko, 'Intellectual property rights and the Uruguay Round', *World Economy*, vol. 11, no. 2, 1988, pp.217-231.

⁵⁸ S. Charnovitz, 'Improving environmental and trade governance', *International Environmental Affairs*, vol. 7, no. 7, 1995, pp.59-91 at p.66.

⁵⁹ Australia, Department of Foreign Affairs and Trade, GATT Projects Section, *The Relationship Between the Provisions of the Multilateral Trading System and Trade Measures Pursuant to Multilateral Environment Agreements: A Discussion Paper*, Canberra, Department of Foreign Affairs and Trade, 1995, at p.6.

⁶⁰ WTO Trade and Environment Decision of 14 April 1994.

⁶¹ 'Marrakesh Ministerial Decision on Trade and Environment', <http://www.wto.org>. The Report (WT/CTE/1, dated 12 November 1996) is available from the WTO Secretariat at <<http://www.wto.org/Trade+Env/tocte.html>>.

been critical of its discussions, suggesting that progress on issues is disappointing.⁶² Steve Charnovitz attributes its failure to lack of leadership, the dominance of trade officials, a paucity of commissioned research, lack of NGO input and weak or non-existent linkages with inter-governmental organisations for the environment.⁶³ Another explanation may be that the CTE is overly constrained by its trade focus, which is not an environmental-effects of trade focus. The CTE's meeting in March 1998 for example, focused on market access and the implications of removing trade restrictions for identified industry sectors, leading to economic and environmental benefit.⁶⁴ The WTO is limited to examining trade and trade-related aspects of environmental policies which are of significance for Members' trade and cannot examine environmental issues generally. The CTE will identify the relationships between trade, environmental measures and sustainable development, and make recommendations on whether any modifications to the provisions of the multilateral trading system are required.

The GATT/WTO's poor record on environmental issues is partly because non-corporate international NGOs have only recently been permitted access to GATT meetings and processes independent of Government delegations. To date they have had little influence compared with corporate actors. But NGOs may yet come to have more influence on the direction of WTO governmentality since the WTO is now responding to sustainable development discourse and the new environmental economics. The Constitution of the new WTO includes provision for establishing consultative relations with NGOs,⁶⁵ and the WTO General Council has approved arrangements for WTO-NGO relations. The GATT has held symposiums regularly since 1994 on trade, environment and sustainable development. These have involved NGOs, and are likely to continue to be held.⁶⁶ But Charnovitz' assessment of processes to date is that the CTE has 'failed to move the WTO close toward a faithful implementation of WTO Article V(2)'.⁶⁷

GATT exceptions

The international trade union movement is arguing for the inclusion of a social clause which enables disputes about labour rights to be resolved through GATT/WTO processes and although this is not often argued, such a clause could be added to the current list of exceptions in art. XX of the GATT, and still be brought within the dispute resolution processes. Under art. XX, GATT members can currently restrict imports of products where they are produced by prison labour;⁶⁸ are contrary to public morality or health; or place animal, plant or human life or health at risk.⁶⁹ Trade restrictions can also be imposed so as to conserve exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption.⁷⁰ None of these measures may be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination. States Parties may also claim exemptions for technical measures taken for environmental protection,⁷¹ or for emergency or national security measures.⁷² These exceptions are construed

⁶² C. Carpenter, A. Cosbey, et al., 'WTO Symposium on Trade, Environment and Sustainable Development, 20-21 May 1997', *Earth Negotiations Bulletin* <enb@iisd.ca>, vol. 5, no. 1, 1997; Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment'.

⁶³ Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment', at pp.374-5.

⁶⁴ WTO, 'Second Ministerial Conference of the World Trade Organisation: Press Pack', <<http://www.wto.org>>.

⁶⁵ Art. V (2) of the WTO Constitution on 'relations with other organizations' states that: 'The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.'

⁶⁶ World Trade Organisation, 'GATT/WTO activities on trade and environment 1994-95', *WTO Trade and Environment Bulletin No. 2* <<http://www.wto.org>>, 8 May 1995.

⁶⁷ S. Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment', at p.370.

⁶⁸ Art. XX (e).

⁶⁹ Art. XX (b).

⁷⁰ GATT Art. XX (g).

⁷¹ Agreement on Technical Barriers to Trade, and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Annex 1A to the Agreement establishing the World Trade Organisation.

narrowly however so as to preserve the objectives of the GATT and not to erode its promotion of the right of access to markets. Measures inconsistent with the GATT will only be exempted if there are no alternative measures available which a party could reasonably be expected to employ.⁷³

In several panel determinations on trade disputes where the environmental exemptions in art. XX (b) and (g) have been argued in defence of a trade-restrictive measure, the exemption has been found not to apply. Panel rulings on U.S. dolphin-protection measures for example, have attracted strong condemnation from environmentalists for construing the GATT exceptions so narrowly.⁷⁴ A 1994 GATT Panel ruled that the GATT exceptions cannot be used to justify States' unilateral trade measures which attempt to compel other countries to change their resource management policies as the GATT multilateral trade liberalisation objectives need to be paramount.⁷⁵ One of the reasons given was that since trade embargoes could not further environmental objectives by themselves, because they could only be effective if exporting States agreed to change their laws or policies, such embargoes could not be primarily aimed at conservation, or at rendering effective restrictions on domestic production or consumption as required by art. XX(g).⁷⁶ Another panel has ruled that for measures to be considered 'related to the conservation of an exhaustible natural resource' such measures must be 'primarily aimed' at that conservation, even if it they are not necessary or essential'.⁷⁷

Those who defend the GATT/WTO agreements on environmental issues argue that trade provisions in post-1947 multilateral environmental agreements (MEAs) would usually take precedence over the GATT (where parties are members to both) as later-in-time treaties relating to the same subject-matter or as *lex specialis*.⁷⁸ The WTO CTE has also suggested that WTO members who are also parties to a MEA should first resolve their difficulties via the MEA procedures, and only then consider WTO action.⁷⁹ But where later MEAs are weak or could not be negotiated because of State opposition this response does not allay environmentalists' concerns. In any event legal commentators are divided over the compatibility of MEAs with the GATT/WTO agreements.⁸⁰

⁷² Art. XIX (Emergency Action on Imports), Art. XXI (Security Exceptions).

⁷³ GATT, *Report of the Panel on Section 337 of the United States Tariff Act*, BISD 36S/345; GATT, Reports of the Panels in Canada-Administration of the Foreign Investment Review Act, adopted 7 February 1984, 30S/140, p.64; GATT, 'General Agreement on Tariffs and Trade -Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna', *International Legal Materials*, vol. 33, 1994, pp.839-903 at p.879, 881, 894, 896-7.

⁷⁴ GATT, 'General Agreement on Tariffs and Trade -Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna' (1991).

⁷⁵ The US was required to bring its *Marine Mammal Protection Act 1972* into conformity with the GATT. The GATT has also been used to have environmental action dropped in other cases. In 1993 Canada repealed its law prohibiting the importation of US puppy mill dogs, and the US dropped its threat of sanctions against Norway because of commercial whaling due to threats of GATT action: R.D. Ryder, 'The new World Trade Organisation—a major threat to social values', *Biodiversity and Conservation*, vol. 4, 1995, pp.206-207. See also B. F. Chase, 'Tropical forests and trade policy: the legality of unilateral attempts to promote sustainable development under the GATT', *Hastings International and Comparative Law Review*, vol. 17, 1994, pp.349-388. The US Clean Air Act which set standards on petrol content was effectively challenged by Venezuela and Brazil who could not meet the standards. The Clean Air Act had to be amended to lower its standards so as to comply with the GATT ruling. A finding of GATT-consistency on 'petrol-guzzler' car taxes is one ruling viewed positively by environmentalists: GATT, 'General Agreement on Tariffs and Trade—Dispute Settlement Panel Report on United States Taxes on Automobiles', *International Legal Materials*, vol. 33, 1994, pp.1397-1459. See also: E. Phillips, 'World trade and the environment: the CAFE case', *Michigan Journal of International Law*, vol. 17, 1996, pp.827-863.

⁷⁶ GATT, 'General Agreement on Tariffs and Trade -Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna' (1994) at p.894.

⁷⁷ GATT, 'General Agreement on Tariffs and Trade -Dispute Settlement Panel Report on United States Taxes on Automobiles', *International Legal Materials*, vol.33, 1994, pp.1397-1459, at pp.1441-2. See also the GATT Panel report on Canada-Herring and salmon, BISD 355/98, para. 4.6.

⁷⁸ Art. 30 Vienna Convention on the Law of Treaties

⁷⁹ WTO, 'Second Ministerial Conference of the World Trade Organisation: Press Pack', <<http://www.wto.org>>.

⁸⁰ Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment', at pp.345-50.

The argument remains valid that unilateral trade action may be the only resort available if other remedies such as UN Security Council actions under art. 41 of UN Charter are an unrealistic or unavailable option. For example, in the tuna-dolphin dispute, the fact that dolphins were listed on the CITES Appendix II was not enough to save U.S. legislation which attempted to restrict imports on tuna from jurisdictions where dolphin-protecting practices were not sufficiently effective.

Arguments in favour of a broadened social clause

The strongest arguments in favour of a trade-linked social clause stand on the universality and indivisibility of international human rights standards,⁸¹ and the need to promote better compliance with such standards in this era of continuing environmental degradation, and weakening union power under deregulatory economic policies.⁸² Trade-related human rights violations can include ecologically damaging economic activities which threaten local communities, forced resettlement, exploitative child labour, violence against the critics of commercial activities, wrongful imprisonment, and restrictions on freedom of association and collective bargaining, amongst others. As one indication of the brutality of some regimes, in 1996 264 trade unionists are reported to have been killed because of their union activities.⁸³

Some commentators argue that with trade liberalisation, highly mobile capital, and economic globalisation, governments are competing for direct foreign investment partly by reducing environmental regulation, corporate taxation, wages, working conditions and freedom of association.⁸⁴ This is the downward pull or race-to-the-bottom thesis.⁸⁵ Advocates of a social clause argue that if production and trade involve non-compliance with fundamental human rights standards, this is an unfair trade advantage and can be equivalent to 'social dumping'.⁸⁶ It is also suggested that globalisation is impacting on human rights as governments attempt to reduce public deficits by slashing social, health, education and anti-poverty programmes, thereby jeopardising economic and social rights. Parallels can be drawn in the environmental context. It is suggested that increasing global competition encourages producers to not internalise environmental costs so that their costs of production are lower, possibly leading to 'eco-dumping'.⁸⁷ An assessment of the empirical evidence on this issue is beyond the scope of this paper, but whether labour and environmental protection costs are often a determining factor for MNCs investing and remaining in a jurisdiction, is obviously a central question.⁸⁸ Many commentators suggest that it is not a dominant factor. There is, however, evidence of continuing violations of human rights and environmental standards available in abundance from the UN's Human Rights Commission, Commission on Sustainable Development and the ILO.

⁸¹ Many of the ILO Convention provisions are also reflected in the international Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights).

⁸² R. D'Souza, 'Linking labour rights to world trade: trade or workers' rights?', *HURINET- The Human Rights Information Network* <hurinet-development@mail.comlink.apc.org>, 19 November 1997.

⁸³ B. Jordan, 'Labour rights: international instruments and their application', *Summary record of presentations, Public hearings on the social clause: human rights promotion or protectionism? Brussels, 17 and 18 June 1997, Subcommittee on Human Rights, Committee on Foreign Affairs, Security and Defence Policy*, <<http://www.europarl.eu.int/dg7/hearings/sc1b/soclause/en/doc1.htm>>, 1997.

⁸⁴ J. Bhagwati, 'Trade liberalisation and 'fair trade' demands: addressing the environmental and labour standards issues', *The World Economy*, vol.18, 1995, pp.745-759 at p.746.

⁸⁵ Haworth and Hughes, 'Trade and international labour standards: issues and debates over a social clause', at p.185.

⁸⁶ M. Khor, 'The World Trade Organisation, labour standards and trade protectionism', *Third World Resurgence*, no.45, 1994, pp.30-34 at p.30.

⁸⁷ D. Reed, 'An instrument of global environmental policy', in D. Reed (ed.), *Structural Adjustment, the Environment, and Sustainable Development*, Earthscan Publications Ltd., London, 1996, pp.3-23 at p.17.

⁸⁸ Haworth and Hughes suggest that transnational corporations invested in Asia in the late 1980s and 1990s because of the attractively low labour costs in the region: Haworth and Hughes, 'Trade and international labour standards: issues and debates over a social clause', at p.180.

Trade liberalisation and the collapse of state-socialism are enabling multinational corporations to invest in, and produce and trade from countries with appalling human rights practices, and international law offers little in the way of regulation of multinational corporations. Such multinationals, according to a 1995 UN study, account for two-thirds of the world trade in goods and services: one-third in intra-firm transactions and the other one-third in inter-firm transactions.⁸⁹ Critics of this globalisation say that it is marginalising some regions, such as most parts of Africa, and that it is empowering multinational corporations at the expense of governments and populations. Mounting criticisms of the proposed OECD Multilateral Agreement on Investment seems to be eclipsing the limited debate about the GATT/WTO social clause,⁹⁰ although protests against globalisation generally are growing.⁹¹ For example at the 1998 WTO Ministerial Conference an estimated 10,000 protesters against free trade are reported to have rallied in Geneva.⁹² Although opponents of the MAI share the human rights concerns which motivate many the proponents of the GATT/WTO social clause, MAI critics also emphasise sustainable development obligations under international law.

Supporters of the social clause argue that today many governments are subordinating human rights concerns to their trade agendas. Human Rights Watch, a major human rights international NGO, has noted that in 1997 the major powers showed an increasing tendency to ignore human rights when they proved 'inconvenient to economic or strategic interests'.⁹³ Human Rights Watch has argued that corporations and governments from the U.S., France, Germany, Spain and Italy have all been securing lucrative trade deals with China, a State which has a grim human rights record. Trade is also expanding with other States guilty of serious human rights violations such as Azerbaijan, Turkmenistan, Armenia, Georgia, Russia, Serbia, Turkey, Uzbekistan, Albania, Belarus, Bulgaria, Georgia, Macedonia, and Serbia. Multinational oil and mining companies have been implicated in human rights violations in countries such as Myanmar (Burma), Indonesia, Nigeria, and Colombia because the continuation of their activities has been partly contingent on the effective suppression of opposition, even if there is no direct corporate involvement in that suppression. Human Rights Watch argues that with the contraction of government foreign aid budgets, MNCs are now better placed to influence host governments' policies, but often fail to do so to protect human rights.⁹⁴ African trade unionists have also deplored the increasing incidence of exploitative child labour in Africa; a continent recognised as suffering disproportionately under trade liberalisation and globalisation. In Australia recent Government responses to the recognition of native title, the waterfront dispute and the One Nation phenomenon can also be seen as examples of this subordination of human rights concerns to a trade-promotion agenda. Allegations of numerous instances of human rights violations associated with the activities of multinational corporations engaged in large-scale development projects, often in collaboration with government agencies, have been documented by the International Peoples' Tribunal on Human Rights and the Environment.⁹⁵ There is also a

⁸⁹ Chakravarthi Raghavan, 'TNCs control two-thirds of world economy', 1 Feb 1996.

⁹⁰ See for example, , 'Joint NGO statement on the Multilateral Agreement on Investment to the Organization for Economic Cooperation and Development endorsed by 565 organisations in 68 countries', HURINet – the Human Rights Information Network, , 4 March, 1998.

⁹¹ Peoples' Global Action and People's News Agency (PNA), 'Global Protests Against WTO and MAI: 3rd international press release May 18, 1998', HURINet—The Human Rights Information Network <hurinet-development@mail.comlink.apc.org>, 11 June 1998; twnet@po.jaring.my, 'Globalisation under attack ... or not', HURINet—The Human Rights Information Network, <hurinet-development@mail.comlink.apc.org>, 19 June 1998.

⁹² Twnet@po.jaring.my, 'WTO party marred by anti-globalisation protests', HURINet—The Human Rights Information Network, <hurinet-development@mail.comlink.apc.org>, 24 June 1998.

⁹³ K.P. Foley, 'Monitor criticizes economic approach to human rights', *HURINet-The Human Rights Information Network* <hurinet-development@mail.comlink.apc.org>, 5 December 1997; Haworth and Hughes, 'Trade and international labour standards: issues and debates over a social clause', at p.180.

⁹⁴ R. Dicker, 'Human rights and the activities of multinational enterprises', Summary record of presentations, public hearings on the social clause: human rights promotion or protectionism? Brussels, 17 and 18 June 1997, Subcommittee on Human Rights, Committee on Foreign Affairs, Security and Defence Policy, <<http://www.europarl.eu.int/dg7/hearings/sc1b/soclause/en/doc1.htm>>, 1997.

⁹⁵ S.H. Mendlovitz, 'Statement of the International Peoples' Tribunal on Human Rights and the Environment: Sustainable Development in the Context of Globalization', *Alternatives*, vol.23, 1998, pp.100-146.

growing international legal and academic literature which identifies the linkages between human rights and the environment.⁹⁶ It is only a small step to argue further that the environment, production and human rights are issues which can be embraced within the concept 'trade-related'.

Therefore, one strong ground for arguing for the use of the WTO processes to promote human rights and sustainable development is that the current extensive array of UN procedures for responding to breaches of human rights and environmental standards is inadequate. The ILO does have elaborate supervision and review processes for countries which have ratified ILO Conventions. Governments are supposed to report on compliance to the ILO every two to five years, or more often if requested. Reports are sent to representative employer and employee organisations for comment. States' reports and comments are considered annually by an independent Committee of Experts on the Application of Conventions and Recommendations (CEACR). That committee's report is then considered by a tripartite ILO Conference Committee on the Application of Conventions and Recommendations which can discuss problems and trends with member governments. A final report is then considered at the plenary session of the International Labour Conference.⁹⁷ But in 1995 more than 80% of States' reports were either so late or incomplete that they could not be considered in detail by the Committee of Experts.⁹⁸ The ILO also has complaints mechanisms which enable Convention violations to be scrutinised by ILO bodies. Under the more commonly used procedure, a tripartite committee established by the ILO Governing Body can examine representations made by employer or employee organisations about a Convention violation. A lesser used procedure enables a violation complaint by a government, an ILO Conference delegate or the ILO Governing Body to be examined by an independent Commission of Inquiry established by the Governing Body. The committee can make recommendations which governments can accept or dispute before the International Court of Justice.⁹⁹ The ILO also has a particularly active and effective Committee on Freedom of Association which meets three times a year and which, by 1996, had heard some 1800 complaints concerning alleged non-compliance with the principle of freedom of association. Other compliance-promoting activities include direct contacts between members and the ILO and technical assistance programmes.¹⁰⁰ In recent years the ILO Governing Body has been attempting to strengthen the ILO's supervisory procedures.

Compliance with non-ILO international human rights standards is monitored through States' reports to treaty committees and the Human Rights Commission (at least once described as 'often government propaganda on human rights'),¹⁰¹ individual communications, and special communications procedures.¹⁰² There are some

⁹⁶ United Nations, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment: Final Report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur*, Forty-sixth session, Item 4 of the provisional agenda, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, 6 July 1994, E/CN.4/Sub.2/1994/9; E/CN.4/Sub.2/1994/9/Corr.1; A.E. Boyle and M.R. Anderson ed., *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996; D. McGoldrick, 'Sustainable development and human rights: an integrated conception', *International and Comparative Law Quarterly*, vol.45, 1996, pp.796-818; A. Sachs, 'Upholding human rights and environmental justice' in *State of the World 1996*, L. Brown, J.N. Abramovitz, C. Bright et al., ed., Earthscan Publications Ltd., London, 1996, pp. 133-151.

⁹⁷ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp.154-5.

⁹⁸ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp.154, 159.

⁹⁹ By 1996 the former complaints mechanism had been used only 59 times and the latter only 23: Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at p.155.

¹⁰⁰ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp.156-8.

¹⁰¹ Hilary Charlesworth, 'The UN treaty-based human rights system: an overview' in *Indigenous Peoples, the United Nations and Human Rights*, S. Pritchard, ed., Zed Books and the Federation Press, London and Sydney, 1998, pp. 66-73 at p.72.

¹⁰² United Nations, *Human Rights Questions: Implementation of Human Rights Instruments: Effective implementation of*

moves afoot to strengthen human rights protections with the proposed creation of an International Criminal Court, but the jurisdiction of that court is expected to be one of last resort for gross violations of human rights (possibly genocide, war crimes and crimes against humanity). This development does not detract significantly from the need to consider alternative mechanisms for promoting compliance with international human rights and environmental standards. Diplomatic representations to Governments about allegations of human rights violations are another compliance-promoting mechanism.

Such human rights monitoring processes are not necessarily effective. Many commentators acknowledge that the core UN human rights machinery is under-resourced, cumbersome, politically-charged and overburdened, and therefore often ineffective in the short term. Human rights treaty committees report to the UN General Assembly periodically. Human rights lawyer, Hilary Charlesworth, has suggested that although it is a fairly well developed system, 'in practice it is in many ways deeply flawed, and in need of significant reform'.¹⁰³ She has called for a strengthening of the system, including by expelling from the regime recalcitrant States which do not adhere to minimum human rights standards.¹⁰⁴

The Commission on Human Rights does have some effective processes, such as the system of special rapporteurs and fact-finding missions,¹⁰⁵ and working groups¹⁰⁶ which enable quick, efficient and independent on-site investigations to be conducted.¹⁰⁷ But it is arguable that some of the global NGO campaigns and organised consumer boycotts of products produced by companies using allegedly exploitative practices, such as Nestle, Nike and Shell, have had more impact on these companies than UN processes. But while such NGO campaigns may be more effective than governments which are often unable or unwilling to ensure compliance with domestic laws, there is little accountability with some of these NGO campaigns, and it may be preferable to have allegations investigated and ruled upon by an appropriate international body. Also, if the GATT/WTO dispute resolution procedures resulted in sanctions being instituted against particular products and companies, until prescribed standards were complied with, this could be a particularly effective remedy, as the NGO campaigns have shown. Sanctions are also one of the last-stage remedies, with various softer forms of GATT/WTO dispute resolution procedures available for use first.

Some commentators suggest from a more economic perspective, that developing country fears of a social clause impacting negatively on their economy are unfounded because the enforcement of core labour standards has been found not to impact significantly on economic performance in developing economies. Nor would a social clause imply standardisation of wage levels between countries.¹⁰⁸ For the developed economies, continuing high

international instruments on human rights, including reporting obligations under international instruments on human rights: Note by the Secretary-General, General Assembly, Fifty-first session, Agenda item 110(a), 11 October 1996, Distr. General, A/51/482.

¹⁰³ Charlesworth, 'The UN treaty-based human rights system: an overview' in *Indigenous Peoples, the United Nations and Human Rights*, at p.66.

¹⁰⁴ Charlesworth, 'The UN treaty-based human rights system: an overview' in *Indigenous Peoples, the United Nations and Human Rights*, at p.72.

¹⁰⁵ ECOSOC Res. 1235 (LXII) (1967) provides that violations of human rights can be examined and responded to, and be the subject of annual debate within the Commission on Human Rights. For a discussion on the approach taken by the CHR under the resolution see H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Clarendon Press, Oxford, 1996, pp.388-453.

¹⁰⁶ Under ECOSOC resolution 1503 (XLVIII) (1970) a working group of up to five members can be convened to consider communications where there is a 'consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms', and to make reports to the Sub-Commission on Prevention of Discrimination and Protection of Minorities: H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Clarendon Press, Oxford, 1996, p.376.

¹⁰⁷ Human Rights Watch, 'Human rights mechanisms under attack', HURINET—the human rights information network <hurinet-ungeneral@mail.comlink.apc.org>, 3 February 1998.

¹⁰⁸ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at p.13; de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization', at p.450.

levels of unemployment are attributed to technological change through computerisation and automation which have displaced many employees, rather than labour costs. Other structural factors such as low commodity prices and terms of trade, transfer pricing, currency instability, restrictive business practices and the oligopolisation of markets are said to influence economic and employment statistics more than labour costs per se. So the social clause could be effective in remedying rights violations without necessarily causing negative economic impacts.¹⁰⁹

Arguments against the social clause

One of the strongest arguments against the inclusion of a social clause in the GATT/WTO agreements are that other multilateral institutions and processes exist to promote compliance with core human rights and environmental standards, as just described, and that the GATT/WTO dispute resolution processes are a blunt and inappropriate mechanism. But the ineffectiveness of some of these rights mechanisms has been noted. Such alternatives include the ILO, other specialised human rights and environmental treaty bodies, UN Charter procedures, and unilateral procedures. Other alternatives include bilateral aid programmes including financial and technological assistance, codes of conduct, and MOUs between international agencies, governments and industry,¹¹⁰ social and eco-labelling, NGO campaigns, ethical investment schemes¹¹¹ and extraterritorial applications of domestic law in permitted circumstances (such as to nationals operating abroad).

Governments and commentators who oppose the linking of trade and human rights argue that it is motivated by protectionist sentiment and a wish to shield stubborn and high unemployment levels in developed economies from increasing threats from cheaper imports from developing countries.¹¹² The main difficulty with this argument, as noted above, is that some empirical studies suggest that major multinational companies are not so footloose and do not necessarily relocate after capitalising on low core labour standards initially. Investment decisions and patterns of in-country specialisation are influenced more by factors such as relative factor endowments, technology and economies of scale.¹¹³ One study, for example, suggests that semiconductor firms in Malaysia have not relocated despite labour costs increasing significantly over a twenty-year period.¹¹⁴ It is not necessary; the argument goes, to include a social clause in the international trade regime because the main underlying factors influencing investment decisions and employment levels are not labour costs. Violations of core labour standards flow from poverty and weak state institutions and infrastructure rather than corporate calculations about trade advantage flowing from human rights violations.¹¹⁵ But these kinds of arguments could easily be used to persuade critics that the economic impacts of a social clause could be slight and that therefore such a clause should be supported.

Some critics suggest further that there is no international consensus on human rights standards and that they are not universal but a 'northern' and 'western imposition' which challenges national sovereignty.¹¹⁶ Using the WTO to promote a social agenda would be just a guise for 'dictating the national economic, social and political

¹⁰⁹ Khor, 'The World Trade Organisation, labour standards and trade protectionism', at p.31, 34.

¹¹⁰ Haworth and Hughes, 'Trade and international labour standards: issues and debates over a social clause', at p.191.

¹¹¹ Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp.18-19.

¹¹² Organisation for Economic Co-operation and Development, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, at pp.12-13.

¹¹³ J. Bhagwati, 'Trade liberalisation and 'fair trade' demands: addressing the environmental and labour standards issues', *The World Economy*, vol.18, 1995, pp.745-759 at p.754.

¹¹⁴ K. Ong-Giger, *The Political Economy of the Semiconductor industry in Malaysia: The New International Division of Labour Revisited*, Thesis submitted for the degree of Doctor of Philosophy, Australian National University, Canberra, 1996.

¹¹⁵ Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia-Pacific Region*, at p.viii.

¹¹⁶ See generally: S. Pritchard, 'The jurisprudence of human rights; some critical thought and developments in practice', *Australian Journal of Human Rights*, vol.2, no.1, 1995, pp.3-38.

policies of the developing countries'.¹¹⁷ I do not wish to revisit the universalist/relativist debate about human rights in this paper but wish to just note that the emergence of human rights institutions in Asia, and a proposal for a regional organisation, is one of many testaments to the expanding reach of international human rights norms.¹¹⁸ Others argue that the ILO is best placed to promote compliance with ILO labour standards, not the WTO.¹¹⁹

Conclusions

I recognise that the social clause has met a determined opposition, but in this brief paper I have suggested a few reasons for continuing the debate about the merits of the proposal, and for challenging some of the arguments raised by its opponents. A primary consideration is that the enforcement of human rights and environmental standards could be significantly strengthened were the WTO dispute resolution mechanisms to be brought into play on these issues. As Leary has noted, the issue will not go away because civil society continues to lobby governments to better consider the social aspects of trade liberalisation.¹²⁰ I have also suggested that the inclusion of the rights of indigenous peoples, environmental standards, and human rights linked to the environment, could be brought within the current social clause debate.¹²¹ A positive international response to these issues could address in part, the concerns which many members of international civil society are expressing in relation to globalisation.

Sustainable economic growth needs to be based on good governance and recognition of human rights standards, ethical responsibility and accountability by transnational corporations, and the protection of civil society. With the dramatic erosion of economic and political security in many East Asian and South-east Asian economies, human rights and environmental standards are at increased risk. But human rights and environmental standards have been threatened or breached in many jurisdictions for a long time, and this is unacceptable given the parlous state of the indicators on the condition of our global environment. The inclusion of a broad-ranging social clause in the GATT/WTO agreements could be one way of moving more surely towards sustainable and peaceful development, and humane governance.

¹¹⁷ M. Khor, 'KL meeting brings south together on WTO', <hrnet.development@Germany.EU.net>, 8 August 1996.

¹¹⁸ suriya@samart.co.th, 'ASIA: Thailand backs ASEAN commission on rights', HURINet—The Human Rights Information Network, <hurinet-asia-pacific@mail.comlink.apc.org>, 27 May 1998.

¹¹⁹ Khor, 'The World Trade Organisation, labour standards and trade protectionism', at p.34.

¹²⁰ Leary, 'The WTO and the social clause: post-Singapore', at p.120.

¹²¹ This argument has been made also in Charnovitz, 'The World Trade Organisation and social issues'.

Transnational Corporations and Human Rights

Sarah Joseph*

Introduction

The primary duty-bearer in international human rights law is the State. This circumstance reflects the danger that the State may pose to one's enjoyment of human rights. However, it is clear that non-government entities also threaten the enjoyment of human rights—one only has to note the impacts of secessionist groups, fanatical terrorists, organised crime, abusive spouses, and of course there is scope for human rights abuses by artificial persons like corporations. Today I wish to talk in particular about international human rights and transnational corporations, or TNCs.

This talk is not meant to portray TNC activity as inherently hostile to human rights. Indeed, it is often argued that TNC activity generally leads to greater enjoyment of human rights through, for example, increased economic development.¹

However, the following examples show that TNCs are capable of human rights abuse. TNCs can breach labour rights by mistreating and exploiting their workforce; they can cause extensive environmental damage (note for example the activities of BHP at the Ok Tedi Mine in PNG). Lax safety regulations can threaten the rights to health and life of workers and people in the vicinity of manufacturing plants, as was evinced horribly in 1984 in Bhopal, India, when toxic gas leaked out of a Union Carbide Plant, killing 2000 people and injuring over 200,000. Aggressive marketing policies can conceal the dangers of dangerous products, and pose an unacceptable threat to the life and health of consumers; relevant products might include untested drugs, automobiles with minimal safety features, and cigarettes. TNCs may unacceptably influence the political processes within a State, undermining democratic rights. For example, the overthrow of the Allende government in 1972 in Chile was allegedly engineered in large part by ITT, an American TNC.² As a final example, media monopolies can manipulate the flow of information to the public, posing problems with regard to freedom of expression, and again corrupting democratic processes.

This leads to the question: can any accountability for human rights abuses by TNCs be found in international human rights law?

Human Rights in the Non-governmental Sphere

International human rights law has made some progress towards imposing human rights duties in the non-governmental sphere. Human rights duties are recognised as having a tripartite character: States are required to respect, protect and ensure the enjoyment of human rights by persons within jurisdiction. In order to protect and ensure the enjoyment of human rights, States must control private entities by preventing them from abusing the human rights of others.³

Thus, I shall take as my point of departure the idea that international human rights law has evolved so as to protect us to some extent from non-governmental human rights abuse. Human rights duties are not imposed directly on non-government actors, but indirectly, through the agency of the State. However, specific problems

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¹ See, eg, W.H. Meyer, 'Human Rights and MNCs: Theory Versus Quantitative Analysis', (1996) *HRQ* 368, 391-397.

² See 53 UN ESCOR (1822nd mtg) 19, 22, UN Doc. E/SR, 1822 (1972).

³ See, eg, ICERD, Article 2(d), CEDAW, Article 2(e), CAT, Article 4; ICCPR Article 2(1), *Velásquez-Rodriguez v Honduras* (Judgment of the Inter-American Court of Human Rights of July 29, 1988), (1989) 28 ILM 291, *Yılmaz-Dogan v Netherlands* (CERD Communication No. 1, reprinted at (1995) 2 IHRR 348, *LK v Netherlands* (CERD Communication no. 4/1991), reprinted at (1994) 1(1) IHRR 32. See generally, A. Clapham, *Human Rights and Private Bodies* (1993), especially Chapter 4.

arise with States being required to control TNCs.

Characterisation of Human Rights Abuse

First of all, problems arise with regard to the characterisation of certain TNC activities as human rights abuses.

It cannot be assumed that the human rights obligations which should be imposed on TNCs are the same as those imposed on States. States and TNCs have different capacities and different roles. For example, it is doubtful that the same moral rectitude should be required of TNCs, who perceive their prime duty as being to maximise profits for shareholders, and governments, whose duties are to all of the people that they represent.⁴

Imposition of human rights duties on non-governmental entities poses a fundamental liberal dilemma, as the imposition of duties limits the 'liberties' of those non-governmental entities. Regulation could easily evolve into over-regulation. Such theoretical considerations do not arise when one is attributing human rights duties to governments. Delineation of TNC duties is therefore problematic. Such delineation requires a careful balance between the commercial and even human rights of the TNC, and the rights of others.⁵

I will illustrate this dilemma with one example.

Since 1993, Chrysler Corporation, the fifth largest magazine advertiser in the USA, had required magazines to notify it in writing of upcoming issues containing controversial subject matter. Late last year the magazine industry complained that Chrysler was practising a form of censorship. For example, it came to light that at least one controversial story had been removed, a short story about homosexuality from *Esquire* magazine, after a Chrysler threat to remove its advertising if the offending story was published. Chrysler responded by removing the express policy, but warned that it would still monitor magazine content.⁶

The magazine stance was hailed as a victory for freedom of expression. However, should Chrysler's policy be seen as a violation of freedom of expression, as Chrysler effectively gained significant editorial control over the contents of a substantial part of the US media? Unchecked corporate censorship of this sort would lead to the oversanitisation of art and journalism.

On the other hand, one might note that this control was gained via a threat to withdraw advertising dollars. Should Chrysler not have the right to advertise where it wishes? Certainly, it seems harsh to impose any duty to advertise on Chrysler.

The issue of corporate censorship is one of many possible examples where TNC activity might seem obnoxious, but one might wonder whether it is so obnoxious that it should somehow be subjected to legal regulation.

Power of TNCs and Power of States

A second, perhaps more obvious problem arises with regard to enforcing human rights against TNCs through the medium of a State.

⁴ See T. Donaldson, *The Ethics of International Business* (1989), 84; see also M.J. Whincrop and M.E. Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law', (1997) 25 *Federal Law Review* 51, 71.

⁵ For an incisive analysis of the proper assessment of 'ethical' and 'unethical' business practices, see M. Davies, 'Just (don't) do it: Ethics and International Trade', Inaugural Public Lecture at the University of Melbourne, 21 May 1997.

⁶ See Dave Phillips, *Detroit News*, 'Chrysler drops magazine censorship policy', October 14, 1997, reproduced at <http://www.detnews.com/1997/autos/9710/15/10140009.htm>. See also *Wall Street Journal*, 30 April 1997.

(i) Host States

TNCs are uniquely international, uniquely mobile, and more importantly, uniquely powerful non-government entities. Indeed, TNCs are often more powerful than the States in which they operate, usually referred to as host States. This is usually the case when comparing the relative power of a TNC and a developing country. TNCs may use their economic muscle to discourage the imposition of domestic sanctions, especially when a State perceives TNC investment to be necessary to facilitate economic development. Furthermore, some States lack the technical expertise to regulate and monitor complex corporate activities.⁷ Where such a disparity of power exists, it perhaps seems unrealistic to hold host States accountable for TNC activity which occurs within their jurisdiction.

(ii) Host States

One way around this is to perhaps demand greater regulation of TNCs by their States of origin, their home States, which are usually reasonably powerful developed countries. However, there are problems with the idea of requiring home States to regulate their TNCs.

First, international human rights law has not evolved so as to hold States generally responsible for the actions of their non-government citizens, including corporate citizens, abroad.⁸ In the absence of such laws, home States may be reluctant to regulate their TNCs, as they may perceive that such regulation puts their corporations at a competitive disadvantage.⁹ It may also be difficult to enforce TNC regulation offshore, as such extraterritorial enforcement may on occasion constitute an unacceptable intrusion into the host State's sovereignty.¹⁰

Secondly, power imbalances may exist between a TNC and its home State. For example, one could speculate that Shell as an entity is more powerful than its home State, the Netherlands.

Finally, a TNC's choice of home-state, ie. the state of incorporation, may be a simple matter of convenience. As Johns has argued, it is therefore absurd for this decision to have lasting international legal significance.¹¹ Indeed, greater regulation could encourage flight to a more corporate-friendly State.

Therefore, the optimum solution may be the development of direct international human rights regulation of TNCs.

International Regulation: Codes and Guidelines

Moves towards international regulation of TNCs occurred in the 1970s, 1980s and early 1990s, as part of the international impetus for a 'New International Economic Order'.

Draft Codes of conduct for TNCs were drafted under the auspices of UN Commission on TNCs. These Codes

⁷ M. Lippman, 'Transnational Corporations and Repressive Regimes: The Ethical Dilemma', (1985) 15 *California Western International Law Journal* 542, 545.

⁸ See F. Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', (1994) 19 *Melbourne University Law Review* 893, 895-896.

⁹ See *New York Times*, March 27, 1995, D1, quoted in P. Alston and H. Steiner, *International Human Rights in Context* (1996), 883, commenting on President Clinton's proposal for a 'voluntary code of human rights principles for American companies operating abroad':

'The chief problem is that America's allies, who are its chief economic competitors, have no such codes, and companies in those nations stand to sweep on business that the United States passes by.'

¹⁰ J. Braithwaite, 'Regulation of Transnational Corporations: Towards a Code of Conduct for Australian Businesses Operating Offshore', Discussion Paper for the ICJ (Victorian Branch), January 1997, 19.

¹¹ Johns, above, n8894.

spelt out guidelines for ethical TNC behaviour.¹² For example, draft provisions required TNCs to respect fundamental human rights, and to refrain from interfering in a State's political affairs.

These Codes, had they ever been adopted, had fairly weak enforcement provisions. The implementation provisions called for dissemination and implementation by home and host States, who were to report to the UN Commission on TNCs on these activities. The UN Commission would monitor and report on the Code's implementation, and clarify the meaning of the Code. However, the UN Commission was not to draw conclusions as to the compatibility of certain conduct with the Code, so there was no provision for actual finger-pointing at delinquent TNCs.

The last draft Code appeared in 1990 and was last discussed by the UN General Assembly in 1992. In that year, the Code was abandoned, with the Australian Delegate to the UN Commission on TNCs describing the Code movement as a relic of a bygone era.¹³ Indeed, those comments accurately reflect the abandonment of the New International Economic Order in favour of moves towards a global free market.

In 1992, the Code movement was abandoned in favour of drafting 'Guidelines for Global Business' to provide 'soft law' guidance for appropriate TNC behaviour. However, even this idea has stagnated.¹⁴

Consumer Power

One of the more potent present weapons against TNC immorality may be the consumer. I will give just one famous recent example of this.

Nike have suffered bad publicity and a consequent plunge in profits from revelations about its labour practices and factory conditions in South-East Asia. In the latest blow, legal action has been brought under Californian Trade Practices legislation, alleging that Nike has misrepresented its overseas business practices to Californian consumers. This example shows that current laws, not originally designed to protect human rights, can be used inventively to impose some sort of human rights accountability on TNCs. Pressure on Nike presumably inspired its CEO to announce, on 12 May 1998, several labour initiatives to be implemented in Nike's Asian factories, including raising the minimum age of workers, greater access for NGOs and external audits of Nike factories, expansion of education programs for workers at factories, and funding of university research into issues related to global manufacturing and responsible business practices.¹⁵

Grass-roots consumer activism may be one of the better present mechanisms for encouraging TNC respect for human rights. However, the imposition of duties on TNCs often has the knock-on effect of imposing greater burdens on consumers in the form of more expensive products. There is therefore a limit to the amount of altruistic lifestyle diminution that consumers will accept in order to improve the lot of others. It cannot be left to consumers to decide that the people who make a product are more important than the product itself.¹⁶

Conclusion

In conclusion, I urge that international human rights law must be adapted to reflect the present reality that TNCs are very powerful international agents, capable of inflicting massive human rights abuse. The present invisibility of TNCs in international human rights law facilitates impunity for their human rights abuses. Efforts to impose human rights duties on TNCs must be accompanied by efforts to clarify the content of those

¹² See, eg, UN Doc E/1990/94, 12 June 1990.

¹³ Allan Asher, Australian Delegate, UN Commission on Transnational Corporations, Report on the 18th Session, New York, April 1992, 16, cited in Braithwaite, above, n10, 22.

¹⁴ Braithwaite, above, n10, 23.

¹⁵ http://www.nikebiz.com/social/labor/labor_nj.html?main.html

¹⁶ A. Hughes, 'Is Business Everybody's Business?', (1995) 20(2) *Alternative Law Journal* 71, 73. See also Lippman, above, n7, 551.

duties.

The need for such an adaptation of the international human rights regime is becoming more urgent. Philip Alston notes in his 'Handmaidens' article that the primary concerns of the current international agenda-setters are not human rights values, but the potentially inimical values such as economic efficiency, free market access, minimalist economic regulation, and minimal government.¹⁷ Those agenda-setters include the most powerful States like the United States, international financial institutions like the World Bank and the International Monetary Fund, and transnational corporations. A reconfiguration of international human rights law, or at least the addition of mechanisms to recognise the power of non-State agenda-setters, is urgently needed lest human rights become an anachronistic international value in the age of the global free market.¹⁸

¹⁷ P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation', (1997) 8 *European Journal of International Law* 435, 440-448.

¹⁸ *Id.*, especially at 442 and 447.

Entrenching Corporate States: The Multilateral Agreement on Investment

Krysti Justine Guest¹

Introduction

When US President Bill Clinton addressed the Australian Parliament amidst great fanfare on November 20 1996, he told us triumphant tales of world conversion to Western democracy and freedom, a conversion made possible through the logic of globalisation. Clinton's definitions of freedom and democracy, however, were not located within the usual human rights paradigm: for him, these concepts were interchangeable with the notion of 'free trade'. Accordingly, Clinton announced in seemingly stunned amazement, that "some two thirds of the people on our planet have no access to a telephone ... More than half the people of the world are two days walk from a telephone."² Although cast within the traditional rhetoric of 'human rights violation', Clinton's revelation was directed at harnessing rights discourse to the US agenda for a free trade agreement on telecommunication and information technology at the then imminent World Trade Organisation ministerial meeting. The intended beneficiaries of such an agreement were, of course, not the pitied third world type trudging for days to reach a hallowed phone, but US based transnational corporations, whose global exports of information technology are estimated to be worth \$US 500,000m annually.³

The logic of Clinton's argument (newly defined human right to a phone, legitimising Government agenda, aimed at facilitating private corporate profit) crystallises the symbiotic tangling of State and corporate interests in the international economy. And it seems to me that it is precisely this increasingly blatant alignment of public political space with private profit which has generated the extraordinary community resistance against the newest addition to the not so free trade agreement family, the OECD's draft Multilateral Agreement on Investment. Before I detail the MAI's key provisions, I think its important to contextualise the Agreement within the political economy of globalisation, an economy which the MAI both reflects and which it will serve to further legally entrench.

Economic Globalisation and International Trade Agreements

The glossy phrase economic globalisation generally refers to the current, unprecedented expansion of multinational capitalism throughout the globe. The power behind, and beneficiaries of, this increasing economic integration are Northern based trans-national corporations,⁴ which operate primarily through foreign direct investment in private industry, primarily agriculture, pharmaceuticals and increasingly services and telecommunications.⁵

Through monopolistic strategies of mergers, acquisitions and alliances, TNCs wield immense and highly concentrated political/economic power. A 1995 UN report has documented that trans-nationals control over 33 per cent of private global assets, 70 per cent of products in international trade and generate annual sales of

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² The Honourable William Jefferson Clinton, Address to the Australian Parliament, 20 November 1996 (Senate, *Debates*, vol. S. 180, p. 5729 at p. 5734).

³ "Nations Agree to Abandon Computer Tariffs:", *Sydney Morning Herald*, 13/12/1996

⁴ *Background Document prepared by the Secretary-General on the Relationship Between the Enjoyment of Human Rights, in particular International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations*, E/CN.4/Sub.2/1995/11, p. 2. The Report states that of the 100 largest TNCs, 53 are located in Western Europe, 27 in the United States and 14 in Japan.

⁵ *Ibid.*, p. 4.

over \$7 trillion.⁶ Significantly, these sales do not necessarily occur on the much vaunted 'free market': intra-firm transactions account for 40 per cent of world trade, granting trans-nationals the possibility of setting prices as global monopolies.⁷

International trade agreements are no innocents within this political economy, but have been key mechanisms for facilitating globalisation and the legal power of TNCs. The 1994 Uruguay Round of the GATT prised apart traditional definitions of trade and authorised hardcore, deregulation in the areas of services (including finance and communications), trade-related intellectual property rights and trade-related investment measures. All of these areas reflect the priorities of TNCs and were gains coercively agitated for by the United States openly in response to TNC pressure.⁸ Negotiations on these novel areas were opaque, with little informed input from the South.⁹

United Nations research has documented that the detrimental effect of economic globalisation on world economic, social and cultural rights has been savage. For example, through economic might, locational flexibility and subcontracting, the quality of employment offered by TNCs is often precarious, repetitive and operates in oppressive and abusive conditions.¹⁰ Notwithstanding TNCs concentration of economic power, their operational practices often create a decreasing spiral of employment opportunities, affecting unemployment world wide and often decimating local industry.¹¹ Via World Bank/IMF structural adjustment programs which dictated the removal of barriers to foreign investment, trans-national corporations vast economic reach has undermined the power of many Southern States to retain control over provision of public services, food, and employment, thereby subjecting the well being of whole communities to the vagaries of transnational capital flight. Similarly, income disparity both within countries and between countries is increasing, with the poorer 60% of the world receiving only 5.6% of world income. Accordingly, in the view of many third world commentators, economic globalisation and supporting free trade agreements have become the new weapons of economic apartheid,¹² or through a political frame, a new era of colonisation by faceless corporate powers.¹³

Key Provisions of the MAI: Positive Discrimination for Foreign Investors

With the advent of the MAI, first world commentators have finally begun to appreciate this third world analysis. The stated aim of the MAI is to facilitate the unfettered movement of capital across international borders. It applies to all laws, policies and administrative decisions of the State which are deemed to limit the freedom of foreign investors of State parties. Investment is defined to cover all conceivable aspects of direct and indirect property rights, from an enterprise to intangible property related interests.

Contrary to what is claimed by its supporters, the MAI does not entrench a regime that merely requires non-discrimination between foreign and local investment. Rather, the majority of the draft Agreement provides for a regime of positive discrimination in favour of foreign investors, a regime which inscribes not only economic but increasing political powers for transnationals. For example, unlike most other multilateral trade agreements, the MAI assigns foreign investors a legal status equal to that of State contracting parties.

⁶ *Background Document prepared by the Secretary-General*, op. cit., p. 2.

⁷ *Ibid.*, p.11.

⁸ Peter Drahos, "Global Property Rights in Information: The Story of TRIPs at the GATT", (1995 13(1) *Prometheus*, 6 at 8; Chakravarti Raghavan, *Recolonisation: GATT, the Uruguay Round and the Third World*, Zed Books: London, 1990.

⁹ Raghavan, *ibid.*, pp. 60-76.

¹⁰ These conditions do not merely prevail in the South, but are clearly operating in the North in industries such as textile outworking.

¹¹ For example TNCs switch of focus to low labour intensive services and industry, their practices of mergers and acquisitions which result in operational closures and an increase in speculative trading, which have a destabilising effect on unemployment.

¹² Mazrui, "Global Apartheid: Structural and Overt" (1994) 19 *Alternatives*, 185.

¹³ Raghavan, op. cit.

Although the draft Agreement establishes fetters on a wide range of Government activity, these fetters can generally be reduced to three key categories:

- most favoured nation and non-discrimination provisions
- provisions prohibiting performance requirements and
- investment protection provisions.

Most Favoured Nation and Non-Discrimination Provisions

Firstly, the MAI prohibits Government action which transgresses the two cornerstone provisions of trade law – that foreign investors should receive no less favourable treatment than domestic investors (non-discrimination principle) and that any favour extended to investors of one State must be extended to all States (most favoured nation principle).

There are two things to notice about these provisions. Firstly, in direct contradiction to claims to non-discrimination, these provisions in fact permit foreign investors to be treated more favourably than domestic investors. Secondly, in order to trigger these provisions, Government's must differentiate between two "investors". However, the MAI merely defines an "investor" as a natural or a legal person, with no specific link to any form of investment, meaning that the provision could be triggered when the domestic person would not consider themselves an investor as such, a situation which has implications for the reach of the Agreement.

Performance Requirements

The second key trigger for the MAI is the prohibition on Governments attaching performance requirements which support local industry to foreign investment. Prohibited performance requirements include:

- achieving a given level of domestic content or product
- transferring technology, production processes or other proprietary knowledge to a domestic body
- achieving a given level of research or development
- hiring a given level of nationals (although this appears to permit equal opportunity laws) and
- establishing a joint venture with domestic business.

The prohibition on performance requirements is an extremely significant aspect of the MAI, and is aimed at ensuring foreign investors have near complete autonomy over investment expenditure by disabling Government decisions as to investor operation. This provision has nothing to do with classical MFN or non-discrimination principles, and in fact, as it only relates to the operation of foreign investment, it again positively discriminates in favour of foreign investors. This provision is particularly curious, given that a key argument in support of foreign investment is that it stimulates the local economy and promotes valuable technological transfer. If this mantra-like justification were in fact true, it would seem appropriate for Governments to be able to legally formalise such benefits, rather than relying on a foreign investor's voluntary and self-interested conduct.

In line with the prohibition on performance requirements, the MAI mandates that Government shall grant work permits to the executives, managers, specialists and members of the board of directors of a foreign investor, regardless of labour market programs or immigration restrictions. By overriding usual immigration and labour laws, these provisions assign a superior class of citizenship-type rights for such investor residents.

Investment Protection

The third trigger for the MAI are the far-reaching provisions protecting foreign investment. The investment protection regime prohibits the unreasonable and/or discriminatory¹⁴ impairment (an extremely vague term not defined) and the direct and indirect expropriation (also not defined) of an investment. Expropriation is permitted only for a non-discriminatory purpose in the public interest in accordance with law and compensation is immediately payable. Although unclear, it is likely that if an investment is impaired, compensation would also be required.

Recalling the breadth of the definition of an 'investment', these protection measures are arguably the most radical and far reaching aspects of the MAI. They will operate as a brake on the rights and confidence of Government to make an unidentifiable range of laws and policies which may impair or directly/indirectly expropriate an investment, or, permit such laws and policies only at the risk of liability for compensation. This results in the extraordinary situation that democratic governments will have to pay foreign investors for the privilege of making the decisions for which they were elected. A well known example of such a situation is a case under similar provisions in the North American Free Trade Agreement (NAFTA) where the US based Ethyl Corporation has sued the Canadian government for \$251m in damages for passing a law prohibiting on health grounds production in Canada of a gasoline additive produced by Ethyl. Other examples of impairing or expropriating acts could be environmental laws requiring clean disposal of waste, laws requiring negotiation with indigenous persons over land, laws requiring specific human rights standards be met (such as disability standards) or legal decisions requiring a rise of the minimum wage. The vagueness of these provisions makes their operation completely unpredictable.

Investment protection measures also extend to prohibiting any restriction on transfer of investment capital out of the country. Again, contrary to the justification that foreign investment necessarily stimulates local economies, this provision permits an investment purchased or relevant profits to be immediately relocated. It will also make it extremely difficult to legally respond to the instability and capital flight of short term and speculative investment, which so significantly contributed to the social crisis in Indonesia, or to prohibit situations where foreign investors can pull their capital before sacking their workers and then claiming bankruptcy.

Dispute Resolution

If any of these provisions are triggered, proposed dispute resolution procedures grant a foreign investor the power to take a State to an international tribunal or directly sue the State in the State's domestic courts, thereby granting foreign investors superior legal rights over local investors in their own jurisdiction. The power of a foreign investor to directly sue a State cloaks such an investor with legal status equal to that of a State party, and is a power entrenched neither in the World Trade Organisation or the NAFTA dispute procedures. There is no provision for a State or a citizen to take action against a foreign investor as there are no fetters in the MAI on an investor's behaviour.

Curtailling Actions of Future Governments

Finally, the MAI strictly curtails the actions of future governments. Although States can provide a list of exemptions to the MAI at the time of signature, these exemptions generally cannot be increased in the future (the standstill principle). Notably, Australia's list of exemptions fails to cover the impairment/expropriation provisions. Similarly, although a State can submit a notice to withdraw from the MAI five years after it has become operative, the withdrawal will only take effect in fifteen years. Therefore, once signed, the MAI will lock Government's in for the next twenty years, a requirement which seemingly disregards any commitment to the principle of parliamentary sovereignty.

¹⁴ The current draft of the Agreement has not settled on whether this limitation will be "unreasonable and discriminatory" or "unreasonable or discriminatory".

A Question of Sovereignty or Substantive Democracy?

Finally, I would like to briefly comment on the analytical pitch of the much repeated concern that the MAI will negatively effect Australia's sovereignty. In my view, conceptualising the MAI as a 'crisis in sovereignty' or a sign of 'losing sovereignty' is a limited and dangerous framework, as it assumes the prior existence of a stable 'sovereign' State, independent of private economic interests.¹⁵ This pristine separation of political and economic powers has always been illusory, with Government agendas always already compromised by corporate interests which, for example, control media representations of government policy or which significantly dictate the national economic agenda through the power to restructure the workforce. Within a globalised economy, this entangled relationship between Government and corporate interests is magnified in such a way that no State, however desirous to resist engaging with international trade treaties, is able to sustainably disengage from the multinational capitalist arena. Arguments nostalgically hoping for a return to an illusory sovereignty merely smother these complex questions, and allows Senator Kemp to dismiss community concerns by issuing soothing statements about parliamentary scrutiny of the MAI. Perhaps more urgently, deeply conservative political groups, such as One Nation, are able to effectively invoke the glib rhetoric of a 'return to sovereignty' as an promised panacea to both the economic insecurity and social alienation significantly caused by globalisation and the tangible sense that traditional democratic aspirations are increasingly fashioned to support a corporate agenda.

Rather than a focus on sovereignty, it seems to me that what the MAI clearly raises is the question of the relationship between multinational capitalism (however unfashionable a concept), political power, Government and the impact of this relationship on the possibilities of substantive democracy.

As commentators like our chair Anne Orford have noted, the MAI's radical limitations on Government's legislative and policy options expands the public space for TNCs, whilst increasingly shrinking local peoples capacity to make democratic decisions over their social economy.¹⁶ Orford notes that this shift "has profound implications for the utility of liberal concepts of democracy and human rights in the public sphere."¹⁷ For example, Government desire to intervene in the vagaries of capitalist market forces through social justice legislation would, under the MAI, be scrutinised only through an investor protection lens, thereby radically redefining social justice concerns as infringements on potential private profit. By expanding corporate space in hitherto assumed public areas, what is defined as politically negotiable through democratic change is increasingly limited and the possibility of figuring the State as a site of substantive democracy becomes remote.

As the concept of democracy increasingly shifts away from a sphere of community informed decision-making, it takes on the characteristics of democracy as management, focussed on facilitating the market through regulatory and efficiency issues, where politics is treated as having somehow already happened elsewhere, for example, in the boardrooms of Patricks Stevedoring or Western Mining.¹⁸ As Patricia Williams argues, this shift in the meaning of democracy reinscribes the public social contract increasingly through the symbology of private contract, ordaining a political order governed by privately purchased public rights. Those who cannot afford to purchase these rights, such as social security recipients, are consigned to a collective mindset of public burden/menace, subjected to constant scrutiny and violent derision.¹⁹

I find this framework for analysing the implications of the MAI for more useful than reactionary calls for a return to an illusory lost sovereignty. It also offers a meaningful analysis for social groups, such as indigenous peoples, who have always been beyond the protective armour of traditional state sovereignty.

¹⁵ For a discussion of the operation of the concept of 'sovereignty in international law, see Anne Orford "The Uses of Sovereignty in the New Imperial Order, (1996) 6 *Australian Feminist Law Journal* 63.

¹⁶ See for example Anne Orford, "Locating the International: Military and Monetary Interventions after the Cold War" (1997) 38(2) *Harvard International Law Journal* 443.

¹⁷ *Ibid.*, p. 473.

¹⁸ For a discussion of 'democracy as management', see David Kennedy, "Receiving the International" (1994) 10 *Connecticut Journal of International Law* 1.

¹⁹ Patricia J. Williams, *The Alchemy of Race and Rights*, London: Virago, 1993, pp. 15-43.

Conclusion

International investment does require regulation. But what needs to be regulated is the increasingly expanding power of TNCs, regulation that should occur within political and economic frameworks aimed at ensuring substantive democracy for all social groups. The MAI's focus on the rights of TNCs, without one suggestion of their legal responsibilities to the communities they so deeply affect in the South and increasingly the North, is a recipe for further entrenching political and economic dislocation, where the corporate states will continue to disenfranchise and dispossess communities worldwide.

Non-State Actors in International Law

The Foreign States *Immunities Act 1985*

Rosalie Balkin*

The *Foreign States Immunities Act 1985* entered into force, by and large, on 1 April 1986. This legislation was enacted following a Report by the Australian Law Reform Commission on Foreign State Immunity (Report No. 24). The wording of the legislation is identical to that of the draft Bill attached to the Report.

One of the main purposes of the Act is to establish a procedure to enable individuals to commence legal action against a foreign State in an Australian court. In this regard s.9 of the Act provides that 'except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding'.

The act effectively implements the doctrine of restrictive foreign State immunity in terms of which a foreign State is generally immune from the jurisdiction of local courts. Exceptions include contractual situations and other commercial transactions, claims for personal injury and damage to property and matters such as copyright, patents and trademarks. (This list is not inclusive.)

Part III of the Act deals with service and judgments and provides for two methods of service, the first being service effected in accordance with an agreement to which the foreign State is a party (s.23). This method of service has never been utilised. The second method of service is through the diplomatic channel. In this regard s.24 requires the initiating process to be delivered to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to the Department of Foreign Affairs.

Since I began keeping a register early in 1988 there have been forty-one instances of the service of initiating process through the diplomatic channel. Of these sixteen have been actions against the Republic of Nauru.

The usual procedure is for the solicitor handling the matter to send the relevant documents to the Attorney-General's Department for processing. The relevant documents are the initiating process, a request in accordance with Form 1 in the Schedule to the Act, a Statutory Declaration of the plaintiff stating that the rules of court in respect of service outside the jurisdiction of the court has been complied with, and if English is not an official language of the foreign State, a translation of the initiating process into that language together with a certificate in that language signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the initiating process.

These documents are processed through the Office of International Law. Once we are satisfied that they are in the correct form, they are forwarded to the Administrative Law area of the Department of Foreign Affairs and Trade, which in turn, sets in motion service through the diplomatic channel. This usually involves sending the documents by diplomatic bag to the foreign country and getting a person from the Australian embassy or mission in that country to serve them on the equivalent department of the Department of Foreign Affairs and Trade.

This system has worked relatively well in the past. However, as you may be aware, in recent months the Department of Foreign Affairs and Trade has rationalised the number of its foreign missions. The mission in Nauru was one of those to be closed down. This meant that the Government was obliged to find an alternative method of service but obviously one that accorded with the requirements of s.24 of the Act.

So, when next we received a request for service on the Republic of Nauru, after some discussion, we (being the Attorney-General's Department and the Department of Foreign Affairs and Trade) decided to serve the documents on the Consulate-General of Nauru in Melbourne. We took the view that, because the Consulate-

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General is the only permanent mission of the State of Nauru in Australia and because the Australian Government and the Government of Nauru had agreed that the Consulate-General is authorised to perform diplomatic as well as Consulate functions, the Consulate-General is an organ of the State of Nauru equivalent to the Department of Foreign Affairs and Trade.

The Consulate-General, after initially accepting the documents, subsequently returned them to the Department of Foreign Affairs and Trade on the basis it was not an organ of the State of Nauru equivalent to the Department of Foreign Affairs and Trade and neither was it authorised to receive the documents pursuant to s.24(4) of the Act. Nonetheless, despite the return of the documents, the delegate of the Minister for Foreign Affairs issued a certificate pursuant to s.40 of the Act stating that service of the documents had been effected in accordance with s.24 of the Act. This certificate was duly presented to the court, which accepted it as evidence of service of the documents on the basis that s.40(5) of the Act provides that a certificate issued under the section 'is admissible as evidence of the facts and matters stated in it and is conclusive as to those facts and matters'.

Default judgment was then entered against the Republic of Nauru.

The republic of Nauru countered by initiating action in the Supreme Court of New South Wales challenging the effectiveness of the service due to non compliance with the Act in a number of respects. It argued that the Consulate-General of Nauru in Melbourne was not a department or organ of Nauru equivalent to the Department of Foreign Affairs for the purposes of s.24 of the Act; that the Consulate-General therefore had no authority to receive delivery of initiating process for the purposes of the Act, that service did not take place outside Australia as contemplated by the Act, and that it was not apparent on the face of the certificate issued by the Minister's delegate that it was accompanied by the Statutory Declaration required by s.24(2)(b) of the Act.

Although the action in the Supreme Court was between the Republic of Nauru and the plaintiff, Vitascope Limited, the Attorney-General considering intervening in the action because it raised important issues under the Foreign States Immunities Act, including the constitutional validity of s.40(5) of the Act which provides for the certificate to be conclusive.

Before the matter was actually heard by the Supreme Court, it was settled—the Republic of Nauru apparently having agreed to pay an amount of money by way of settlement of the contractual claim. This left the Australian Government with the problem of what to do in future cases. The terms of settlement did not include any statement that service on the Consulate-General was acceptable to the Republic of Nauru. Another plaintiff has now sought to initiate action against the Republic of Nauru utilising the procedure set out in s.24 of the Act. The current dilemma is how to proceed.

Four possibilities present themselves. The first is again to serve on the Consulate-General of Nauru for the reasons already discussed. The second is to ask the Australian mission in Suva to deliver the documents when next an official from that mission visits Nauru—the problem here is that such visits take place on an infrequent basis. The third option would be to attempt service by post but this raises the question what would happen if Nauru denied ever receiving the documents. It is not clear in such a case whether it would be possible to rely on the common law rule of service by post with regard to proof of service. The fourth option would be for Australia to negotiate an agreement with the Republic of Nauru pursuant to s.23 of the Act to establish an acceptable method of service. However, this is, at best, a long term option and it is not at all clear that Nauru would wish to facilitate a method of service by such an agreement.

The Designation of Archipelagic Sea Lanes in the Indonesian Archipelago

This is a brief update on the proposal first put by Indonesia to the International Maritime Organization on 30 August 1996 for the designation of three north-south archipelagic sea lanes through its archipelagic waters.

By way of a brief chronology of events, when it met in December 1996, the Maritime Safety Committee deferred consideration of the issue to the meeting of the Sub-Committee on the Safety of Navigation in July 1997. At that meeting, the Sub-Committee proposed draft 'General Provisions for the Adoption, Designation and Substitution of Archipelagic Sea Lanes' and the Indonesian proposal was deferred again. Indonesia was invited to submit a revised proposal taking into account the General Provisions for consideration at the May 1988 session of the Maritime Safety Committee.

Indonesia duly submitted its revised proposal to the Maritime Safety Committee in February 1988. In so doing it confirmed that it had accepted the principles in the General Provisions. This enabled the Committee at its May meeting to adopt Indonesia's archipelagic sea lanes proposal.

The effect of this adoption means that Indonesia can now proceed with its plan to designate the three north-south archipelagic sea lanes on 5 December 1988, for entry into force on 5 June 1999.

Indonesia also confirmed, in line with the General Provisions, that its proposal for three north-south archipelagic sea lanes was a partial proposal only. Indonesia's acceptance of the General Provisions, coupled with its acknowledgement that its proposal to designate three North-South sealanes was a partial proposal only, has the following consequences:

- the IMO will retain continuing jurisdiction over the process of adoption of archipelagic sea lanes until such time as all sea lanes, including all normal passage routes through the archipelago, have been adopted as required by UNCLOS. At least twelve archipelagic sea lanes have been identified by Australia, so this provision has practical consequences;
- Indonesia is obliged periodically to inform IMO of its plans for conducting further surveys and studies in regard to the submission to the IMO of further proposals to designate all remaining normal passage routes, as required by UNCLOS;
- Indonesia has acknowledged that the right of archipelagic sea lanes passage may be exercised in all other normal passage routes as required by the provisions of UNCLOS;
- Indonesia has acknowledged that the right of innocent passage may be exercised through Indonesia's territorial sea and archipelagic waters outside of the designated archipelagic sea lanes.

What is there still to do?

Indonesia is obliged to prepare charts within a period of six months indicating the axis lines from entry to exit points of each archipelagic sea lane. It has stated that, in so doing, the axis lines will approximate the normal passage routes used for international navigation.

This is consistent with the view which Australia has adopted throughout the negotiations, namely, that axis lines should approximate normal sea lanes and should be safe for navigation. The United States does not necessarily agree with this view. It has argued that axis lines should be positioned to ensure maximum width of the sea lanes without regard to the suitability of navigation and overflight. Nevertheless, at the May meeting of the Maritime Safety Committee, the United States delegation did not insist that their point of view be accepted.

Indonesia has also voluntarily undertaken to include in its charts a depiction of the 10% rule referred to in Article 53(5) of UNCLOS. That rule provides that ships and aircraft engaged archipelagic sea lanes passage shall not navigate closer to the coast than 10% of the distance between the nearest point on islands bordering the sea lane.

The 10% rule has proved very difficult to interpret and, despite intensive discussions within IMO there remain a number of unresolved issues in relation to the operation of the rule. These include how it applies in circumstances where islands are located wholly within the sea lane (the so-called islands in the stream issue), as well as the basis of the calculation of the rule (that is, from which point should the 10% limitation be calculated and applied—the island or the axis line).

Another matter that has not been resolved is the issue of air routes above the archipelagic sea lanes. During the negotiations, the International Civil Aviation Organisation (ICAO), as the international organisation charged with the responsibility for the safety of international civil aviation, submitted a paper to the IMO raising significant concerns at the prospect of civilian air routes being approved without regard to ICAO's usual systems and procedures for ensuring the safety of international civil air traffic.

In this regard Article 39(3) of UNCLOS requires 'aircraft in transit passage to observe the Rules of the Air established by the International Civil Aviation Organisation as they apply to civil aircraft; State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation'.

The ICAO raised further interpretive issues relating to the relationship between sea lanes and air routes which cannot be resolved by the IMO or by the ICAO alone. The non-resolution of those issues had the potential for delaying the approval of the Indonesian sea lanes. In order to avoid this occurring, a pragmatic solution to these issues was adopted. In essence, it was agreed that the air routes above the designated archipelagic sea lanes would be applicable only to State aircraft, to which the ICAO rules were not applicable. Any civil or commercial aircraft would remain subject to the normal ICAO requirements.

One final issue that should be noted was the reaction of the Philippines to the designation of the three north-south archipelagic sea lanes in the Indonesian archipelago. Apart from Indonesia, Australia and the United States, the Philippines took the most active role in the working group in the debate on both the General Provisions and Indonesia's archipelagic sea lanes designation proposal. Given the possibility that the Philippines may eventually follow Indonesia's example and submit its own archipelagic sea lanes designation proposal to the IMO, this is not surprising.

Interestingly, the Philippines were at pains to stress that no two archipelagic situations were the same (in the sense of geographic configurations, number and proximity of islands, etc). The Philippines emphasised in the course of the negotiations that, while the lessons derived from the process taken by the IMO to adopt Indonesia's archipelagic sea lanes proposal would 'guide' other archipelagic States, the discussions and agreements on Indonesia's archipelagic sea lanes proposal 'should apply exclusively to Indonesia's archipelagic sea lanes and must not be interpreted as precedents for future applications for designation of archipelagic sea lanes'.

Any proposal by the Philippine Government to designate archipelagic sea lanes would, however, seem to lie well into the future, given that it has not yet promulgated any archipelagic base lines in accordance with UNCLOS. From the interventions of the Philippines delegation within the sub-committee, it was difficult to assess what plans, if any, the Philippine Government currently has regarding the submission of an archipelagic sea lanes designation proposal to the IMO. Obviously, however, despite assertions to the contrary by the Philippine delegation, the essential principles which have been incorporated into the General Provisions would guide any such future negotiations.

Non-Governmental Organisations and the Interaction between International Law and Australian Law

Christopher Ward *

The topic of this paper is the role of non-governmental organisations (NGO's) in the process of interaction between international law and Australian law. That role is important because of the new significance of international law in Australian law, and because of the specialised knowledge now held by various NGOs.

Public international law is relevant to Australian law both directly, in cases of legislative incorporation, and indirectly; in terms of government policy, the exercise of administrative discretions, and the interpretation of legislation and development of the common law by the judiciary. In particular, international law as developed in the context of multilateral treaties continues to set standards in fields such as human rights, including indigenous rights, women's rights and economic and social rights; labour standards; environmental protection and international trade.

In addition to multilateral treaties, non-binding or "soft law" principles such as the Rio Declaration and the draft statement of Indigenous Rights at the United Nations will continue to set standards by which the conduct of States is and will be measured.

The Source of NGO experience in international law

The status of NGOs in international law has been well documented. It is the backbone of the newly emerged, or emerging, "civil society".¹ Dianne Otto has documented the importance of the United Nations Economic and Social Council (ECOSOC) to the increased participation by NGOs at the international level.² The mechanism established by ECOSOC under resolution 1296 formed the initial basis of the ability of NGOs to participate in the development of international law.

Today, NGOs at the international level participate in increasing numbers in the activities of ECOSOC Committees. They also participate, as observers or more rarely as full participants, in United Nations conferences. In addition, many NGOs participate to some extent in the delegations sent by States to the international conferences. Finally, NGOs frequently run parallel conferences at the same time as the United Nations conference.

Recent examples of note include the 1992 United Nations Conference on Environment and Development and the 1995 Fourth World Conference on Women at which some 2,900 NGOs participated on a formal or informal basis.³

Although accreditation, and consequent participation in international conferences has the direct effect that NGOs can influence to some extent the outcomes of such gatherings, it also has a secondary effect of providing NGOs with a unique expertise and knowledge of the process and content of public international law. The importance of NGOs in the domestic implementation of international norms has recently been recognised by the United Nations. Chapter 27 of Agenda 21, adopted at the United Nations Conference on Environment and Development in 1992 is devoted to the role of NGOs. Paragraph 27.8 states that:

Governments and international bodies should promote and allow the participation of non-governmental organisations in the conception, establishment and evaluation of official mechanisms and formal

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¹ See Joyner, *C The United Nations and International Law* (1997) Cambridge University Press at 37.

² Otto D, *Nongovernmental Organisations in the United Nations System: The Emerging Role of International Civil Society* (1996) 18 Human Rights Quarterly 107.

³ Ibid.

procedures designed to review the implementation of Agenda 21 at all levels.

Similarly, the Fourth World Conference on Women also concluded with a recognition of the ongoing role of NGOs. Paragraph 20 of the Beijing Declaration states that:

The participation and contribution of all actors of civil society, particularly women's groups and networks and other non-governmental organisations and community-based organisations, with full respect for their autonomy, in cooperation with Governments, are important to the effective implementation and follow-up of the Platform for Action.⁴

So how do NGOs fulfil this new mandate?

NGOs in the Australian context

I first note that the scrutiny of government policy and implementing legislation by NGOs may lead to a tension between the activities of NGOs in the domestic legal system and the interests of the government in question. It is in the very nature of the work of NGOs, and particularly NGOs in the environmental and human rights fields, that they will more often than not come into conflict with the prevailing attitudes of the governments of the State in which they work. It has been said that "even a government which is publicly committed to allowing NGOs to operate freely may react with hostility when NGOs draw attention to their abuses of human rights".⁵ Nevertheless, in Australia, there is an awareness, both on the part of NGOs, and on the part of the Australian government, that some increased interaction between government and NGOs is desirable.⁶ The traditional lobbying and law reform role of certain NGOs has been formalised in some areas. The linkage between the Australian government and the NGO sector in the context of the Climate Change Summit included the creation of a non-governmental organisation forum. Individual NGO delegates were selected to represent the forum on the Australian delegation to that conference. Following the summit the Department of Foreign Affairs and Trade continued to co-ordinate with a sub group of the NGO Forum. More importantly, in 1995, the climate change non- governmental organisations consultative group was formed to ensure better co-ordination between NGOs and the Australian government representatives involved in the negotiations in the international arena.⁷

A similar approach has been seen in relation to the general implementation of the Agenda 21 principles in Australia. The Australian Inter-Governmental Committee for Environmentally Sustainable Development⁸ regularly consults with a number of non-governmental organisations including the World Wide Fund for Nature, Australian Conservation Foundation, Greenpeace, Aboriginal and Torres Strait Islander Commission, and other community and business organisations.⁹ Similar developments have occurred in relation to the development of the government's Oceans Policy.

⁴ United Nations Document A/CONF.177/20 (17 October 1995) para 20.

⁵ Posner, M, 25 Columbia Human Rights Law Review 269.

⁶ This is also the case in relation to international NGOs. For example, the Earth Council has commenced a number of initiatives designed to increase the participation of NGOs and other members of civil-society in decision-making at the local level. The Earth Council notes that "Participation of different interest groups in national decision-making processes is a necessary condition for development to be sustainable". The Earth Council will establish national secretariats to "facilitate informed civil society participation". The National Councils for Sustainable Development play a central role in this regard.

⁷ Brazil, P *The impact of treaties and treaty-making power on the resources industry*; Australian Mining and Petroleum Law Association Yearbook 1997.

⁸ The Committee provides the forum for key national issues pertaining to the implementation of the National Strategy for Environmentally Sustainable Development and the National Greenhouse Response Strategy,

⁹ *Institutional Aspects of Sustainable Development*: Australian Report to 5th Session of the United Nations Commission on Sustainable Development; 1 April 1997.

These consultative developments are to be welcomed. They are, of course, in addition to the traditional means by which NGOs have had a voice in law reform, such as, for example, the making of submissions to law reform commissions and parliamentary committees, in which references to international law principles are frequent.

It has been suggested that the Joint Standing Committee on Treaties will assist in enabling NGO voices to be heard.¹⁰ In its report to the 5th session of the United Nations Commission on Sustainable Development, the Australian government stated that: "This package of treaty reforms will enhance domestic involvement in, and ensure Parliamentary scrutiny of, treaties to which Australia intends to become a party. In this way treaty reforms are expected to have a positive impact on the operation and implementation of international environmental law in Australia."

Although this is undoubtably true, the input of the NGO community to the Joint Standing Committee on Treaties is of primary relevance to the signature or ratification by Australia of treaties, and not to the subsequent implementation of treaties in Australia. The fact that the Committee has recently demonstrated its ability to become more involved in the treaty-making process at an earlier stage, as seen in relation to the proposed Multilateral Agreement on Investment, will not assist NGOs in ensuring the observance of Australia's existing international obligations in domestic law. Instead, it is to be hoped that the consultative developments in other areas of government continue to flourish.

NGOs and the Judicial Process

The nature of the common law system in Australia, as well as Australia's dualist relationship with international law has placed a significant focus on the judicial process in the field of international law. It is in this area that I see the most opportunities for increased participation by NGOs.

The developments in the common law recognition and application of international law have been well documented by others.¹¹ International law is of significant practical relevance to litigants before Australian courts. In view of the significance of international law in the judicial process in Australia, it is perhaps surprising that NGOs with their established knowledge of international law do not play a greater role in the context of litigation. It is rare for an NGO to be a formal participant before an Australian court.

The issue can be seen as one of standing, that is, access to the courts. The rules of standing in most Australian jurisdictions standing rules are based on the concept of "special interest".¹² Essentially, this test requires a potential litigant to demonstrate that he or she has more than a mere intellectual or emotional concern, or that the litigation could affect his or her proprietary, business or economic interests, social interests or cultural interests.¹³ The "person aggrieved" test, which is applied to some statutory remedies is similar.

It is extraordinarily difficult for an NGO to satisfy these tests. Only in a small number of Australian cases have NGOs and community sector organisations been active participants. In the case of judicial review of administrative decisions, there has been some broadening of the traditional special interest test, to include entities which can represent the public interest in what has become known as "public interest litigation".¹⁴ In addition to development of the common law rules of standing along these lines, there have been some limited legislative developments such as the *Endangered Species Act 1992 (Cth)* which defines an "interested person" to include "an organisation or association...whose objects or purposes include, and whose activities relate to,

¹⁰ Ibid.

¹¹ Shearer I in *International Law and Australian Federalism* (1997) at 34-61.

¹² See Australian Law Reform Commission Report No 78 *Beyond the door-keeperstanding to sue for public remedies* at p.25.

¹³ Ibid.

¹⁴ One NGO which has been successful in obtaining standing in this context include the Australian Conservation Foundation; e.g. *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70.

the protection or conservation of, or research into, listed native species or listed ecological communities".¹⁵

Although these developments are to be welcomed, they do not aid the NGO with specialised international law knowledge who wishes to bring that expertise to the attention of a court in matters other than public interest litigation. There are limited opportunities to develop the status of international law before Australian courts, and it seems to me that those entities with a detailed knowledge of that international law have a stake in assisting the courts to reach a constructive and well-founded decision.

One obvious solution to the lack of participation by NGOs before Australian courts would be to liberalise the rules of standing. Such a proposal is not without some support. The Australian Law Reform Commission has twice recommended that the restrictive rules of standing be liberalised. Most recently, in 1996, it recommended that any person be able to commence and maintain "public law" proceedings unless the legislation in question reflected a contrary intention, or the litigation would unreasonably interfere with the ability of a person with a private interest to deal with the litigation differently.

However, this view is not universal. The Committee on International law in National Courts of the International Law Association recently resolved that rules of standing should generally not be liberalised to permit individuals or groups to introduce actions based on international law.¹⁶ There are clear cost and resource implications as a result of any increase in party participation in litigation. As a result, increased flexibility in standing rules may not be appropriate in this context.

The right of intervention carries with it similar difficulties. An intervenor becomes a full party to the proceedings, and can participate in the litigation and be subject to orders for costs.¹⁷ The Courts have indicated that the power to allow interventions will be exercised only on strict criteria. In *Levy v State of Victoria*,¹⁸ a number of parties were permitted to intervene in the proceedings. Brennan CJ explained the basis of the decision to allow intervention with the following words:

Nothing short of ... an affection of legal interests will suffice.

It can readily be seen that such a right of intervention will not normally assist an NGO which wishes to place a particular view of international law before the court, but which does not have any other interest in the litigation.

Of more relevance is the possibility that an NGO could be called upon as a "friend of the court". This process has received particular attention in the United States of America and to a lesser extent in Canada. In Australia, the procedure has been limited to a small number of cases. Most recently, in *Levy v State of Victoria*,¹⁹ the High Court granted leave to make submissions as amicus to the Media and Arts Alliance and the Australian Press Council. Brennan CJ, noting that the matter was one for the discretion of the court, stated that:

The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.²⁰

¹⁵ s131.

¹⁶ Draft Resolution, 68th Conference of the International Law Association; Committee on International Law in National Courts, para. (f).

¹⁷ *Beyond the Door-keeper* ALRC Report No.78, para.6.5. The right to intervene is usually the subject of statute. For example, s11 of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) is one of the sources of authority for intervention of the Human Rights and Equal Opportunity Commission. Another method by which intervention may be authorised is by virtue of s 12 of the Administrative Decisions Judicial Review Act.

¹⁸ (1997) 146 ALR 248.

¹⁹ *supra* note 18.

²⁰ His Honour also noted that where the "Court has parties before it who are willing and able to provide adequate

In the same case, Kirby J stated that:

The acknowledgment of the fact that courts, especially this Court, have unavoidable choices to make in finding and declaring the law, makes it appropriate, in some cases at least, to hear from a broader range of interveners and amici curiae than would have appeared proper when the declaratory theory of the judicial function was unquestioningly accepted.²¹

He stated that intervenors and amici may have “perspectives which help the Court to see a problem in a context larger than that which the parties are willing, or able, to offer”.

Finally, Kirby J noted that:

...this Court should adapt its procedures, particularly in constitutional cases or where large issues of legal principle and legal policy are at stake, to ensure that its eventual opinions on contested legal questions are informed by relevant submissions and enlivened by appropriate materials.

The amicus procedure is more or less well established in the courts of other countries, and in particular in the courts of the United States and Canada. In most cases, the submissions of a friend of the court could be made in writing, with resultant savings in cost and time.

It seems possible for international NGOs to come within this definition and participate in litigation as a friend of the court. As was demonstrated earlier, NGOs frequently have knowledge and expertise beyond that of the parties, particularly where the Commonwealth is not a party to litigation which raises questions of the interpretation of treaties. They certainly bring a perspective beyond that of the parties.

As a result, it seems that in many cases involving international law, NGOs with appropriate expertise and interest may be able to seek participation as a friend of the court. This should not be viewed by the courts as a negative. Nor should it be seen as the opening of the floodgates. There remain, proportionately, very few cases which involve international law to such an extent that NGO participation would be warranted.

Finally, there is a method by which NGOs could play a significant role in the judicial process with no legislative amendment or change in judicial procedures. That is, of course, through communication and liaison with the profession and with litigants. This is a process which occurs already to some extent, particularly in environmental and indigenous rights cases, and recently in relation to the family law case of *B v B*. There are obviously pressures on both NGOs and litigants which limit this process. These pressures include the resource limitations on NGOs, and the time and budgetary pressures of lawyers and litigants. Nevertheless, formal interaction between litigants, their lawyers, and NGOs must be of benefit both to the individual litigant in a case in which international law is relevant, and to the NGO which wishes to see the relevant principles of international law applied appropriately, or at all, in the judicial context. It is my hope that with increased communication between NGOs and the legal profession, a greater understanding of international law and its potential in the domestic context could be reached in Australia.

assistance to the Court it is inappropriate to grant the application. C.f. *Kruger v the Commonwealth* (Matter M 21 of 1995).

²¹ *Supra* note 18.

The Role of Non-State Actors in International Law

Helen Durham ¹

There are few case studies involving international litigation and civil society. This paper looks at the role Non-State actors played in assisting the instigation of the Advisory Opinion on the legality of nuclear weapons at the International Court of Justice (ICJ) and the role civil society played during proceedings. In particular it focuses upon the actions of the World Court Project—an NGO Coalition.

Like many instances involving coalitions of civil society, the history of the involvement of Non-State actors in the ICJ nuclear weapons opinion is complex and often depends upon which section of the coalition is asked. What there is no doubt about is the fact that the ruling undertaken by the ICJ in 1996 was urged on, and even perhaps brought about, by the efforts of Non-State actors, in particular a Non-Governmental Organization (NGO) Coalition called the World Court Project. The World Court Project consists of three major organizations—the *International Association of Lawyers Against Nuclear Arms*, the *International Physicians for the Prevention of Nuclear War* and the *International Peace Bureau*. Another definite issue in relation to this case is that for the first time in international litigation, Non-State actors played a considerable role in the legal proceedings submitting “citizens evidence”.

A) Non-State actors’ role in initiating the case

Much of the early efforts to obtain a legal ruling appear to be conducted in New Zealand. In March 1987 Harold Evans, a retired district judge from Christchurch, sent an Open Letter to the Prime Ministers of New Zealand and Australia urging them to initiate action to lead to an advisory opinion “on the legality (or otherwise) of nuclear weaponry at international law”.² The then Australian Prime Minister Bob Hawke responded to the letter advising that he considered arms control negotiations a more promising avenue for disarmament and New Zealand’s David Lange, whilst giving cautious encouragement, eventually formally rejected the proposal.

However the idea of using the ICJ to determine the status of nuclear weapons was spreading and gaining rapid support in citizens groups through-out Australia and New Zealand. Late in 1987 Evans wrote a lengthy letter to all 71 UN Member States with diplomatic accreditation in Canberra and Wellington asking their governments to bring a UN Resolution on the topic. A number of diplomats expressed interest and passed the proposal to their governments.

In 1988 lawyers from 11 countries assembled in Sweden for the inaugural meeting of the *International Association of Lawyers Against Nuclear Arms* (IALANA). The creation of this association had been proposed by *Lawyers’ Committee on Nuclear Policy* (LCNP, USA) and the *Association of Soviet Lawyers* in 1987.

A year later IALANA held its first World Congress in The Hague with an attendance of more than 200 lawyers from all over the world. The major theme of discussion at the Congress involved the relationship between nuclear arms and international law. A closing declaration was drafted stating that the use or threat of use of nuclear weapons constitutes a violation of international law and should be regarded as a war crime and a crime against humanity. Attention and support was given to the concept of obtaining an opinion from the ICJ and *The Hague Declaration of the International Association of Lawyers against Nuclear Arms* was adopted by IALANA’s General Assembly at the Congress. The 11th Article of The Hague Declaration states:

IALANA **appeals** to the Government of all States Members of the United Nations to take immediate steps towards obtaining a resolution by the United Nations Assembly under article 96 of the United

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² Mothersson K *From Hiroshima to the Hague: A guide to the World Court Project* International Peace Bureau Geneva, 1992 p. 31.

Nations Charter, requesting the International Court of Justice to render an advisory opinion on the illegality of the use of nuclear weapons;³

The General Assembly of the United Nations is permitted to request such opinions under Article 96(1) of the Charter.⁴ It is important to note that States cannot request advisory opinions from the International Court of Justice nor can they prevent the giving of an advisory opinion which the United Nations considers to be necessary for the proper exercise of its functions.

In the same year the *International Physicians for the Prevention of Nuclear War* (IPPNW) became interested in a judgment relating to nuclear weapons. IPPNW is a federation of physicians' organizations with affiliates in 76 countries and more than 200,000 members with a central goal of the abolition of nuclear warfare.⁵ At its' Montreal Congress IPPNW identified a second complementary route to obtain an Advisory Opinion from the International Court of Justice through the World Health Organization (WHO). WHO had recently completed a study on the effects of nuclear weapons and health which concluded that the only treatment of the health effects of nuclear warfare was the prevention of nuclear war.⁶

WHO and other United Nations Specialized Agencies are authorized pursuant to Article 96(2) of the Charter of the United Nations to request advisory opinions on matters relevant to their activities with the authorization of the General Assembly.⁷ In an agreement between the UN and WHO the latter is authorized to request advisory opinions from the ICJ "on legal questions arising within the scope of its competence".⁸

Also in 1989 the *International Peace Bureau* (IPB) endorsed the strategy of using international judicial methods to assist in attempts to eliminate nuclear warfare. The IPB is a global network of independent and nonaligned organizations with a permanent secretariat located in Geneva. Founded in 1892 it brings together groups of all sizes and types in the common pursuit of the non-violent settlement of conflicts.

For the next few years work continued on this concept through-out the world. Citizen's groups as diverse as trade unions, *Women's International League for Peace and Freedom* (WILPF), *World Peace Council*, *Friends World Committee for Consultation*, and Quaker groups became involved in supporting the proposal. Lobbying was undertaken at Commonwealth Bar Association meetings, at the Non-Proliferation Review Conference in Geneva and approaches made to a number of diplomatic missions in New York and Geneva. In 1992 IALANA, IPB and IPPNW together formally launch the World Court Project on Nuclear Weapons (World Court Project).⁹

In many ways the strength of the World Court Project can be seen to be the inter-play of unity and diversity between the three core organizations. Whilst all three worked jointly they also focused upon their specialised

³ *Nuclear Arms and the Law—Lawyers are Uniting* International Association of Lawyers Against Nuclear Arms Drukkerij Gebroeders Peters, Rotterdam 1990 p.24.

⁴ *Charter of the United Nations* Article 96 (1):
The General Assembly or the Security Council may request the International Court of Justice to give advisory opinion on any legal question.

⁵ Grief N *The World Court Project on Nuclear Weapons and International Law: A Joint Project Of The International Association Of Lawyers Against Nuclear Weapons, The International Peace Bureau and The International Physicians For the Prevention Of Nuclear War* Altetheia Press 1993, pp. viii-xiv.

⁶ See *Effects of Nuclear War on Health and Human Services* 2nd Ed. Geneva World Health Organization 1987.

⁷ *Charter of the United Nations* Article 96 (2):
Other organs of the United Nations and specialised agencies, which may at time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

⁸ *Agreement between the United Nations and the World Health Organization*, 1947-48 U.N.Y.B 919 Article X(2).

⁹ For a full account of citizen actions and activity through-out the World Court Project see Dewes K & R Green *World Court Project: How a Citizen Network Can Influence the United Nations* September 1995.

constituency— IALANA, the legal profession and diplomatic community—IPB, numerous grass-root groups and IPPNW, the medical profession.

For example in 1992 IPPNW began intense lobbying of delegations to the World Health Assembly, the membership meeting of WHO. That year concern was expressed by WHO's legal Counsel in relation to the competence of the Organization's referral capacity on this question. The issue was raised the next year and detailed discussion on competence resulted in a resolution adopted by secret ballot.

The question WHO asked the ICJ to determine in May 1993 was:

In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO constitution?

Meanwhile *Lawyers Committee on Nuclear Policy* (LCNP) as part of IALANA commenced lobbying at the United Nations in New York as part of the strategy to encourage the UNGA to request an Advisory Opinion. Mr Alan Ware, Executive Director of LCNP, had identified potentially supportive States by reviewing voting records in the UN of nuclear issues. Countries such as Mexico, Costa Rica, Colombia, Samoa and other Pacific States had a precedent of being supportive of anti-nuclear initiatives. In 1992 Ware commenced to lobby full time at the UN, providing States with material, position papers, discussing the matter at length with relevant diplomats and building up what he describes as a mixture of "trust and usefulness".¹⁰

Ware found that the strongest support was located within States belonging to the Non-Aligned Movement (N.A.M) and Pacific Island States. In late 1993 Zimbabwe suggested that the 110 members of N.A.M sponsor a resolution to the ICJ to determine the legal status of nuclear weapons. This proposal was controversial and it took a year of negotiations and lobbying before the resolution was put to the vote at the UNGA. Issues such as a push to have the matter determined important, thus requiring a two-third majority rather than mere majority,¹¹ and attempts to make the issue a "non-action vote" were dealt with.¹² On 15 December 1994, 78 nations voted in favour, 40 against and 36 abstained from Resolution 49/75K.

Resolution 49/75K of the General Assembly of the United Nations requested that the ICJ determine:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

B) The role played during proceedings by Non-State actors

Under Article 66(2) of the ICJ Statute the Court may receive written or oral submissions from Non-State parties:

The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

It was under this Article that IPPNW endeavoured to submit information in relation to the Advisory Opinion filed by WHO. However the Registrar wrote back advising that permission to provide the ICJ with information was refused despite careful consideration. The reasons given related to the circumstances of the case and the scope of WHO's request.

¹⁰ Interview with Mr Alan Ware, Executive Director *Lawyers Committee on Nuclear Policy*, New York Office December 1996.

¹¹ *Charter of the United Nations* Article 18.

¹² Ware interview op. cit.

It is interesting to note that to date there has never been a successful submission to the ICJ from a Non-State actor. In the *South-West Africa* advisory opinion permission was given to the International League for Human Rights to submit information pursuant to Article 66 (2) however the League failed to comply with the Court's orders in relation to the time period for submission and thus the documents were not considered.¹³ In contentious cases Article 34 allows submissions from "public international organisations on their own initiative". There has been limited jurisprudence on this topic.¹⁴

In relation to the Nuclear Test case at the ICJ at a late stage in the proceedings the International Committee of the Red Cross (ICRC) sent material to the Court pursuant to the Additional Protocols of the Geneva Conventions 1949, yet no formal reference is made to this information in the ICJ's decision. Thus Non-State actors played no formal role in the proceedings.

The ICJ did, however, receive perhaps for the first time in the Court's history "citizens' evidence" as documented in *Implications of the Advisory Opinion by the International Court of Justice on the Legal Status of Nuclear Weapons*.¹⁵

On 10 June 1994, the ICJ Registrar received a citizens' delegation representing over 700 NGO organizations which had endorsed the initiative to ask the ICJ for the Advisory Opinion. The delegation presented a unique collection of documents, which included:

- 170,000 individually signed Declarations of Public Conscience invoking the "Martens" clause from the 1907 Hague Convention;
- a sample of more than 50 million signatures to the Appeal from Hiroshima and Nagasaki;
- 11,000 signatures to the MacBride Lawyers' Appeal Against Nuclear Weapons;
- material surveying 50 years of citizens' opposition to nuclear weapons.

Subsequently, over 3.5 million more Declarations of Public Conscience were presented to the International Court of Justice. Over 3 million of these were from Japan. In accepting these the Registrar undertook to draw the judges attention to the information during the period when they deliberated on judgments. Through-out the case, NGOs were made aware that the "citizens' evidence" had not been accepted as legal evidence. Nevertheless, by allowing the submission of this information, the Court:

... indicated that the ICJ acknowledged the strength of public concern world-wide about the issue—indeed, several judges drew attention to this aspect in their separate Opinions.¹⁶

As well as judges having informal access to a wide range of "citizens' evidence" members of the World Court Project encouraged supportive governments to include citizens as witnesses and as part of States' legal teams. For example an invitation by community groups was made to the Mayor of Hiroshima Mr Takashi Hiroaka. The Japanese Government refused to allow Mr Hiroaka to be part of their legal team, a situation which was leaked by the press to the Japanese people. Community outrage in Japan ensued and the Japanese Government was embarrassed into inviting Mr Hiroaka to The Hague to give evidence independent of their Government's

¹³ For a full account see Clark R "The International League for Human Rights and South West Africa 1947 -1957: The Human Rights NGO as Catalyst in the International legal Process" *Human Rights Quarterly* Fall 1981 pp.101–116.

¹⁴ For an excellent discussion on this topic see Shelton D "Participation of non-governmental organizations in international judicial proceedings" *American Journal of International Law* Vol. 88 pp. 611–642.

¹⁵ *Implications of the Advisory Opinion by the International Court of Justice on the legal status of nuclear weapons* The World Court Project, Pottle Press London 1996 pp.12–13.

¹⁶ *Ibid* p. 12.

legal stance.¹⁷ Mr Hiroaka gave a poignant statement to the Court:

History is written by the victors. Thus the heinous massacre that was Hiroshima has been handed down to us as a perfectly justified act of war. As a result, for 50 years we have never directly confronted the full implications of this horrifying act for the future of the human race... I feel frustrated at not being able to express this completely in my testimony about the tragedy of the atomic bombing. For that reason, I would like to ask you, the judges, to visit Hiroshima and Nagasaki to verify for yourselves the actual result of the bombing to deepen your understanding of it.¹⁸

The Government of the Marshall Islands included as part of their legal representation Mrs Lijon Eknilang, who gave a personal statement on the effects of nuclear explosion on her life and the lives of her family, friends and other citizens of the Marshall Islands. Mrs Eknilang was assisted by LCNP with this group funding her travel to The Hague and accommodation. It was necessary for Mrs Eknilang to give her evidence in English, which was not her first language, and those who witnessed her speech advise that it was deeply moving.¹⁹ Below is an excerpt from her Oral Presentation:

I hope that the Court will understand that I cannot be unemotional about the facts of my experience with nuclear weapons. The important point is that they are facts, and are not “abstract”... My own health has suffered very much, as a result of radiation poisoning. I cannot have children. I have had miscarriages on seven occasions...

The most common birth defects on Rongelap and nearby islands have been “jellyfish” babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating. The babies usually live for a day or two, before they stop breathing... My purpose for travelling such a great distance to appear before the Court today is to plead with you to do what you cannot to allow the suffering that we Marshallese have experienced to be repeated in any other community in the world.²⁰

C) Reference to “citizen’s evidence” in the Decision

As previously mentioned, Judges did make reference to a number of pieces of the formal and informal evidence available from citizens during the case. During an examination of the Martens clause and Nuremberg Principles, the ICJ confirmed that these are vital components of the principles and rules of humanitarian law which apply to nuclear weapons.²¹ The Martens clause states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

The 170,000 individual “Declarations of Public Conscience” were submitted by citizens to assist the Court in determining the “dictates” of public conscience. In accepting this evidence the ICJ can be seen to acknowledge the impact a ruling on nuclear weapons would have upon the citizens of the world.

The ICJ cited the continuing spread of nuclear weapon-free zones as testifying to:

¹⁷ Ware interview op.cit.

¹⁸ “Refusing to Learn to Love the Bomb: Nations Take Their Case to Court” *The New York Times* 14/1/96.

¹⁹ Ware Interview op.cit.

²⁰ Clark op. cit pp.239–242.

²¹ Main opinion on UNGA paragraphs 78–87.

a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons.²²

The dissenting Opinion of Judge Shahabuddeen dealt with a statement made by the International Committee of the Red Cross (ICRC) after the use of nuclear weapons at Hiroshima in which extreme concern was expressed by the ICRC of the impact of nuclear weapons on the law of war.²³ Other Judges made detailed reference to the evidence given by the Mayor of Hiroshima and the Marshall Islands delegation. Judge Korma dedicated over five pages of his decision to reviewing this evidence. Judge Weeramantry submitted:

The Mayor of Hiroshima has given the Court some glimpses of the lingering agonies of the survivors—all of which is amply documented in a vast literature that has grown up around the subject... Reference should also be made to the many documents received by the Registry in this regard, including materials from the International Symposium: Fifty Years since the Atomic Bombing of Hiroshima and Nagasaki. It is not possible in this Opinion even to attempt the briefest summary of the details of these sufferings.²⁴

However not all judges viewed the involvement of NGOs as assisting them in their deliberations. Judge Oda was the only judge to dissent in relation to the UNGA request for an advisory opinion. His reasons for dissenting centred around his concerns that the whole exercise was a “plot” by NGOs and thus an abuse of process and position.

The idea behind the resolution whereby the General Assembly (and also the WHO) requested advisory opinions, had previously been advanced by a handful of non-governmental organizations which initiated a campaign for the total prohibition of nuclear weapons but failed to persuade the States’ delegations in the forum of the General Assembly... Some NGOs seem to have tried to compensate for the vainness of their efforts by attempting to get the principal judicial organ of the United Nations to determine the absolute illegality of nuclear weapons, in a bid to persuade the member States of the United Nations to press for their immediate and complete prohibition in the political forum... This gives the impression that the Request for an advisory opinion which was made by the General Assembly in 1994 originated in ideas developed by some NGOs.²⁵

There is no doubt that there is a fine balance between NGOs being perceived as moving beyond their sphere of influence and NGOs contributing to a depth of judicial debate. This is particularly so with topics, such as nuclear weapons, which are intrinsic to the survival of humanity as a whole. The fact that the ICJ, unlike domestic courts, is not located in the politics of one society brings to bear the question of the type of limited influences placed upon this court. Any domestic legal system responds, to a varying degree, to public perception and requires broad base confidence in the judiciary to function effectively.²⁶ Due to the limited involvement to date of Non-State actors in the ICJ’s proceedings, there has been little analysis on the potential benefits and disadvantages of broader “civil society” participation.

With increased technology and growing communication networks, there is no doubt that more citizens have access to information. This is likely to lead to wider education on matters such as the role of the ICJ, which in turn may result in more interest and willingness to participate. To date matters such as requests to submit information to ICJ proceedings have been dealt with in an ad hoc matter. For example, in the case at hand the Registry was pre-disposed to the workings of NGOs and thus not only allowed “citizens evidence” but directed judges to it. Whilst this development is warmly welcomed by the author, it is of concern that such matters are

²² Ibid paragraph 63.

²³ <http://www.dfat.gov.au/intorgs/icj-nuc/shahabuddeen-a.html> Dissenting Opinion of Judge Shahabuddeen Part 1, p.11.

²⁴ http://www.dfat.gov.au/intorgs/icj_nuc/w_man_b.html p.15.

²⁵ www.ddh.nl/org/ialana/oda.htm #part 12 paragraph 8.

²⁶ Such an example is the review of the role of Justice Beech of the NSW Supreme Court and the response by many civil society groups to *R v J* Unreported judgement South Australian Supreme Court No. SCC/RM/91/452 at 13. This case dealt with the issue of rape and the concept of whether “no means yes” in relation to consent.

purely at the discretion of individuals. Such discretion does not encourage any form of consistency as the situation has the potential to change dramatically with a change of staff. Furthermore exclusively relying on the goodwill of an individual can be used exclusively by powerful NGOs who have the capacity to make strong personal contacts. If it is deemed that NGOs have some positive role to play in the future of the ICJ then there is a great need to further develop, even informal, procedure in relation to access.

D) Conclusion

In legal terms the ICJ decision on the legality of nuclear weapons is somewhat ambiguous. Whilst some important propositions were unanimously articulated, such as the obligation to negotiate in relation to nuclear disarmament, the decision was not conclusive to the extent that the Court could not “conclude definitively” that in all cases the threat or use of nuclear weapons is illegal. Much excellent jurisprudence has been written on the issue examining the international legal impact of the ruling.²⁷

The Advisory Opinion on the legal status of nuclear weapons importantly drew the world’s attention to the under-used International Court of Justice. As the United Nation’s organ to enforce international law, it has not played as significant role as it could have in determining matters impacting upon the whole of humanity. In cases such as the use of nuclear weapons which are governed by no specific international legal provision, the ICJ walks a fine line between “declaring what the law is” and “breaking new ground”. Whilst the ICJ Statute and the UN Charter are silent on the role of the ICJ in the development of international law²⁸ the judicial process inevitably involves decisions which clarify what the law should be. In this respect the use of the Court to deal with nuclear weapons was an innovative strategy.

The World Court Project demonstrated the opportunities available in the international legal process to Non-State actors, and concerned citizens. It also highlighted the need to consider international litigation as a valid tool for clarification of the law and in some instances even change. Whilst the International Court of Justice is a legal avenue restricted to State parties, this paper has indicated the role Non-State actors can play in assisting to instigate proceedings and providing valuable support during the case. Professor Richard Falk, addressing the first IALANA World Congress in The Hague, characterised international law as “the sleeping giant of the peace movement”²⁹ indicating the potential of the international legal regime. There is no doubt that power continues to rest in the hands of States and that it is political negotiations rather than merely laws that will result in changes to States’ behaviour. However, as Kate Dewes, active member of the World Court Project states:

²⁷ *International Review of the Red Cross : Special Issue The Advisory Opinion of the International Court of Justice on the legality of nuclear weapons and international humanitarian law* No. 316 Jan-Feb 1997.

²⁸ Article 13 of the UN Charter requires the General Assembly to “institute studies and make recommendations for the purpose of ...encouraging the progressive development of international law and its codification”. For a further discussion on this subject see Clarke op.cit pp.33–35.

²⁹ *Nuclear Arms and the Law—Lawyers are Uniting* International Association of Lawyers Against Nuclear Arms Drukkerij Gebroeders Peters, Rotterdam 1990 p.7.

it is up to “We the peoples” to use the law to generate the necessary political will.³⁰

“I have to cast my lot with those who age after age, with no extraordinary power, reconstitute the world”

Adrienne Rich (Poet)

³⁰ Dewes K and Green R “Citizens Action to Implement the ICJ Opinion” *Disarmament Times* Vol. XIX No.4 September 1996 p.2.

Non-State Actors and Development Assistance

Roland Rich¹

There can be little doubt that Non Government Organisations (NGOs) have a significant role to play in international standard setting. It is unimaginable these days to envisage a negotiation of a new environment law or human rights instrument without the participation of NGOs. There may be moments when we look back fondly at simpler times when government negotiators dealt only with their counterparts. These days we must add the Greenpeaces and Amnesty Internationals to the list. Indeed it is often NGOs with their expertise, their commitment and their ability to attract press coverage which play the decisive roles.

There are UN instruments which formally recognise the role of the NGO. ECOSOC has a committee which accords consultative status to NGOs thereby allowing these organisations to participate in some UN meetings and be involved in UN processes. There are about 1,500 NGOs with UN Consultative Status. It is less frequent to find NGOs specifically listed in treaty status instruments but one example is the 1972 World Heritage Convention Article 8(3) of which provides for a formal role by the International Union for the Conservation of Nature and the International Committee on Monuments and Sites (ICOMOS) in the evaluation of heritage nominations.

In this paper I wish to concentrate on the role of NGOs in the development assistance phenomenon. The Development Assistance Committee of the OECD provides figures for total resources flowing from OECD countries to the developing world in 1996. To put the figures in context, it is worth noting that private investment flows came to some \$US130B. Official Development Assistance in grant form was \$US55B. These figures are instructive in view of the ongoing debate over globalisation. It is clear that developing countries cannot generate sufficient investment funds to develop those projects which will ultimately secure the economic and social rights of their people. ODA is one important source but clearly private or market investment flows are far more significant. One of the key factors creating globalisation is competition for private investment flows.

Of the \$US55B in grant ODA, \$US1B went direct to NGOs. In addition to ODA, however, \$US5.5B was expended on development assistance by NGOs from their own sources. The \$US1B figure is misleading. This is the sum of donor programs specifically administered by NGOs. For example in AusAID's program of about \$A1.4B, about \$A100M goes to NGOs for their overseas development work. But NGOs are involved in the delivery of programs under many other headings. UNHCR advised me recently that some 60% of their relief operations are now undertaken by NGOs. I don't have budget figures for the World Bank but its report for 1997 claims that 47% of World Bank projects had some form of participation by NGOs. My guess is that of the total global development assistance and humanitarian assistance work, NGOs would probably be involved in delivering around 15%. This proportion has risen steadily in recent years and it is sure to continue to rise over the next few years.

When discussing these particular non-State actors, we should make a distinction between the global NGOs and the local organisations. The global NGOs such as Save the Children, Care, World Vision and World Concern are quite powerful well organised bodies able to deal with States and international organisations on a relatively equal footing and able to mobilise considerable resources for their purposes. Local NGOs are usually small, geographically narrowly focused and usually only able to mobilise contributions in kind, like local labour. There are, of course, exceptions to both generalisations.

In terms of aid program delivery, we can safely conclude that NGOs are now a fixed feature. They provide a number of important advantages much sought after by aid donors. These include local accountability and grass roots participation and responsiveness. They can also provide useful local innovation and assist with the sustainability of the projects. The staff are usually highly committed people who often are prepared to take

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personal risks and are not as focused on remuneration as are the consultants whose role these NGOs are increasingly challenging. Internationally they can bring a degree of respectability to a project, particularly to large resource projects. Because of these attributes we are now beginning to see the role of NGOs also rising in commercial projects leading us again to reflect on that rather large figure for private investment flows.

How does all this impact on international law? First, global NGOs are significant players in policy formulation in the field of development. NGOs will tend to favour community projects over the traditional infrastructure projects that recipient governments are forever requesting. They will favour assistance direct to the people rather than through the hands of the local government. In some countries which are heavily dependent on foreign aid flows, NGOs will have considerable influence over local policy formulation. In terms of their place in international society, therefore, they have the capacity to act as independent actors with their own agenda, their own firmly held convictions and growing influence.

At the same time, I believe we should think of the relationship between governments and NGOs involved in ODA delivery as analogous to the institution of agency. After all, they are spending public money, operating under the cover of national aid programs and their staff often enjoy a certain degree of diplomatic protection. Perhaps most telling is the fact that they are invariably identified with the donor country by the recipients.

In this duality lies something of a dilemma for governments. The agents are often trying to call the tune. They want to have access to a slice of ODA but they also want to have a say in how ODA is spent. On the ground, we find the NGO officials to be committed and very involved. They are not, however, one dimensional people and will want to get involved in the major issues confronting their local community, and not simply implement the water supply or crop substitution project for which they have been funded. The agents are trying to act as principals.

The local NGOs pose a similar dilemma for the recipient government. Developing country leaders tend to favour processes that attract greater ODA and investment flows to their countries and so are pleased to see money flowing to local communities. At the same time they are casting a wary eye to the political power this generates. The larger and more successful the local NGO, the more power to it.

The ODA community has come to see this as one of the great benefits of the involvement of NGOs because ODA flows are directly encouraging the flowering of civil society. This aspect of the ODA phenomenon is rarely identified as a project outcome but in many cases it may be the most enduring and effective result. One of the lessons we are beginning to learn from the crisis facing authoritarian forms of government is that economic development may not be sustainable unless it is generated in a political environment that has the basic consent of the people. Allowing civil society to flourish is a key means of establishing that consent.

I think most of us will be comfortable with the above comments on civil society but the issue I wish to raise in conclusion is perhaps more challenging for our traditional notions of international law. The question I wish to pose is whether we should also be drawing an analogy from our domestic notions of civil society and asking whether the international community should think of its healthy functioning in terms of an international civil society.

I recall many years ago attending the lectures given by Professor Dupuy at The Hague Academy. In striving to prove that personality in international law went beyond the nation state, Professor Dupuy centred his argument on the recognition at international law of the individual in the form of the pirate. I don't believe we need to resort to such elaborate arguments today. We live in an international society where two specific international criminal courts already exist and a general International Criminal Court is being negotiated in Rome as we speak. We work in a world where transnational corporations are more powerful than many states. And world leaders no longer rely on their diplomats to tell them what is happening, they watch CNN.

In this brave new world I believe we should find an honourable place for the humble NGO. The fact that it is self-appointed is balanced by its voluntary nature. The fact that it is cause oriented is balanced by its not-for-profit vocation. It should not be a criticism that NGOs focus so sharply on environmental and development causes because these very issues are at the heart of the political debate. As actors with some degree of international personality in our international civil society, we can see NGOs playing a role as critics and

cajolers of governments. They tend not to accept government explanations at face value and to have the skill to find the flaws in government arguments. They have their own transnational network which simply reflects the globalisation in the workings of international society. The recent NGO campaign against the OECD's Multilateral Agreement on Investment demonstrated the capacity of international civil society to stop the world's most powerful governments from pursuing a course they had previously set.

The world has become more complex and international relations have followed suit. It is no surprise that international law as the grammar of international relations should also follow suit. I believe we need to begin to speak of international civil society as the new paradigm in which States compete with many non-state actors including NGOs for influence over the direction of global policy.

The Unbearable Lightness of Customary International Law¹

Hilary Charlesworth*

This paper is a response to the outpouring of euphoric writing on the contribution of non-government organizations to the creation of international law, in particular the suggestion that NGOs have now begun to influence the formation of customary international law. The title of this paper is of course drawn from Milan Kundera's wonderful novel, *The Unbearable Lightness of Being*.² I wanted to evoke some elements of Kundera's book, especially the choice he gives to his central characters between weight and lightness—moral responsibility on the one hand, vacuousness on the other. I also wanted to evoke Kundera's playful reversal and undermining of the categories of weight and lightness.

Customary international law is a paradigm of the tension between apology and utopia that Martti Koskenniemi has diagnosed in international legal discourse. The positivist account of custom is an apologetic one, where the actions of states are simply justified by legal norms. In his stern critique of 'relative normativity', Prosper Weil presented customary law as a type of Trojan horse by which the homogenous normativity of traditional international law was threatened.³ For Weil, distinguishing between customary norms (through, for example, the doctrines of *jus cogens* and rights *erga omnes*) radically undermined the purposes of the international legal system, which Weil defined as securing co-existence and co-operation among the states that made up the international community.⁴ Customary international law, then, was a dangerously manipulable, unbearably light, source of international norms.

But custom also has utopian potential. Many jurists regard custom as a very useful mechanism that can compensate for the rigidity and inflexibility of treaty law and have argued for expansion of the category. For example, Louis Sohn (and Jim Anaya) has suggested that customary rules can emerge by virtue of the treaty-negotiation process, even before the treaty is signed.⁵ Isabelle Gunning has gone further and argued that, at least in the area of human rights, the activities of non-government organizations should be regarded as constituting relevant practice in the generation of customary norms.⁶ On such an analysis, custom is not light, but a weighty, important source of international law.

My main concern is: will the increased participation of non-state actors in the generation of customary norms affect compliance with those norms?

For a positivist such as Weil, the answer would be straightforward. A positivist account of customary law locates its normative force in the voluntarism that gave it birth. Thus, custom, that curious (and circular)⁷ amalgam of 'state practice' and *opinio juris*, binds because states have agreed to be bound by it.⁸ In this sense, compliance is a pre-condition for custom. Custom derived from sources such as 'world order values' is seen as undermining the significance of consent and thus reducing the likelihood of compliance. For this reason, the

¹ An earlier version of this paper was given at a roundtable on 'Contemporary Conceptions of Customary Law', Annual Meeting of the American Society of International Law, Washington DC, 1-4 April, 1998.

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² Harper and Row (1984) (translated by Michael Henry Heim).

³ P. Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* 413 (1983).

⁴ *Id.* at 418-19.

⁵ L. Sohn, "'Generally Accepted' International Rules", 61 *Washington Law Review* 1073 (1986).

⁶ I. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', 31 *Virginia Journal of International Law* 211 (1991).

⁷ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) at 363.

⁸ Weil, above note 3 at 433.

Nicaragua case, which identified customary norms limiting the use of force and intervention despite the lack of supporting state practice, has been much criticised. It is presented as a hopelessly utopian approach because it separates compliance and custom.

Allowing non-state actors a role in the generation of customary international law would undermine the traditional requirements of state practice and *opinio juris*. Prosper Weil does not directly consider non-state actors, but his article implies that the expansion of contributors to legal normativity beyond states would 'destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.'⁹ It would threaten the self-contained world of a state-centered international law by introducing external, subjective values that would prove unable to provide clear guidance for state action and that, by imposing particular visions of the good and virtuous life, threaten the pluralistic character of international society, specifically the principle of the sovereign equality of states.

By contrast, from outside the positivist tradition, my argument is that the increasing involvement of non-state actors in international-law making creates a compliance paradox. On the one hand, the engagement of non-state actors enhances what the Chayes have termed 'the iterative process of discourse'¹⁰ which lies at the heart of their 'managerial' model of compliance with international treaty norms. Or to use Tom Franck's linkage of fairness and compliance, it increases the perception of fairness of the norm-creating process and the substantive rules that emerge from it.¹¹ Or to use Harold Koh's theory of compliance, it contributes to the evolutionary process of 'interaction, interpretation and internalization of international norms'.¹² But, on the other hand, the involvement of non-state actors in the creation of customary rules often has the effect of generating weak norms on a wide variety of topics, so that compliance is neither particularly demanding nor particularly responsive to the problems the norms were designed to address.

The first proposition of my paradox is that non-state actors can contribute to the generation of genuinely communal norms in international law. I want to draw on John Tasioulas'¹³ articulation of a 'communitarian' notion of international society in which the state does not have priority. This conception:

affirms ... that it is only as members of the community of humankind as a whole ... that its components (be they states, peoples, organizations or individuals) can understand their own identities. ... The members of such a community are conceived as essentially members thereof, united ultimately by shared aspirations of world public order that are definitive of their identities and hence are not merely the emanations of a normatively unconstrained will. In the international case, what underlies these aspirations is a sense of common humanity and of the conditions of human dignity and well-being.¹⁴

While I agree with John Tasioulas that the insulated, self-sufficient universe of international law created by positivists such as Weil leads us to an unbearably light, bleak, ethically unsatisfying dead end, we must ensure that reliance on the notion of communitarian values as the bedrock of custom does not simply reproduce values of domination and subordination.¹⁵ We need to arrive at international laws that are neither unbearably light nor unbearably heavy in an ethical sense—in Tasioulas' words, that do not suffer from 'radical indeterminacy, ethnocentrism [or] patriarchy'.¹⁶

⁹ *Id.*

¹⁰ A. Chayes & A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) at 25.

¹¹ T. Franck, *Fairness in International Law and Institutions* (1995).

¹² H. Koh, 'Review Essay: Why Do Nations Obey International Law?', 106 *Yale Law Journal* 2599 at 2603 (1997).

¹³ J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case', 16 *Oxford Journal of Legal Studies* 85 (1996).

¹⁴ *Id.* at 117.

¹⁵ Tasioulas acknowledges this problem: *id.* at 128.

¹⁶ *Id.*

The second proposition in the paradox I have described is that there is evidence to suggest that the engagement of non-state actors in customary law-making may result in very little gain.

An example of this is the great energy put into both the Vienna Conference on Human Rights in 1993 and the Beijing Conference on Women in 1995 by women's organisations from around the globe. Although the official final declarations of both conferences were hailed as significant advances for women and as contributions to customary international law, they in fact contain relatively modest initiatives to improve the situation of women and reinforce a stereotype of women as wives and mothers.¹⁷ In any event, the compliance requirements in the official documents are very weak. Christine Chinkin has pointed to the practical problem that non-state actors can present so many diverse voices that it becomes easier for governments to pick and choose and only accept those voices that coincide with their interests.¹⁸

Non-state actors appear to have the greatest impact in using international law in national legal systems. This has two advantages. Many national legal systems are increasingly responsive to arguments based on customary international law to deliver progressive decisions.¹⁹ So, non-state actors can, as Harold Koh has pointed out, aid in *internalizing* international law.²⁰ At the same time, the use of international law in national laws itself contributes to the formation of custom. In this way the 'state practice' requirement for custom can be met through the activities of particular arms of the state, such as the judiciary, which may have views that differ markedly from those of the executive or legislative branches of the state.

I have expressed some doubts about whether the participation of non-state actors in the creation of customary norms assists in compliance with them. Is there then any value for non-state actors in the generation of legal norms? What is the effect of a distinctive legal normativity? In a study of the emergence of a 'normative community' between Aboriginal peoples and colonists in Canada, despite a history of cultural division, inequality and violence, Jeremy Webber emphasises the role of a complex process of interaction between the two groups.²¹ Webber develops an idea of community that can be usefully translated to the international level to give some substance to the communitarian ideals sketched by John Tasioulas. For Webber, 'community' does not imply a tight, cohesive group. Rather

a community's substance, its shared core, consists not in its members' adherence to a single set of beliefs or values, but rather in their participation in a common discourse through time. Participation implies that one accepts, at least provisionally, the specific terms of that discourse, its vernacular. But it does not require that members have identical values or limit their involvement to a single discourse.²²

Webber argues that a member of one community might have multiple allegiances and memberships in other communities each with their own normative discourse.²³ The advantage of legal normativity on this analysis is that it offers some form of peace and stability: 'Even if the resulting order was marked by inequality and oppression, even if it was not "just" in any absolute sense, the parties gained real advantage from

¹⁷ See D. Otto, 'Holding up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women', 6 *Australian Feminist Law Journal* 7 (1996).

¹⁸ C. Chinkin, 'The Future of Non-Governmental Organisations in the International Legal Order'.

¹⁹ E.g., I. Shearer, 'The Implications of Non-Treaty Law Making: Customary International Law and its Implications' in P. Alston & M. Chiam eds, *Treaty-Making and Australia: Globalisation versus Sovereignty* (1995) 93. Compare J. Wilets, 'Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts', 27 *Columbia Human Rights Law Review* (1995) 33 at 52-3 (discussing the limitations of using arguments based on customary international law in United States courts.)

²⁰ H. Koh, above note 12 at 2658.

²¹ J. Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples', 33 *Osgoode Hall Law Journal* 623 (1995).

²² *Id.* at 627.

²³ *Id.* at 628.

acknowledging it to be normative.²⁴

I think that this account of legal normativity is useful in the international legal sphere where a great range of actors in differing power relations form an uneasy community. International law offers one discourse for the expression of concerns in the international community. The discourse is contested and discordant but it provides a basis for the negotiation of just outcomes. The broader and the deeper the participation in the discourse, the more just its outcomes will be.

In Milan Kundera's novel, two of the central characters, Tomas and Sabina, conduct their lives with deep scepticism and lack of commitment against the turbulent political background in the wake of the Prague spring of 1968. The unbearable lightness of their lives is in contrast to the heaviness of the political situation and the lives of the other main characters, Tereza and Franz. Customary international law will appear unbearably light to the positivist when it moves beyond its traditional voluntaristic base. But custom may also seem to be unbearably light to those who require international law to have an agenda of justice.

Notions of weight and lightness also apply to NGOs. Non-state actors of course will not all have a similar agenda with respect to international law. The term 'non-state actors' applies as much to indigenous peoples encouraging the development of norms elaborating their rights and to human rights organizations supporting the creation of better monitoring procedures as to multi-national corporations arguing for an international commitment to a free-market economy. Indeed the phenomena described as 'globalization' are often portrayed as giving priority to the interests of global business interests over those of states. So we must be careful to distinguish between the potential contributions of non-state actors to the definition of communitarian values that may animate customary international law.

The task ahead is to give custom more ethical substance and weight through the generation of communal norms and to work out how non-state actors can contribute to this process. At the same time, it's worth remembering that Milan Kundera twists and collapses easy categories of weight and lightness, implying that, at the end of the day, they may not be very different.

²⁴ *Id.* at 656.

Recent Treaty Action

Progress Report on the Development of an Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women

Deborah Nance¹

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not contain any procedure whereby complaints of violations of the Treaty may be made to the international body that monitors implementation of the Convention, in this case the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee). Such a procedure is in the process of being elaborated by way of an Optional Protocol to CEDAW and the third session of a Working Group elaborating the Protocol met in March this year parallel to the 42nd session of the Commission on the Status of Women (CSW). This paper is intended to provide a progress report on the current status of negotiations on the Protocol.

In its lack of such a complaints mechanism CEDAW is different to some of the other major human rights treaties. The International Covenant on Civil and Political Rights (ICCPR) through its First Optional Protocol contains such a mechanism as does the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (in Article 14) and the Convention Against Torture (CAT) (in Article 22). Australia is a party to all these mechanisms.

Background

Proposals for a Protocol to CEDAW to provide a complaints procedure began to circulate in the early 1990s and gained momentum in the lead up to the 1993 World Conference on Human Rights in Vienna. The Vienna Declaration and Programme of Action arising from the Vienna Conference called for work to begin on developing an optional Protocol to CEDAW.

This proposal was considered in 1994 and 1995 by the CEDAW Committee and the CSW and a non-Government expert group drew on existing international procedures and prepared a draft Protocol in 1994. The calls for a complaints mechanism for CEDAW were reinforced in 1995 when the Platform for Action arising from the Fourth World Conference on Women in Beijing also supported the development of an optional Protocol.

In 1996 CSW convened an open ended Working Group to consider the draft text and the Working Group met again in March 1997. The third session as I noted has just concluded.

Overview of the Third Session

The draft Protocol with which we began the third session of the working group contained elements of an optional Protocol that were drawn largely from existing international and regional human rights procedures. Some of the elements make explicit in the draft text procedural innovations which have been developed under existing mechanisms through the rules of the procedure of the various Committees dealing with communications under them. The draft also contained a couple of 'novel' elements such as an inquiry procedure in addition to the standard individual communications procedure. The draft text included provisions on matters such as who would be entitled to make a complaint, on what grounds would a complaint be admissible or inadmissible, the conduct of proceedings by the CEDAW Committee, the effect of the Committee's deliberations and a host of 'machinery' provisions enabling the Committee to establish its own rules of procedure for dealing with communications and so on.

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The session of the Working Group held from 2–13 March this year parallel to the 42nd session of CSW was hence the third actual negotiating session on the text of the proposed optional Protocol and it was not until the meeting in 1997 that a draft text was accepted by States as a basis for detailed consideration. At the commencement of this third session the draft contained a great deal of bracketed text or proposed alternative wording indicating that there was little agreement on what should be included in the Protocol and what form these inclusions should take.

Having said that, the third session began on a very positive note with opening statements reflecting a considerable degree of support for rapid conclusion and adoption of the Protocol at this year's session. The Austrian Chair of the Working Group argued that finalisation of the Protocol this year would be appropriate in order to sustain the momentum of the 1995 Fourth World Conference on Women and to mark the 50th anniversary of the Universal Declaration of Human Rights. This sentiment drew significant support.

The initial strong push to conclude the negotiations on the Protocol this year was supported by the countries of the European Union (including the United Kingdom), the USA, the Latin American countries, many Southern African countries and the Philippines. It was also supported by the large number of non-government organisations attending the Working Group as observers.

At the same time, several opening statements also referred to the need for a strong quality text that would strengthen the protection of women's rights throughout the world and would at the very least be consistent with the other currently available mechanisms I referred to earlier if not going beyond them. Despite the apparent support for the early conclusion of the text, tensions appeared early on between the two objectives of desire for rapid conclusion of negotiations and desire for a strong text. This tension and its resultant concern for some that quality would be sacrificed to speed was a feature of the session.

Towards the conclusion of the session the desire to finalise the text at the third session contributed to the belief on the part of many delegations and NGOs (attending the Working Group as observers) that the supporters of a strong effective Protocol were being pressured, for the sake of finalisation, into accepting compromises that would unacceptably weaken the text and be inconsistent with provisions agreed to by governments in comparable instruments.

In the event the Working Group on the optional Protocol concluded its work at the third session without being able to finalise the text. Many of those delegations in favour of a strong effective text (notably Ghana, the Netherlands and the Philippines) were not prepared to make any further compromises and were instrumental in ending the attempt to finalise the Protocol at this session.

Results of the Third Session

While the text was not finalised, the expressed support for finalisation, gave a real impetus to negotiations and considerable progress was made in developing text on areas such as interim measures, the preamble, obligations on states parties to cooperate with the CEDAW Committee and to protect those submitting communications from reprisals or interference and the obligations on states parties to provide access to information about the Protocol and its procedures. The 'procedural' articles (articles 13, 15, 17 and 21 to 24) have all been agreed as have other provisions such as article 3.

Turning to some of these specific areas, the Working Group agreed that the Protocol would be preceded by a short succinct preamble which reflected the international human rights framework of the United Nations. Delegations agreed that the preamble would note that the United Nations Charter and the Universal Declaration of Human Rights establish the principles of equality between men and women and the entitlement of all, without distinction based on sex or other grounds, to human rights. Delegations agreed that the preamble would recall the International Covenants and other human rights instruments including CEDAW. It would reaffirm States parties determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms. Further additions to the Preamble are still the subject of consideration.

Largely procedural articles such as article 3 requiring that communications be in writing and not be

anonymous, article 13 which provides for the Committee's activities to be summarised in the Committee's annual report, article 15 enabling the Committee to establish its rules of procedure, article 17 setting out steps for becoming a party to the Protocol and articles 21 to 24 to do with amending the Protocol, notification of the Protocol and official languages were all agreed at this session.

Other articles which were wholly or largely agreed at this session do incorporate progressive development of international practice in the area of complaints mechanisms. Article 14 would require States Parties to publicise the Protocol and facilitate access to or information about the views and recommendations of the CEDAW Committee in particular in matters involving that State Party.

While the final wording of Article 12 is unresolved it aims to ensure that the right to petition can be exercised and guarantee the protection of applicants from victimisation.

Article 5 would empower the Committee to issue a request for a state party to take immediate action to prevent irreparable harm to the alleged victim(s) that would render nugatory any final decision in her favour (interim measures). Such requests would be issued without prejudice to a determination on the admissibility or merit of a communication. The draft Article 5 reflects the current practice under existing mechanisms (where currently interim measures are referred to in the rules of procedure of the Optional Protocol to the ICCPR, CAT and CERD) but the inclusion of a provision relating to interim measures in the instrument itself is a progressive development of international human rights practice as well as a necessary safeguard for alleged victims and will add to the transparency of the procedure.

What as a result of this session is now proposed article 7 (which is an amalgamation of previous draft articles 7, 8 and 9 in an earlier draft) deals with the conduct of proceedings, the transmission of the CEDAW Committee's views and recommendations to the State party on completion of the process and the response in writing by the State party to the Committee's views. The draft article would also enable the Committee to seek further information from States about the measures they have taken in response to the Committee's views or recommendations. The possibility of the Committee transmitting recommendations as well as views to States as a result of its consideration of a communication represents a codification of the existing practice of Committees whereby they frequently make recommendations to the State as to specific measures to remedy a violation if one has been found. The proposed requirement for the State to provide a written response to the Committee strengthens existing practice and improves the transparency and effectiveness of the process. The addition of a proposed follow up mechanism also represents progressive development of existing practice.

Insofar as admissibility is concerned (ie the requirements that must be met before the Committee will begin an examination of the communication on its merits), the current draft of Article 4 as a result of the third session still contains some bracketed text but the structure has been reworked and the article streamlined. The current draft would provide two elements to admissibility. The first would provide that the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. The individual right to petition does not arise until available and effective domestic remedies have been exhausted and the CEDAW Committee is not competent to examine the admissibility or merits of a complaint unless it can first ascertain that the individual has done so. The rule of exhaustion of domestic remedies reflects the principle that States have a responsibility and the right under international law to remedy a breach within their own jurisdiction before being subjected to the scrutiny of an international body.

The second element of proposed article 4 would require the Committee to declare a communication inadmissible in accordance with a list of admissibility criteria such as that it has already been examined by the Committee or before another procedure of another committee or that it is incompatible with the Convention. A couple of the other criteria in Article 4 are as yet unresolved.

Unresolved Issues

The key issues still remaining for resolution in the Protocol as a whole after the third session relate to standing to make a complaint, the inquiry procedure and reservations to the Protocol.

Standing

Article 2 of the draft deals with standing. The standing provision is important in any complaints mechanism because it identifies who would be entitled to lodge a communication with the CEDAW Committee in relation to a violation of provisions of the CEDAW Convention. Currently the Optional Protocol to the ICCPR and the CAT grant standing to individuals who claim to be a victim of a violation. While not expressly recognised, groups of individuals who each claim to be a victim may also submit a communication under the ICCPR. In such an instance the communication would comprise multiple individual complaints but be registered as one communication. Under Article 14 of CERD standing is granted to individuals or groups of individuals claiming to be victims of a violation by a State Party of any of the rights set forth in CERD.

Several countries pushing for a strong Protocol were among a group supporting the extension of standing to 'organisations' such as NGOs to lodge communications in their own right as well as 'individuals' and 'groups of individuals'. It was clear that this proposal did not enjoy sufficiently wide support and these states did not continue to push for its retention. There was widespread support for granting standing to 'individuals and groups of individuals' in line with existing mechanisms but the issue remains unresolved. Other issues relating to standing that also remain unresolved are whether provision should be explicitly made for complainants to be represented in making their complaints and how to deal with the issue of consent to be represented where women might be in situations where they are unable to grant their consent. Currently under existing mechanisms the right to representation is only specifically provided for in CAT but the Rules of Procedure of the Human Rights Committee receiving complaints under the ICCPR and also the CERD Committee provide for representation.

Inquiry

The proposed inquiry procedure would empower the Committee to examine a situation of serious and/or systematic violations by a State Party provided the Committee has received reliable information. The current draft provision in the Protocol (article 10) has been modelled on article 20 of CAT. Arguments in favour of including an inquiry procedure in the Protocol have been that it would allow a focus on the root causes of discrimination and would be valuable in those cases where individual victims who suffered over and above other women could not be identified. The inclusion of such a procedure in the Protocol would be a 'novel' element as noted earlier.

The current draft would provide that where the CEDAW Committee receives reliable information indicating a serious and/or systematic violation by a State Party of the rights set forth under CEDAW (or in alternative wording, of a failure to give effect to the obligations set forth in CEDAW) the State Party shall be invited to cooperate in the examination of the information and to submit observations with regard to the information. The following procedure would then ensue. One or more members of the Committee may be designated to conduct an inquiry; the Committee shall examine the findings of such an inquiry and transmit these to the State Party concerned together with its comments and recommendations, following which the State shall submit its observations on these to the Committee.

Several aspects of the above procedure are still unresolved and the inclusion of the procedure in the Protocol has been contentious since, as noted, it goes beyond what is provided for in the Optional Protocol to the ICCPR and the CERD mechanisms. Recognising that, while many delegations favoured the inclusion of an inquiry procedure in the Protocol, others were reluctant to provide the Committee with such a mandate, the Chair introduced a proposed provision prior to the start of the session, according to which States Parties could, upon signature, ratification or accession to the Protocol declare that they did not recognise the competence of the Committee to conduct such an inquiry (the so-called opt out mechanism).

This proposal for including an inquiry procedure in the Protocol with an opt out mechanism won very wide acceptance at the third session of the working group.

A major remaining issue in relation to the inquiry procedure however is the threshold required to trigger the inquiry procedure, that is whether the CEDAW Committee's power to carry out inquiries would be triggered by a one-off serious violation of the Convention or whether a higher threshold, involving clear systematic violations, would be required.

Reservations

Most delegations indicated their in principle support for a 'no reservations' article in the Protocol but many delegations also indicated that their final position on an article dealing with reservations would have to await the final text.

The Australian position

Australia supports the process of developing the Protocol and participated constructively in the negotiations to influence the shape of the Protocol, to contribute Australia's ideas on reform of the procedures for dealing with communications and to ensure it is consistent with Australia's broader agenda for reform of the human rights treaty bodies. We were concerned to ensure that any communications procedure which does emerge is, at the very least, consistent with those procedures already available under other internationally agreed instruments and took the view, with others, that guidance should be provided by language already agreed in relevant international treaties which have won wide acceptance and to the practices and procedures established under them. The Government does not, however, have a final position on the text.

Future Progress

While the aim of finalising the Protocol text this year proved over-ambitious in the end, as noted earlier it did inject a great deal of impetus to the negotiations, more clearly defined the views of the various participants and served to clarify those countries which favoured a stronger text and those wishing to block the process.

Throughout the session it was apparent that for those countries which support the development of an effective Protocol this meant taking the existing mechanisms as the basic foundation and seeking to incorporate into the Protocol language which reflects the more recent positive developments in the international practice of the existing human rights treaty bodies and which are usually contained in those bodies' rules of procedure. By and large such improvements are consistent with current Australian efforts to reform the complaint handling practices of the treaty bodies.

The more negative group of countries—consisting largely of Egypt, China, Algeria, Togo and Cuba—attempted to include restrictions on the Protocol greater than those which exist for other complaints mechanisms and which would have raised the threshold for complaints under CEDAW above those applying to the other human rights treaties. This is an outcome that would have been unacceptable to most delegations.

Hence despite the fact that the Protocol was not finalised, the impetus towards finalisation meant that considerable progress was made at this session. The text was significantly refined, alternative text was eliminated and differences about what the Protocol should contain were narrowed considerably. This provides a major stepping stone to progress at next year's session which is once again scheduled to take place parallel to the March 1999 session of CSW.

In their concluding statements the majority of countries reaffirmed their commitment to finalising the text in as short a time as possible.

Should agreement be reached in the Working Group the proposed draft would be put to CSW and then referred to the Economic and Social Council (ECOSOC) for both to adopt it and ECOSOC would then refer it to the United Nations General Assembly. At this point the Protocol would be opened for signature or ratification by governments.

It is important to note that an optional Protocol to CEDAW, if one is agreed, would be truly 'optional'. It would be applicable only to States who are already States Parties to CEDAW and who choose to ratify or accede to the Protocol. No additional obligations can be imposed on a State Party to CEDAW unless it accepts those obligations by means of ratification.

Insofar as Australia is concerned, this means that a decision on whether to ratify the Protocol would be a separate one for the Australian Government to make and would be subject to the usual domestic processes for consultation on treaty action.

Multiple Boundaries in Maritime Boundary Delimitation: The Problems of Common Jurisdiction

Stuart B. Kaye *

Introduction

In March 1997, Australia and Indonesia concluded a comprehensive maritime boundary agreement,¹ that largely settled the outstanding issues between the two States. This agreement attracted some notice by virtue of its separation of the seabed and water column jurisdictions, which was used to reconcile the negotiating provisions of the parties. This paper will consider the difficulties inherent in the separation of jurisdiction, firstly examining the problems within the Law of the Sea Convention² that spring from such a technique, and then turning to the boundary agreement itself.

Provisions of the Law of the Sea Convention

Direct Inconsistencies

The logical starting point for any examination of the relationship between the EEZ and the continental shelf must begin with the Law of the Sea Convention. While both maritime zones had some existence in international law before the conclusion of UNCLOS III,³ which in the case of the continental shelf included a specific convention,⁴ the provisions of the Law of the Sea Convention have come to codify the content of international law with respect to offshore jurisdiction.⁵ On this basis, it is appropriate to briefly examine the content of both regimes, and to note where conflict may potentially occur.

The continental shelf is dealt with in Part VI of the Law of the Sea Convention. The shelf is defined in Article 76 as being the seabed and subsoil adjacent to the coastal State to a distance of 200 nautical miles, and in limited circumstances beyond that distance. The coastal State's rights over this area are spelled out through the remainder of Part VI and include sovereign rights to explore and exploit the natural resources of the continental shelf,⁶ rights to construct artificial islands, installations and structures,⁷ exclusive rights to authorise drilling,⁸ and for the coastal State to permit tunnelling through the subsoil.⁹

The EEZ is dealt with in Part V of the Law of the Sea Convention. It defines the EEZ as the area where a coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural

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¹ Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997, 36 ILM 222 (1997) [hereafter cited as Australia-Indonesia Maritime Boundary Treaty].

² United Nations Convention on the Law of the Sea, 10 December 1982, 21 ILM 1261 (1982) [hereafter cited as LOSC].

³ For a succinct history of the development and content of the regime of the continental shelf and EEZ in international law see Churchill RR, and Lowe AV, *The Law of the Sea*, (1988), pp 133-176.

⁴ Convention on the Continental Shelf 10 June 1958, 499 UNTS 311.

⁵ As much was explicitly recognised by the Chamber of the International Court of Justice in 1984 in the *Gulf of Maine* case, ICJ Rep 1984, p 246 at 294.

⁶ Article 77(1), LOSC.

⁷ Article 80, LOSC.

⁸ Article 81, LOSC.

⁹ Article 85, LOSC.

resources, whether living or non-living, of the waters superadjacent to the seabed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
- (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;¹⁰

This is an impressive range of rights and jurisdictional responsibility, covering all aspects of the economic exploitation of the sea and seabed, and the activities necessary to support and protect these activities. Article 57 indicates that the EEZ is to operate beyond the territorial sea, to a distance of 200 nautical miles from the territorial sea baselines. Part V goes on to describe how these rights are to be exercised,¹¹ and for the most part the limitations do not have relevance for the continental shelf regime. An exception is Article 68 dealing with sedentary species. It provides for an abdication of responsibility over the regulation of these species under the EEZ regime, leaving them regulated pursuant to the continental shelf provisions in Part VI.¹² In doing so, it resolves one area of potential conflict, although given the overlap extends to a far wider range of subjects, its resolution in this instance is somewhat curious.

What is clear is that both the EEZ and continental shelf regimes overlap in the context of the economic exploitation of the seabed and its subsoil. Both grant coastal States sovereign rights for the exploration and exploitation of the natural resources. The closest the Convention comes to resolving the overlap is in Articles 56(2) and 56(3). The former notes that where rights under Part V are exercised by a coastal State "due regard" will be had to the rights of other States, and that the coastal State will "act in a manner compatible" with the provisions of the Convention. The latter states that rights with respect to the seabed and subsoil shall be exercised in a manner consistent with Part VI.

These provisions are suggestive of some superiority of the shelf regime over that of the EEZ exists, and that in the event of conflict the rules of the continental shelf ought to prevail. This could be seen to be part of the "harmonization" of the two regimes described by Attard,¹³ to ensure that they are consistent with each other. While this solution, if accepted, neatly resolves conflict in a coastal State's choice of applicable international law, it does nothing to resolve the difficulty of differing coastal States having jurisdiction over continental shelf and EEZ in the same area. Certainly it is not open to be argued that the EEZ rights of one State to the seabed are subservient to the rights of the continental shelf coastal State, as Article 56(2) requires only "due regard" be had to such rights. Giving due regard to another State's rights would seem somewhat less onerous than surrendering rights or admitting that EEZ rights were necessarily inferior. Given the continental shelf grants exclusive rights to the seabed and subsoil, such an interpretation of due regard would necessarily mean extinguishment of EEZ rights over the seabed, which is not the tenor of the provision at all.

Consequently, the Law of the Sea Convention does not squarely face the problem of different coastal States exercising continental shelf rights and EEZ rights over the same area. It would seem that the problem was not foreseen by delegates to UNCLOS III, probably because both regimes were given the same criteria for calculation within 200 miles of the coast, leading to the assumption that the two could not fall to different States if calculated by the same method.

¹⁰ Article 56, LOSC.

¹¹ For example Articles 60-73, LOSC.

¹² Article 68, LOSC states:

"This Part [ie Part V] does not apply to sedentary species as defined in article 77, paragraph 4."

¹³ Attard DJ, *The Exclusive Economic Zone in International Law*, (1987), pp 140-143.

Logically, this direct inconsistency can only be resolved by limiting certain rights under one regime, to permit the exercise of rights with respect to the same subject matter under the other regime. Two propositions necessarily follow from any limitation: firstly, that it can only be achieved with the agreement of the affected States, and secondly, that it must involve the limitation of rights pertaining to the EEZ. The first proposition is necessary because it is clear that nothing in the Law of the Sea Convention obliges a coastal State to limit the scope of its EEZ or continental shelf rights where they overlap with another State's maritime zones, except by agreement, or by voluntary application of dispute resolution procedures.¹⁴ Secondly, given EEZ rights deal with the seabed and the water column, making such rights superior at the expense of shelf rights, would leave a shelf coastal State left with no rights apart from a right to harvest sedentary species guaranteed under Article 68. Therefore, to get a meaningful division, EEZ rights would need to be restricted to the water column, leaving rights over the seabed and subsoil to be determined solely by the continental shelf regime. In the two existing instances of agreements to separate shelf and EEZ jurisdiction, such a division has been implemented.¹⁵

The difficulties are not so easily resolved. One area of potential concern is in the context of artificial islands, installations and structures under the Law of the Sea Convention. References to the construction of artificial islands and other man-made features in the Convention are found in the EEZ regime,¹⁶ and applied *mutatis mutandis* to the continental shelf.¹⁷ Article 60 gives the exclusive right to construct islands and other installations and structures to the coastal State. Further, it continues by providing that a coastal State also retains exclusive jurisdiction over such structures.¹⁸ Clearly, exclusive rights cannot be possessed by two coastal States over the same area over ocean-space or on the same installation, so the rights of both States must be circumscribed, or alternatively the rights of one extinguished. As might be expected, the Convention provides no clue as to how this might be done, but several points can be made. Firstly, the construction of installations such as oil platforms are essential to the viable exploitation and exploration of the continental shelf. Logically, if a shelf State is to retain rights that are of any value, it must retain control over the construction of, and jurisdiction over such features. Secondly, any such feature must be constructed on the seabed, therefore interfering with the enjoyment of that area by a shelf State.¹⁹ If EEZ rights are limited to the water column, then it makes it questionable whether the EEZ has any business in the regulating the construction or operation of a platform built on the continental shelf, for the exploration and/or exploitation of that shelf.

Such an argument does make two assumptions. The first is that all construction on the seabed is intended to further exploration and exploitation of the continental shelf. While the bulk of such activities may be categorised in those terms, there are certain structures which are used for other purposes. Examples could include the construction of artificial reefs and other structures are fish aggregation devices, or the platforms constructed by Britain in the North Sea during World War II, used for the purposes of defence.²⁰ These structures, particularly the former, would seem to be more closely allied to the use of the water column, and therefore would fall into the remaining rights possessed by EEZ State. The second is that the construction of a platform does not interfere with the enjoyment of the water column for the EEZ State. Clearly, this is not so, as

¹⁴ This is explicitly spelled out in identical terms for both regimes under Articles 74 and 83, LOSC.

¹⁵ The two treaties are the Australia-Indonesia Maritime Boundary Agreement and the Torres Strait Treaty: Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area known as Torres Strait and Related Matters, 18 December 1978, *Australian Treaty Series* (1985) no 4.

¹⁶ Articles 56(1)(b)(i) and 60, LOSC.

¹⁷ Article 80, LOSC.

¹⁸ Article 60(2), LOSC.

¹⁹ The LOSC permits the proclamation of a safety zone around a structure, to a distance not exceeding 500 metres: Articles 60(4) and 60(5), LOSC. See Kwiatkowska B, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, (1989), pp 120-123.

²⁰ One of these features was subsequently proclaimed as independent by its occupiers under the name "Sealand". For a discussion see Menefee SP, "'Republics of the Reefs': Nation-Building on the Continental Shelf and in the World's Oceans" (1994) 25 *California Western International Law Journal* 81.

a State with jurisdiction over a seabed platform is entitled to proclaim a safety zone around the feature.²¹ This safety zone can only extend to a radius of 500 metres, so the interference is not great, yet it amounts to a substantial interference as that caused by the physical presence of an artificial structure on a portion of the seabed to the enjoyment of the shelf State, with a similar safety zone around it.²²

With this in mind, it would seem reasonable that where seabed and water column are subject to separate jurisdiction, the right of a coastal State to engage in offshore construction would seem to best attributed to the use to which the facility will be put. Where seabed mining is intended, the structure would fall under the exclusive jurisdiction of the shelf State, whereas if fish aggregation is intended, then jurisdiction falls to the EEZ State. This raises the question of whether a shelf State ceases to have jurisdiction after a structure is abandoned, and where its only purpose after abandonment would be to act as a *de facto* fish aggregation device. In practice, this would seem unlikely, as the LOSC does provide for the State responsible for construction to have responsibility for removal and warning of remaining features.²³ A transferral of jurisdiction upon the completion of seabed mining would make the fulfilling of this obligation difficult.

Indirect Inconsistencies

The resolution of direct inconsistency by abdicating EEZ rights over the seabed does not resolve other less direct problems. Coastal States when exercising jurisdiction over the EEZ do not merely have that jurisdiction restricted to resource activities, but can exercise control over other events. The two principal areas outside of resource exploitation where jurisdiction can be exercised are the fields of marine pollution and marine scientific research. There is a significant potential for the exercise of jurisdiction in both of these fields to impact upon the situation of separated continental shelf and EEZ.

Jurisdiction over protection and preservation of the marine environment is dealt with in Article 56, where a coastal State is given control over these matters within its EEZ. The Convention deals with the subject of marine environmental protection more generally in Part XII, where Article 194 vests all States with the power to take such measures, as are consistent with the Convention, to prevent, reduce and control pollution from any source,²⁴ and to ensure that activities under their jurisdiction are conducted so as to avoid damage to other States.²⁵

Where the seabed is subject to a different State's jurisdiction to the State with responsibility for the water column, it is possible to envisage two distinct situations where the overlap may cause problems. The first is where activities taking place in the water column damage the seabed, or more particularly the living resources of the seabed. Such damage caused by pollution from a vessel falls under Article 211 which provides for coastal States implementing domestic anti-pollution measures in the absence of effective international protection. For a shelf State, it appears that Article 211 would be unavailable as the provision refers to the coastal State's exclusive economic zone rather than its continental shelf.²⁶ On that basis, action would have to be based on the general duty imposed on States under Article 194 not to permit pollution to spread, and on general rules of international law on liability for pollution that has spread to another jurisdiction.²⁷ In any case, this situation is unlikely to occur, although it is by no means impossible.²⁸

²¹ Articles 60(4) and 60(5), LOSC.

²² The safety zones cannot be used to cause interference to recognised international sea lanes: Article 60(7), LOSC.

²³ Article 60(3), LOSC.

²⁴ Article 194(1), LOSC.

²⁵ Article 194(2), LOSC.

²⁶ For discussions of marine protection within the EEZ see Orrego Vicuña F, *The Exclusive Economic Zone*, (1987), pp 83-90; Kwiatkowska, above, pp 120-123.

²⁷ For example, see *Trial Smelter Arbitration*, 3 RIAA 1905.

²⁸ Interestingly, a situation of this type did occur in the vicinity of an area now subject to split water column and seabed jurisdiction. In 1970, the *Oceanic Grandeur* ran aground in Torres Strait, spilling oil. The pearl oyster industry of the Strait was decimated by a strange disease in the 18 months following the oil spill. Suspicions of a causal link between

A more likely scenario is the second category of potential problem, namely that seabed activities cause pollution within the water column. Oil drilling operations offshore potentially could cause damage to the sea around an oil platform, in terms of drilling, the risk to pipelines around the platform, in the transfer of oil from a platform to a tanker, and from the presence of the platform, and the pollution it may generate. In such a situation it might be argued that both coastal States retain jurisdiction, given the interests of both States would be directly affected: the shelf State, who would have a legitimate interest in the regulation of mining and its consequences; and the water column State, whose interest in the marine living resources of the polluted area may be detrimentally affected.

A similar problem arises in the context of marine scientific research. Authority for marine scientific research falls under the EEZ regime, which grants the coastal State exclusive power to undertake such research.²⁹ However Article 246, which is contained in Part XIII of the Convention, directed towards the regulation of marine scientific research, provides that the coastal State has the right to "regulate, authorise and conduct" marine scientific research in their EEZ and continental shelf.³⁰ While logically this should mean research into the continental shelf and its resources is the appropriate subject of regulation by the State claiming the shelf, the nature and scope of the EEZ is such that all research activities falling within its area are within the province of the coastal State. Accordingly, if the continental shelf and EEZ are separated, and depending on the precise nature of the research, then there may be two coastal States who are capable of purporting to regulate research activities in the same maritime space.

Article 246(5) goes on to provide that a coastal State can withhold its consent to permit research in certain circumstances, including where the research is of direct relevance to the exploration and exploitation of marine resources, living or non-living. This could effectively give either of the two States in an area of jurisdictional separation a power of veto over any research or exploration of the seabed. Similarly, Article 248 provides that coastal States have a right to receive scientific data drawn from the research in its maritime zones. Given that much seismic and related data gleaned in oil exploration research is commercially valuable, and highly prized by corporations, the transmission of such data to two States would be disconcerting to those who collected it.

Even if the jurisdiction over marine scientific research is read down to authority over water column research to the restricted EEZ State, and seabed research to the shelf State, the problems are not entirely resolved. Seabed exploration may require some studying of the adjacent water column. Knowledge of the currents, water temperature, and the marine species in the vicinity of a planned oil platform may all be vital to its operation, and would seem to be within the jurisdictional bailiwick of the water column State, even if its jurisdiction is read down.

One response to this problem is to narrow the definition of marine scientific research to exclude research undertaken in the exploration of the seabed and its subsoil. Exploration by its very nature requires the collection and analysis of scientific data, and this in turn may provide a way of distinguishing it from other marine scientific research. Churchill and Lowe describe this distinguishing "pure" marine scientific research from "applied" marine scientific research, although they are careful to note these terms are not found in the Law of the Sea Convention.³¹ While possible to make an argument that exploration of the seabed is not marine scientific research, it is difficult to sustain in view of Article 246(5), which provides a coastal State may withhold its consent to the research if the project "is of direct significance for the exploration and exploitation of natural resources, whether living or non-living".

It therefore appears where there is the overlap of the EEZ and continental shelf under the respective authority of different coastal States, the Law of the Sea Convention would clearly seem to grant both States jurisdiction.

the spill and the collapse of the industry have been periodically raised: See Kaye SB, *The Torres Strait*, (1997), p 122.

²⁹ Article 56(1)(b)(ii), LOSC.

³⁰ See Kwiatkowska, above, pp 134-155.

³¹ Churchill and Lowe do not suggest that exploration is not research, merely that there is a difference in treatment for applied and pure research under the Convention: Churchill & Lowe, above, p 293.

That does not mean however that the problem has not been considered in international law, having been considered by the International Court of Justice and in practice between States.

Australia-Indonesia Maritime Boundary Treaty

The Australia-Indonesia Maritime Boundary Treaty was concluded in 1997, and at the time of writing had yet to enter into force. It was intended to provide a comprehensive boundary settlement between Australia and Indonesia, after 25 years of periodic negotiation. Aside from a permanent continental shelf boundary which will need to be concluded upon the winding-up of the Timor Gap JDZ, all outstanding maritime boundary issues were concluded.³² The negotiating positions of the two States had been quite far apart during most of this period, and so the mechanism of dividing the boundary for different purposes was used as a mechanism to bring the two parties together. The agreement provides for separate EEZ and continental shelf boundaries, creating quite substantial areas of Australian continental shelf overlapping with Indonesian EEZ.³³

The problem of separate boundaries for the continental shelf and the EEZ is dealt with in Article 7. In the areas of overlap, Article 7 provides that EEZ sovereign rights and jurisdiction are limited to the water column, and that continental shelf sovereign rights and jurisdiction are applicable to the seabed.³⁴ There appears to be an implicit assumption that the content of continental shelf seabed rights and jurisdiction equates to the scope of EEZ rights over the seabed, as to do otherwise would mean there was a lacuna of jurisdictional competence in relation to certain seabed activities. Such an assumption certainly appears reasonable given that all present uses of the seabed that could ordinarily be regulated by the EEZ regime would equally fall under the continental shelf regime.

The content of the both the EEZ and continental shelf rights are expressly drawn from the Law of the Sea Convention.³⁵ However recognising that so simple a division would not answer all the potential conflicts, provisions are put in place for jurisdiction over and notice of certain activities. For the most part, the provisions seek to allow both States to exercise their jurisdiction independently of the other party. At the same time, certain uses of the sea and seabed that could potentially interfere with the other's jurisdiction and/or enjoyment require notice of the activity that is to take place. For example, the construction of any installation or structure that is not an artificial island must be preceded by "due notice".³⁶ The Treaty does not prescribe how long this notice period should be, but the term is used in the Law of the Sea Convention in the same context,³⁷ and was selected to permit flexibility in the time between the decision to construct an installation, and its actual construction.³⁸ The same "due notice" requirement is imposed upon on the construction of fish aggregating devices. Where a State has constructed an installation, structure or fish aggregation device, they retain exclusive jurisdiction over it.³⁹ Equivalent duties to those in the Law of the Sea Convention with respect to removal, and publicity over abandoned structures are also found.⁴⁰ As the shelf State, Australia is also obliged to give 3 months notice of the granting of any exploration or exploitation rights.⁴¹ What is clear is that

³² The Timor Gap arrangements were expressly preserved by virtue of Article 8, Australia-Indonesia Maritime Boundary Treaty.

³³ For background see Kaye SB, "The Australia/Indonesia Maritime Boundary Treaty: A Review", (1997) 94 *Maritime Studies* 28; Kaye SB, "Australia and Indonesia tie the Maritime Knot", (1997) 71 *Australian Law Journal* 916.

³⁴ Articles 7(a) and 7(b), Australia-Indonesia Maritime Boundary Treaty.

³⁵ For the water column: Article 7(a), Australia-Indonesia Maritime Boundary Treaty; and for the continental shelf: Article 7(b), Australia-Indonesia Maritime Boundary Treaty.

³⁶ Article 7(e), Australia-Indonesia Maritime Boundary Treaty.

³⁷ Article 60(3), LOSC.

³⁸ Attorney-General's Department, *Submissions to the Joint Standing Committee on Treaties Inquiry into the Australia-Indonesia Maritime Delimitation Treaty*, 5 November 1997, pp 3a-3d.

³⁹ Article 7(h), Australia-Indonesia Maritime Boundary Treaty.

⁴⁰ Article 7(f), Australia-Indonesia Maritime Boundary Treaty.

⁴¹ Article 7(d), Australia-Indonesia Maritime Boundary Treaty.

where a State wishes to engage in the construction of an installation or other structure on the seabed, it does not require the concurrence of the other party, merely to inform it in advance of its intentions.⁴²

However, the Treaty does not indicate whether *both* States have an unfettered power to construct installations in the overlap area. It is evident that the right to construct structures on the seabed is not restricted to the shelf State, Australia. Article 7(h) provides that the party responsible for the construction of the feature has jurisdiction over it. This implies that in certain circumstances both States will have the right to construct structures in the areas under their jurisdiction. Logically if this is the case Indonesia, as the water column State, ought to be entitled to construct structures to assist in the exploitation of the waters under its jurisdiction. Such a view was expressed by the Australian Attorney-General's Department in submissions on the Treaty made to a Parliamentary inquiry,⁴³ and can be easily accommodated under Article 7(g), which provides the construction of a fish aggregation device should be subject to "due notice".

The only area where the parties can directly interfere with the other's exercise of jurisdiction is the rather restricted category of artificial islands. An artificial island is defined as an area of land, clear of the water at high tide, but only by reason of human intervention.⁴⁴ Consequently, it can be distinguished from a platform or other installation, which are clearly not land. Both parties retain the right to refuse the construction of an artificial island, as the agreement of both is necessary for construction to go ahead. In practice, the overlap areas are in areas where water depth would mitigate against the construction of artificial islands, so neither State are likely to be adversely affected by the granting of a veto to the other.

Other aspects of jurisdiction are also dealt with in the Treaty. Marine scientific research is provided for in Article 7(i). It provides that marine scientific research is to be carried out in accordance with the Law of the Sea Convention, with notification to the other party of such research. Given the Convention is ill-equipped to deal with the separation of jurisdiction, the provision gives limited guidance into its actual operation. In theory, the application of Part XIII would be subject to the jurisdiction of both States with respect to marine scientific research, given that both are coastal States for the purposes of the Convention. Such an arrangement would be problematic, and appears to have been recognised as such by the parties, even if not expressly spelled out in the Treaty itself. Again in submissions to a Parliamentary Committee by the Australian Attorney-General's Department, it was stated that in the course of negotiations it was settled that Australia would have jurisdiction over research taking place into the seabed, and Indonesia would have jurisdiction over research into the water column.⁴⁵ On that basis, the lack of certainty on the face of the provision could easily be resolved with recourse to the *travaux préparatoires*.⁴⁶

However, the issue of the collection of water column data to support exploration of the seabed would still not be resolved. Although related to the seabed, and therefore capable of authorisation by Australia, the subject matter of the research is the water column, falling under Indonesian jurisdiction. There are two possible interpretations. The first, that research that is incidental to seabed exploration is entirely under Australian jurisdiction, and accordingly the only obligation to Indonesia is the notification of such activities under Article 7(i). The second is that Indonesia has jurisdiction over such research. While it is unlikely that jurisdiction would translate into an ability to withdraw consent, as that would inhibit Australia's exercise of its rights to conduct exploration by virtue of Article 7(m), it may certainly have an entitlement to the data collected from such research.

⁴² This is confirmed by the submission of the Attorney-General's Department to the Parliamentary Treaties Committee Inquiry into the Treaty, an interpretation that was expressly adopted by the Committee in its Report: Attorney-General's Department, *Submissions to the Joint Standing Committee on Treaties Inquiry into the Australia-Indonesia Maritime Delimitation Treaty*, 5 November 1997, p 3c.

⁴³ Attorney-General's Department, *Submissions to the Joint Standing Committee on Treaties Inquiry into the Australia-Indonesia Maritime Delimitation Treaty*, 5 November 1997, p 3b.

⁴⁴ Article 7(c), Australia-Indonesia Maritime Boundary Treaty.

⁴⁵ Attorney-General's Department, *Submissions to the Joint Standing Committee on Treaties Inquiry into the Australia-Indonesia Maritime Delimitation Treaty*, 5 November 1997, p 3c.

⁴⁶ Pursuant to Article 32, Vienna Convention on the Law of Treaties, 1969, 8 ILM 679 (1969).

The Treaty is also not overly effusive on the subject of marine pollution. Article 7(j) provides that each part will take effective measures as may be necessary to prevent, reduce and control pollution of the marine environment. Logically, the measures a State can take to control pollution must fall within its jurisdiction, which would mean marine pollution of the water column would be subject to Indonesian regulation. Where such pollution originated from activities associated with exploitation and exploration of the seabed, it would follow that Australia would be able to regulate such matters as an incidental part of its regulation of exploitation or exploration.

As such marine pollution from an oil platform would potentially be subject to the jurisdiction of both States, necessitating some level of cooperation and coordination by both parties. The Treaty provides no further help, other than attributing liability on the basis of international law for pollution caused by matters under its jurisdiction.⁴⁷ Therefore, oil pollution emanating from a platform would be Australia's responsibility, as the structure would be subject exclusively to Australia's jurisdiction by virtue of Article 7(h). In practice, Article 7(h) would appear to be the most effective way of removing the likelihood of conflict. Indonesian jurisdiction over marine pollution would only be attracted when the water column was affected. Their jurisdiction could not pre-empt the act of pollution, as Australia is guaranteed exclusive jurisdiction over activities on the structure. Consequently, if Indonesia's jurisdiction is only manifested by pollution, its principal concern will be restoration of the environment, and compensation for damage. Article 7(k) by expressly fixing liability would mean Australia would assume that responsibility.⁴⁸ Indonesian interest would therefore be directed at a State level, to ensure Australia met this obligation, rather than the operator of the platform.

The parties have also recognised that given there is an overlap of jurisdiction, that coordination of efforts to prevent damage from an accident is most desirable. This was recognised even before the conclusion of the Treaty with the adoption of a Memorandum of Understanding with respect to oil pollution preparedness and response.⁴⁹ This MOU strongly suggests that both parties are committed to a cooperative approach to the issue of marine pollution in the overlapping area.

These arrangements have been criticised by Herriman and Tsamenyi on the basis that they do not satisfactorily resolve the division of jurisdiction in all instances, and that the agreement fails to address all areas where potential conflict could occur. They are of the view that the present agreement is heavily dependent on the goodwill of the parties, and their ability to amicably resolve any potential problems that could arise.⁵⁰

The agreement itself attempts to deal with this problem by requiring that neither party exercise its rights and jurisdiction in a way which unduly inhibits the rights and jurisdiction of the other, and that both cooperate in relation to the exercise of their rights and jurisdiction.⁵¹ Certainly while relations between the two States are strong, then it is reasonable to assume these provisions will operate satisfactorily. However should relations seriously deteriorate then the criticisms raised would not be without foundation.

Conclusion

The separation of the continental shelf and the EEZ provides States with a useful technique in the delimitation

⁴⁷ Article 7(k), Australia-Indonesia Maritime Boundary Treaty.

⁴⁸ Article 7(k), Australia-Indonesia Maritime Boundary Treaty provides:

"each Party shall be liable in accordance with international law for the pollution of the marine environment caused by activities under its jurisdiction."

⁴⁹ Memorandum of Understanding between the Governments of Australia and Indonesia on Oil Pollution Preparedness and Response, 3 September 1996 and 3 October 1996, unpublished. I am grateful to Max Herriman for providing me with a copy of the MOU.

⁵⁰ Herriman M and Tsamenyi BM, "The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?" in *Submissions to the Joint Standing Committee on Treaties Inquiry into the Australia-Indonesia Maritime Delimitation Treaty—12th Report*, 17 November 1997, p 111-131.

⁵¹ Article 7(m) and 7(n), Australia-Indonesia Maritime Boundary Agreement.

of maritime boundaries. It gives negotiators significantly greater flexibility in bargaining, and allows for a greater number of areas where concessions might be made to increase the likelihood of resolution. However, as is noted above, the Law of the Sea Convention is ill-equipped to deal with the jurisdiction difficulties that separation gives rise to, and consequently States are left to leave issues open, leaving them to another day, or to negotiate their way through a set of complex and difficult issues. State practice has tended towards the former solution rather than the latter, although given the relative satisfaction of the parties to the Timor Gap Agreement, there is certainly room for optimism in the success of complex arrangements if States are prepared to support them. What is clear however if the separation of jurisdiction in delimitation is used with greater frequency in the future, States will have to give increasing attention to the nature of their jurisdiction over the continental shelf and exclusive jurisdiction, and develop techniques for the complementary and joint exercise of jurisdiction over the seabed and the ocean.

What is clear, is that where jurisdiction is separated or where joint development is pursued, the arrangements are heavily dependent upon the goodwill and active cooperation of the State parties. Given that such arrangements will generally mean the physical presence of both parties in a the affected area, an absence of goodwill could quickly make it extremely problematic for either party to effectively conduct its activities. In areas such as marine pollution, where the interests of all parties will be in issue, parties must have confidence in each other that effective measures are in place to prevent pollution. Cooperation would also be essential to deal with accidents, given the few States will possess all the resources in all circumstances necessary to cope with a large scale pollution problem.

The Review of the Reformed Treaty-Making Process

Jeff Hart ¹

Introduction

1. In May 1996, the Commonwealth Government responded to public concern about treaty making when the Minister for Foreign Affairs and the Attorney General jointly announced that there would be significant reform of the process. In introducing the changes to Parliament, Mr. Downer foreshadowed a further review after the benefit of two years' experience of the new treaty making arrangements. That time is now with us.

What is a Treaty?

2. In the words of the Vienna Convention on the Law of Treaties, "treaty" means "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"—or a similar agreement between a state and an international organisation. Many titles are used; the most common are Agreement (for practical, bilateral treaties), Convention (for multilateral or plurilateral—limited membership—codifying and standard-setting treaties), and Protocol (for instruments derived from Conventions).

The Reformed Process

3. Five initiatives constituted the package of treaties reform announced in May 1996.

(i) Tabling

4. The first initiative was the requirement for all proposed treaty actions to be tabled for at least fifteen sitting days in both Houses of Commonwealth Parliament prior to the Government's taking any steps to bind Australia under international law with a limited number of exceptions where urgency provisions apply (in which case tabling and JSCOT consideration will follow treaty action). Fifteen sitting days—thirty to one hundred calendar days—is a tight turn-round deadline, but of the same order as corresponding periods in other common-law systems—and has proved manageable for the Joint Standing Committee on Treaties, which has been conscious of the importance of Australia's expeditious participation in co-operative international enterprises. Flexibility has worked well in both directions, with the Government able on occasion to invoke the urgency provisions (for example, the Truce Monitoring Agreement for Bougainville of 5 December 1997, and Whaling and Bonn Convention Amendments with default entry into force), and the Joint Standing Committee on Treaties able as necessary to seek from the Minister for Foreign Affairs extensions for further consideration before finalisation.

(ii) National Interest Analyses

5. The second initiative was the requirement for National Interest Analyses ('Treaty Impact Statements' in some of the literature) to accompany tabled treaty actions. The Analyses include three especially interesting sections: a description of implementing machinery (the assurance that any necessary domestic legislation and arrangements are in place); a summary of consultation undertaken; and a note on withdrawal provisions (responding to earlier concerns about treaties restricting Australia's freedom of manoeuvre). Content is evolving, following comments by the Joint Standing Committee on Treaties, to include ever

¹ Executive Director Treaties Secretariat, Department of Foreign Affairs and Trade. The author wishes to acknowledge the earlier work of Ian Biggs in the preparation of this paper. The views expressed are those of the author and should not be regarded as reflecting the views of the Commonwealth Government or the Department of Foreign Affairs and Trade.

fuller accounts of consultation (with whom, and to what effect). Additionally there is always a balance to be struck between concision and clarity (compress the explanation of a tax-sparing Agreement too much and you render it unintelligible); and a layperson's guide to a treaty can never substitute for the treaty text itself. The National Interest Analyses tabled so far have been welcomed as useful statements of official interpretation.

6. National Interest Analyses are drafted by line Departments and agencies, then cleared by the Treaties Secretariat, in consultation with the Attorney-General's Office of International Law and the Office of Regulation Review (part of the Industry Commission). Authorisation for tabling comes from the Minister for Foreign Affairs, though the nominated contact points for any follow-up enquiries are in the line Departments and agencies—who remain responsible for any errors not actually introduced during clearance. Experience to date is that time spent negotiating formulations is well worthwhile, ensuring consistency of prose and thorough coverage of all the essential components of analysis. National Interest Analyses are Government documents, even if they normally reflect some outside consultation. In many cases they draw on earlier discussion papers and briefing, so the line of the tabled document will rarely be new.
7. National Interest Analyses are tabled under embargo as Government Documents. Significant changes before treaty finalisation mean the tabling of any amended version. After finalisation of the action in question, the Analysis must be regarded as a statement of the Government position at a particular stage, rather than a set of eternal verities; the meaning of the provisions of international instruments does sometimes evolve with custom and jurisprudence.

(iii) Joint Standing Committee on Treaties

8. The third initiative was Government support for creation of the Joint Standing Committee on Treaties (JSCOT). This Committee composed of sixteen members of both Houses has served as an impartial check on Government proposals, and a medium for the dissemination into Parliament of information about treaty-related projects. The Committee whose resolution of appointment is quite wideranging has taken the view that treaties entered into before the 1996 reform are also available for consideration and on this basis has undertaken an inquiry into the implementation of the Convention on the Rights of the Child.
9. The Committee has taken as many of its inquiries out to the people as possible, with hearings held at locations convenient to stakeholders rather than in Canberra. The Government has strongly supported efforts to make the system more accessible and the 'public' nature of such inquiries more meaningful; travel funds are (with members' time) the main brake. Likewise there are limits on the resources available for advertising the Committee's inquiries. However, in addition to public notices the Committee secretariat has through its own efforts contacted the obvious stakeholders for each treaty under consideration.

(iv) Treaties Council and the Standing Committee on Treaties

10. The fourth initiative was Commonwealth support for creation of the Treaties Council, consisting of the Prime Minister and all the Premiers and Chief Ministers.² As an adjunct to the Council of Australian Governments, the Treaties Council has an advisory function—allowing the States and Territories to draw to Commonwealth attention any treaty-related concerns, and the Commonwealth to reassure them of a continuing commitment to consultation. The Council met for the first time in November 1997.
11. The related officials committee the Standing Committee on Treaties (SCOT), meets approximately twice a year. It brings the people responsible for treaties process within the central agencies of each of the Australian jurisdictions together; simplifies Commonwealth briefing of the States (and Territories) on relevant developments in Australia's international relations; and facilitates prompt attention to any problems in consultation identified by any of the jurisdictions. States (in most cases, Premier's Departments

² *Principles and Procedures for Commonwealth-State Consultation on Treaties* (June 1997)—the current edition of guidelines agreed upon at the Premiers Conference of October 1997

or Cabinet Offices) have always indicated that their involvement in treaty making should be co-ordinated, at least at the initiating stage, through central agencies. Major treaty-related issues (an obvious example would be Climate Change) are eventually managed through special consultative forums, or through the range of other Commonwealth-State councils and committees—but SCOT allows continuing central-agency co-ordination and whole-of-government approaches. As important as the actual meetings of SCOT are the schedules circulated several times a year, of proposed, imminent, current, and recent treaty action. The schedule is normally the first vehicle for the Commonwealth to advise the States of a treaty negotiation, and States' responses either request more information, seek involvement, or, through a nil return, give the Commonwealth some indication that States' interests are not significantly affected. Finally, SCOT amounts to a ready mailing list for the ad hoc distribution of treaty-related information or requests for comment, among the jurisdictions.

(v) Treaties Library

12. The fifth initiative was the construction of the Treaties Library on the Internet (www.austlii.edu.au/dfat)—the most complete freely available national database of treaty information in the world. Australia also promoted a Resolution at the UN General Assembly in December 1996 calling on other countries and treaty depositaries to make treaty records available electronically; now the US Treaty List is on the Internet, Britain and the Netherlands have multilateral status lists there, and international organisations with all 'their' treaties on the Internet include the International Maritime Organization, the World Intellectual Property Organization, and the International Institute for the Unification of Private Law (Unidroit). The UN Treaty Series—about 1500 volumes, or more than 80,000 treaties and subsequent actions—is available, but only as (non-searchable) graphical images.
13. The database has been established as part of the Australasian Legal Information Institute collection, so that cross-references to Australian statutes and case law can be generated within the site. During the construction phase, the Government's financial support has made a more than useful contribution to the general AUSTLII process. When the database is complete—probably mid-1999—maintenance and updating should be relatively inexpensive.

Parliamentary Involvement

14. The assertion of Parliament's part in treaty making has been basic in the treaties reform process. As noted, before the Government takes final action to bind Australia to a treaty, it gives JSCOT at least fifteen sitting days to consider the proposal. For bilateral treaties—by international practice confidential to the parties until signature—this has meant Australia insisting on a confirmatory step in entry-into-force provisions, or on the agreement of the other side to table the negotiated text in Parliament before signature. Parliamentary involvement became inevitable as Australian jurisprudence and international practice ever more clearly regarded treaties as elements of or factors in the legal system; and as surveys of comparable systems found only a relatively few countries in which the legislature was not involved in treaty making (Britain and New Zealand were cases in point but both have since introduced their own reforms.)

Consultation

15. Consultation was one of the concepts at the heart of the 1996 reform. The challenge is to ensure wideranging consultation including not only mandated actors and lobby groups but the community at large—the citizenry, the general public. Efficiency dictates, however, that a test of significant interest is in practice applied to limit the active expenditure of bureaucratic resources—in treaty making as in other government policy functions.
16. The Government has endeavoured to provide the wider community with real opportunities to influence national outcomes on treaties. The standard means include writing to Ministers, Members of Parliaments, and the media, and joining organisations active in the relevant fields. Special channels for public input on treaties include the twice-yearly tabling and publication of lists of multilateral instruments under negotiation or consideration (with contact details), and the public inquiries and hearings into all proposed

actions now held by the Joint Standing Committee on Treaties. The material emerging in these inquiries is as much a part of consultation as the unavoidably more restricted lists of stakeholders involved in policy deliberations before tabling. Parliament and its Committees have direct linkages to the community at large that central Departments and agencies do not. Given that Parliamentary consideration is now an integral part of the final determination of the national interest and that the Consultation section of tabled National Interest Analyses has never purported to be more than a summary of what has been undertaken in the pre-Parliamentary phase, it has not been regarded as practicable to attempt a general testing of community views on particular treaties, but rather to have a review exercise undertaken by the legislative arm.

17. The current effort is for a more thorough consultation of groups reasonably known to be interested—and at the earliest stages compatible with treaty law, international practice, and the need for expeditious policy development. This has been a theme of Joint Standing Committee on Treaties Reports, and improved efforts are increasingly evident in tabled National Interest Analyses. Thoroughness is not foolproof, however, and there will always be community groups with a plausible interest who can be contacted to confirm that they have not so far been consulted (or, if consulted, that their opinions have not been accepted).

Transparency

18. Transparency was the other concept at the heart of the 1996 reform. Much of the public complaint about international obligations, is a strongly held belief in some quarters that treaties are often negotiated and agreed to in a clandestine fashion. In practice, controversy about the sovereignty-eroding qualities of treaties commonly turns out to involve about a score of major multilateral Conventions in the fields of human rights, the environment, and economic globalisation.
19. It should also be said, however, that Australia's inclusion in the international trading system, our security through rules-based international behaviour, our sovereignty over marine areas, the inter-operability of modern technology, and the safeguarding of global interests such as the quality of the environment require our participation in the international legal system, of which treaties are the statutes. Because we are preponderant in almost no field of global endeavour, we do not have the luxury of standing aloof, as a superpower such as the United States has sometimes been able to, without penalty.
20. On balance Australia's participation in the international treaty making process is about average for any OECD country; with most multilateral Conventions we wait for a consensus of like-minded countries to emerge before ratifying; and there are whole categories of treaty (ILO Conventions, for example) about which Australia has over many years been among the most cautious of developed countries.
21. Yet, public concern is still best addressed through transparency. Through advances in the technology of electronic publication, and the enthusiasm of proponents of such systems as SCALEplus³ and Window on the Law⁴ databases, and university projects—pre-eminently the Australasian Legal Information Institute (University of New South Wales/University of Technology, Sydney),⁵ Australia now has the most accessible laws in the world. Legislation is available in full text at every stage from Parliamentary debates, through Committee inquiries, to enacted form and then case law.
22. As part of this transparency, treaty-related information is now available on Departmental, Parliamentary, and academic and international Internet sites. Australia is believed to be (so far) the only country to have its entire Treaty Series freely and widely available in this way. Access to legal materials does not make them readily intelligible, though explanatory documents like National Interest Analyses are remedying that as far as new international instruments are concerned. A vital element of transparency for treaties is therefore the provision of contact details for proposed actions. And the Treaties Secretariat has prepared and distributed many hundreds of copies of its Information Kit (*Australia and International Treaty*

³ scaleplus.law.gov.au

⁴ law.gov.au

⁵ austlii.edu.au

Making) to students and the general public to promote comprehension of the international legal system.

The Review

23. The review process foreshadowed at the time that the reforms were introduced will begin shortly. Apart from consultation with the various arms and layers of Government fullest possible community involvement in the process is obviously essential. This involvement will be sought through the internet and advertisements in the print media. It is also intended to solicit the views of those who have contributed to the reform process either through their involvement in the "Trick or Treaty" review or through their contribution to JSCOT hearing. A meeting such as this also provides a valuable opportunity to get the message out the review process is about to begin.

Race Discrimination and Indigenous Issues

International Human Rights and Domestic Law: Indigenous Peoples' Rights in Australia, Canada and New Zealand

Catherine J. Iorns Magallanes *

Preface

This paper comes from a chapter that I have written for a book on the development of indigenous rights in Australia, Canada and New Zealand over the past 20 years.¹

My chapter describes the development of international norms on indigenous rights and then analyses and compares how the international norms had affected the law in the three countries in the past 20 years. This paper focuses solely on my findings in respect of the effect of international law on domestic law in the three countries.

Introduction

Australia, Canada and New Zealand are all members of the Anglo-Commonwealth, with similar colonial and cultural backgrounds. They all publicly support the concept of human rights as these have evolved in the international sphere; they all support the instruments through which they have been implemented and they have ratified them at similar times. Moreover, they have the same methods of incorporating international law in their domestic legal systems.

However, despite these great apparent similarities, the impact of international human rights laws and politics upon domestic laws and politics on indigenous rights has been very different and occurred at different rates in each country.

I will address each country in turn and then make some comparisons and conclusions.

Australia

Australia sticks out like a sore thumb when compared with New Zealand and Canada. But in terms of international law, that is good. Since 1975, international human rights law has had a direct and very profound effect on Australia's laws relating to both racial discrimination and Aboriginal rights, and Australia's peculiar constitutional structure and politics have enabled the utilisation of international human rights standards in domestic law and politics. What Phillip Tahmindjis, in his PhD thesis, calls the growing synergy between international and domestic human rights laws² has resulted in the Aboriginal rights that Australia has in the late 1990s.

It started with the Labor Party push for Aboriginal rights especially national land rights legislation in the 1960s and early 1970s, based on ILO Convention No. 107.

Of much greater significance was the enactment of the Racial Discrimination Act in 1975 under the external affairs power. While the RDA concerns racial discrimination in general rather than Aboriginal rights in particular, it has played a significant and often crucial role in the determination of cases upholding Aboriginal rights.³ See, for example: the 1982 High Court decision in *Koowarta*;⁴ *Gerhardy v Brown*, in respect of the

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¹ *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, Paul Havemann, ed. (OUP, forthcoming, 1998).

² P. Tahmindjis, 'From Symbiosis to Synergy? A Comparative Analysis of the Impact of International Human Rights Norms on the Legal Systems of Canada and Australia', JSD Thesis, Dalhousie University, May 1996.

³ The Act was passed in order to implement in domestic law the International Convention on the Elimination of Racial

Pitjantjatjara Land Rights Act 1981 (SA);⁵ and the defeat of the Queensland legislation in *Mabo v Queensland No. 1*;⁶ then the defeat of the WA legislation in the *Worrora* case.⁷

*Mabo No. 2*⁸ is the case that has probably had the largest impact on Australian law and politics on Aboriginal rights since the 1970s. As we all know, it, too, utilised international law for support. While the case upheld common law rights on Aboriginal title, and these do not depend on international human rights law, the international human rights developments played an important part in the reasoning to decide that the common law doctrine could be relied upon in Australia. Notably, most judges adopted the approach of the International Court of Justice in its 1975 *Western Sahara* case, to reject the application of *terra nullius*.⁹ And of course there are Brennan's comments that we all know so well, about keeping the common law in step with international law and not being frozen in an age of racial discrimination.

In addition to law, domestic politics on Aboriginal issues have also been affected by international law and politics. The most common method has been the use of the international arena by Aboriginal groups, by other NGOs, academics, activists and politicians to both place issues on the national political agenda and push for their resolution. This use, particularly for purposes of embarrassment of the Australian government, appears to have had a significant positive affect on Aboriginal affairs policies and politics in Australia, quite apart from any resulting impact on Australian laws.¹⁰ Indeed, the fact that the Commonwealth government is held accountable at the international level for its policies in respect of Indigenous peoples—including its need to report on domestic affairs—may be one reason why the Commonwealth government has (at least in the past) been more receptive than the States to recognising and addressing Aboriginal issues domestically.¹¹

Canada

In contrast, Canadian laws relating to Aboriginal affairs appear to be influenced nearly exclusively by domestic political considerations, with only very few exceptions. Indeed, Phillip Tahmindjis comments that Canada has been 'lukewarm and sceptical' with respect to international human rights.¹² And this is despite that fact that domestic standards have invariably gone further than international ones.

For example, the Canadian Charter of Fundamental Rights and Freedoms—which is Canada's constitutionally entrenched human rights document and includes protection for Aboriginal rights—was motivated by solely domestic political considerations. While the provisions reflect international standards, there is little recourse to

Discrimination, which is included as a Schedule to the Act. Some of the wording of the Convention is incorporated directly into the Act, including the definition of 'racial discrimination.'

⁴ *Koowarta v Bjelke Petersen* (1982) 153 CLR 168.

⁵ *Gerhardy v Brown* (1985) 57 ALR 472 (HC of A).

⁶ *Mabo & Ors. v State of Queensland* (1988) 83 ALR 14, 63 ALJR 84 (HC of A) ('*Mabo No. 1*').

⁷ *WA v Commonwealth* (1995) 128 ALR 1.

⁸ (1992) 107 ALR 1.

⁹ As Brennan in the principal judgment put it, such a racist doctrine 'can hardly be retained'. *Mabo No. 2*, *ibid*, at 28. See also Deane and Gaudron, JJ, *ibid*, at 82, 83.

¹⁰ Since the United Nations Working Group on Indigenous Peoples was established in 1982, the Australian government and Aboriginal organisations have attended its meetings, where Aboriginal representatives have been publicly critical of Australian government policies and slow progress on Aboriginal issues, while the Australian government has always been quick to describe any positive developments that have occurred. The Aboriginal representatives have imported the language of self-determination, and other rights articulated in international fora, into political argument in Australia.

¹¹ See, eg., R. Mulgan & W. Sanders, 'Transforming Indigenous Affairs Policy: Labour's Contribution to "Internal Decolonisation"', in *The Great Experiment: Labour Parties and Public Policy Transformation in Australia and New Zealand*, Castles, F. R. Gerritsen & J. Vowles, eds (1996), 133.

¹² Tahmindjis, *supra* n.2, 1137.

international law in cases under the Charter.

The two major exceptions to this general approach are where changes have been made in response to complaints by Aboriginal persons to the UN Human Rights Committee—namely the Lovelace and Lubicon Lake Cree cases. What these are good examples of is the use of the international sphere by Aboriginal First Nations in Canada to further domestic political issues. They have been pursuing such strategies since the 1970s and consistently used the politics of embarrassment to encourage the Canadian Government to further recognise Aboriginal rights and meet Aboriginal claims.¹³

Such strategies have contributed to some domestic successes, with the Canadian government responding at both the national and international levels.

New Zealand

International human rights law has had a direct and significant effect on New Zealand's human rights laws, particularly those relating to race discrimination. Indeed, the pieces of legislation that have produced New Zealand's most significant anti-discrimination measures and remedies were enacted specifically to implement the ICERD and ICCPR and enable their ratification.¹⁴

However, unlike in Australia, such legislation has not been instrumental in the upholding of Maori rights. Indeed, the settlement of Maori claims to lands and resources made under the Treaty of Waitangi has proceeded largely without reference to international indigenous rights or standards at all.

For instance, none of the significant court decisions on Maori rights have utilised any of the developments on indigenous rights in international law. For example, the *New Zealand Maori Council* decision has been described as 'the most significant event of the decade for Maori'¹⁵ and 'one of the most important decisions that the court has made this century.'¹⁶ Yet it was decided without reference to international human rights

¹³ First Nations have appealed to outside bodies ever since colonisation. Sanders describes some appeals within the imperial structures of the British Empire, as well as appeals to international institutions, D. Sanders, 'Aboriginal Rights: The Search for Recognition in International Law', in *The Quest for Justice*, M Boldt & JA Long, eds (1985), 292–303.

¹⁴ See, for example, the *Race Relations Act 1971* and *Human Rights Commission Act 1977*. The Long Title of the former Act provides: 'an Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination on All Forms of Racial Discrimination.' This Act created the office of the Race Relations Conciliator.

See also the *New Zealand Bill of Rights Act 1990*. This, too, contains civil and political rights and was justified as implementing New Zealand's obligations under the ICCPR. The Long Title of the Bill of Rights reads:

An Act-

(a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and

(b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

In contrast, nowhere in the discussion of the inclusion of the Treaty of Waitangi in the Bill was there any mention of international human rights requirements, either general or those specific to indigenous peoples.

See Paul Hunt & Margaret Bedggood, 'The International Law Dimension of Human Rights in New Zealand', in *Rights and Freedoms*, eds. Grant Huscroft & Paul Rishworth, 1995, 37 at 5 1. The consolidation and extension of the *Race Relations Act* and *Human Rights Commission Act* in the *Human Rights Act 1993* states in its Long Title that it is designed 'to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on human rights'.

¹⁵ M.Russell, *Revolution: From Fortress to Free Market* (1996), 188, paraphrasing Wira Gardner.

¹⁶ *Ibid.*, quoting Geoffrey Paimer.

developments, despite arguments by counsel that they should be considered.¹⁷

In some cases, not only have international human rights developments not been referred to, but international law has even been rejected as unhelpful.¹⁸ There is one example of a District Court judge who did follow the Waitangi Tribunal approach and utilise general international human rights developments in order to develop Maori rights, but he has since been overturned on appeal.¹⁹

In contrast with the courts, international legal and political developments on human rights have had a significant effect on the jurisprudence of the Waitangi Tribunal.²⁰ For example, in its 1988 Muriwhenua Fishing Report the Tribunal discussed the emerging right to development in international (and comparative) law and used it to support the Tribunal's findings in respect of the development of Maori fishing rights.²¹ Further, the right to development was adopted in the Tribunal's 1992 Ngai Tahu Sea Fisheries Resource Report.²² In 1995 reference to public international law expanded such that, in two 1995 Tribunal reports, there are reports of counsel for claimants arguing that the Crown breached New Zealand's obligations under the ICCPR in respect of a right of Maori to enjoy their culture²³ and breached 'the right of [indigenous peoples to] self-determination at international law.'²⁴

Unfortunately, despite these latter references and arguments by counsel, they do not appear to have been utilised by the Tribunal, who did not refer to them in their recommendations. Further, the international developments referred to have not been comprehensive. For example, none of the developments surrounding ILO Conventions 107 and 169 and their statements on land and resource rights have been discussed, and the customary international right of cultural integrity could be made more of. However, the Tribunal shows a growing awareness of the implications of international human rights law, and is certainly making more use of international human rights law than the courts are.

Despite the international developments in respect of indigenous rights not being explicitly reflected in New Zealand law, they have had a significant effect at the political level. Maori are adept at utilising the politics of embarrassment against the government in international fora and I suggest that the government is fully aware

¹⁷ In the case counsel argued that the Treaty of Waitangi 'should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms'. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, at 655-6 per Cooke P. The Court of Appeal, however, declined to do this. For example, Cooke P was of the opinion that this was one of a number of matters 'better left free of crumbs of dicta.' *Ibid*, at 655.

Other landmark cases have been similarly decided. For example, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) was decided solely on the domestic legal history and context and importance of the Treaty to 'the fabric of New Zealand society.' *Ibid*, per Chilwell J. This lack of reference to international human rights developments has continued in decisions under the *Resource Management Act* and, indeed, under other modern legislation. For example, the case *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR, at 23-4, only refers to international law concerning the acquisition of territory by a colonising power.

¹⁸ For example, see *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 518. In contrast, I note that the jurisprudence of USA, Canada, and Australia on indigenous rights has been used extensively for decisions here. See, eg, *New Zealand Maori Council*, *supra* n. 167, 682; *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 644; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

¹⁹ *McRitchie v Taranaki Fish and Game Council*, (Wanganui District Court, Becroft J, unreported CRN 5083006813-14, 27 Feb. 1997); overturned by the High Court on May 14 1998 (unreported, Neazor & Greig, JJ).

²⁰ International law generally, eg. that concerning the interpretation of treaties and the status of the Treaty of Waitangi in international law, is frequently referred to; but the focus of this paper is whether international developments in respect of indigenous rights influenced similar domestic developments.

²¹ *Muriwhenua Fishing Report* (WAI 22), 1988, 234-8.

²² *Ngai Tahu Sea Fisheries Resource Report*, 1992, 253, 259.

²³ *Te Whanganui-a-Orotu Report* (WAI 55), 1995 161.

²⁴ *Kiwifruit Marketing Report* (WAI 449), 1995, 3.

that it is being held up to international scrutiny in this area. Thus domestic political forces have been influenced by international developments. Further, there are signs that such international influence is going to increase, with the use by Maori of the UN Human Rights Committee.²⁵

Summary and comparison:

International human rights law, even within a positivist legal framework, is increasingly recognising indigenous rights, which are requiring States to change the way they have historically regarded and treated indigenous peoples.

Despite the existence of international laws and norms, practices within States vary widely. While not as wide as if other countries were compared, the variation among Australia, Canada and New Zealand is significant given the similar colonial and legal backgrounds and similar attitudes toward human rights generally that these three countries share.²⁶ Developments in all three countries have paralleled international developments, in that all have implicitly rejected assimilationist goals and conceded elements of self-determination. Yet New Zealand and Canada appear to prefer to ignore international law if possible. In those countries, domestic legal and political circumstances provide sources for domestic indigenous rights; whereas Australia, with different domestic political and legal circumstances, has relied on international developments as tools for achieving significant developments in Aboriginal rights. In most respects, Canada and New Zealand have recognised rights in domestic law much earlier than Australia has, and Australia has been able to refer to the fact that it is 'behind' in its attempts to 'catch up'. Ironically, despite being further ahead, Canada and New Zealand have been publicly more reluctant to accept more progressive international standards, than Australia has.

Indigenous peoples in Canada, Australia and New Zealand all hold the view 'that their rights are not simply a matter for domestic law'.²⁷ Indigenous organisations in all three countries have made strong links with indigenous peoples worldwide and organised internationally from an early stage. Canadian organisations did this first, perhaps because of their historical links across the US-Canada border and geographical proximity to international events and other indigenous organisations. Indigenous organisations from Australia and New Zealand are also well-represented in the international sphere. It is the indigenous groups that have both taken their domestic concerns into the international arena and brought the politics and rhetoric of international rights back. They have had an impact on politics and law on indigenous rights in all three countries, whether or not that impact is explicitly acknowledged in subsequent legal standards. It is perhaps the strength of the indigenous voice within New Zealand and Canada that required the governments in these countries to accommodate their interests, whereas in Australia the comparative political weakness of the Aboriginal voice has meant that lawmakers have had to utilise external sources in order to justify recognising the indigenous rights that they have.

In relation to the domestic incorporation of international human rights standards it is noteworthy that, due to domestic circumstances, Australian law in respect of *terra nullius* and native title was modified long after the international law changed. In New Zealand and Australia, a very narrow range of international legal developments has been incorporated. For example, there is little in these countries of the autonomy or self-government that indigenous peoples in Canada have been assuming. Again, I suggest that this is due to domestic factors. For example, because most First Nations in Canada have historically had separate reserves, Canadians are used to the concept of divided and overlapping sovereignties. This concept is much less comprehensible in Australia and New Zealand, least so in New Zealand, perhaps because Australia is at least used to the concept of divided sovereignty under federalism and to different regimes applying to geographically remote Aboriginal peoples. Australia and New Zealand also do not appear to be concerning themselves with some of the possible implications of Article 27 of the ICCPR, despite having ratified the Optional Protocol,

²⁵ The UN HRC is currently considering the merits of the communication made by the Maori Legal Service in relation to the Sealords deal.

²⁶ Tahmindjis refers to the lack of a 'culture of rights' in Australia and Canada that I suggest New Zealand also shares. Tahmindjis, *supra* n.2, 691-712.

²⁷ Sanders, 'Remembering Deskaheh: Indigenous Peoples and International Law,' in *International Human Rights Law: Theory and Practice*, I Cotler & FP Eliadis, eds. (1992), 303.

which can make non-compliance embarrassing if complaints are upheld by the UN Human Rights Committee. Nevertheless, Australia appears from past experience to be the country most often looking to the developments in international law with an eye to implications for domestic change.

In Conclusion

The developments in international law outlined in this chapter are largely reflected and paralleled by those in domestic law. However, the utility of international law as a fulcrum for domestic legal and political change depends more on domestic than on international circumstances. Within our positivist legal and political frameworks, States will continue to resist the incorporation of indigenous rights; it will thus take strong domestic pressures, even if through internationally focused tactics such as the politics of international embarrassment, to effect domestic change in these three countries

The Credibility Gap: Australia's tenth, eleventh and twelfth periodic reports under the *International Convention on the Elimination of all Forms of Racial Discrimination*¹

Stephen Bull

This article briefly surveys some of the issues that may be relevant in Australia's tenth, eleventh and twelfth reports under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). As of the 30 June 1998, these three periodic reports are due to be submitted to the Secretary-General of the United Nations as required by article 9 of the CERD. The Commonwealth Government has recently commenced the process of drafting Australia's tenth, eleventh and twelfth periodic report under the CERD. These report covers the period 1 July 1992 to 30 June 1998.

Due to the absence of timely reports, it may be difficult for Australia to faithfully inform the Committee on the matters relevant to the implementation of the CERD within the reporting period. In brief, there is a 'credibility gap' created by political and policy changes within the reporting period that highlights the desirability of timely reporting. This becomes particularly apparent if policy concerning native title is examined.

Background

The obligation to furnish periodic reports is contained in article 9 paragraph 1 of the CERD. Article 9(1) of the CERD reads:

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

The Committee on the Elimination of Racial Discrimination (CERD Committee) has produced general guidelines regarding the form and content of reports. The most recent guidelines were produced in 1993.²

In the most general sense, reports under article 9 concern what the State Party has done in the relevant period to eliminate racial discrimination within its territory. The sort of measures contemplated to be undertaken by the CERD are diverse and a variety of different strategies can be legitimately employed to further the aims and objectives of the Convention. The CERD is not concerned narrowly with racial discrimination and a broad range of matters relating to the status of racial groups within the States Party's territory are potentially relevant.

A States Party's periodic report is not limited to matters constitutionally within the jurisdiction of the State Party. For example, the Commonwealth of Australia must report on the activities of State and Territory governments. Further, the type of measures that should be reported on are very wide and not limited to executive or legislative actions of governments and encompass 'legislative, judicial, administrative or other

¹ Since this paper was given at the ANZSIL conference in June, the Native Title Amendment Bill 1997 was passed by the Australian Senate on 8 July 1998. The *Native Title Amendment Act* 1998 came into force on 27 July 1998. Accordingly some alterations have been made to accommodate this significant development. Although the proclamation of the Amendment Act falls outside the twelfth reporting period, most of the consideration of the 'Wik Bill' occurred within the twelfth reporting period.

² General guidelines regarding the form and content of reports to be submitted by states parties under article 9, paragraph 1 of the Convention 23/7/93 CERD/C/70/Rev.3.

measures' which have been adopted to give effect to the provisions of the CERD. For example, article 2(1)(e) of the CERD requires States Parties 'to encourage, where appropriate, integrationist multi-racial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.' It would be relevant under this article to outline the emergence of political parties such as Pauline Hanson's *One Nation*. Similarly, development of reconciliation and anti-racism organisations such as Australians for Native Title and Reconciliations (ANTaR) would also be relevant.

Australia's ninth report

The last report under the CERD submitted to the United Nations was Australia's ninth report for the period January 1991-June 1992. Australia's ninth report contains an extensive summary of the then Commonwealth Governments policies concerning multiculturalism and Indigenous Australians. The main federal laws described as relevant to the elimination of racial discrimination were the *Racial Discrimination Act 1975* (RDA) and the *Human Rights and Equal Opportunity Act 1986*. The plan to establish an office of the Aboriginal and Torres Strait Islander Social Justice Commissioner was also mentioned in the context of government activity designed to eliminate racial discrimination.

The CERD Committee considered Australia's ninth periodic report at its 1058th and 1059th meeting on 11 and 12 August 1994. Australia's delegation was lead by the then Minister for Aboriginal and Torres Strait Islander Affairs, the Hon. Robert Tickner MP and the newly appointed Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Michael Dodson. The Committee was greatly impressed with the assistance provided by Commissioner Michael Dodson and noted:

The opportunity given to the Social Justice Commissioner (Human Rights and Equal Opportunity Commission), who was independent from the Government, to provide information in reply to questions raised and comments made by members of the Committee was highly commended and considered to be an example to be followed by other reporting States.³

Generally, the Committee recommended that Australia pursue 'an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustices of the past.'⁴

The era of *Mabo*

In the tenth, eleventh and twelfth reporting period, 1 July 1992 to 30 June 1998, momentous changes have occurred in Australia's implementation of the CERD. The period coincides almost precisely with the recognition of native title by the Australian legal system and the *Native Title Act 1993* (NTA). Due to the race based nature of native title, any measures affecting native title are highly relevant to the CERD. Current policy concerning native title is further important because of past, and present, discrimination experienced by Indigenous Australian.

The recognition of native title by the High Court in *Mabo* [No.2] was explicitly viewed as involving the rejection of racial discrimination. For example, Mr Justice Brennan, as he then was, observed in *Mabo* [No.2]:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of

³ CERD/C/SR.1058. para. 519.

⁴ CERD/C/SR.1058. para. 548.

the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.⁵

The situation that confronted the Commonwealth Government in 1992 was unique. Australia possessed developed State and Territory based systems of land law and land management. These systems had evolved on the assumption that Australia was *terra nullius* and that an allodial⁶ interest in land such as native title could not exist. Prior to the second *Mabo* decision, land law in Australia was relatively simply, all interests in land ultimately derived from a crown grant and were relatively easy to identify. The expectation that all interests in land are easily identifiable is compounded by the development and use of the Torrens title system of land registration.

Australia was both delayed and back-to-front in its recognition of indigenous rights. Native title was only recognised by the Australian legal system in 1992. This compares with the much earlier recognition and acceptance of native title in Canada and New Zealand. These two countries had comparable colonial experiences to Australia and their current circumstances are also broadly similar. Significantly, the CERD's proscription concerning racial discrimination was enacted as federal law in the RDA in 1975. As *Mabo* [No.1]⁷ stated, the RDA provided generalised protection for native title holder and altered the common law relating to the extinguishment of native title. All this occurred prior to the recognition of native title rights by the Australian legal system. In a very real sense the *Native Title Act* 1993, was not the first Commonwealth enactment dealing with native title. The first was the RDA. Accordingly, racial discrimination was outlawed in Australia prior to the legal recognition of a significant racial minority's legal entitlement to land. This as events transpired was a fundamental problem for the Commonwealth Government in 1993 when the need for legislation to deal with the recognition of native title became apparent.

The 1993 NTA is an innovative response to the issues associated with the incorporation of native title into the land law and land management systems of Australia. Space precludes a detailed exposition of the features of the NTA. It should be noted that the NTA deals comprehensively with the complex integration and discrimination issues that arose from Australia's belated and back-to-front recognition of native title in 1992.

The High Court in *Western Australia v Commonwealth*⁸ described the 1993 Act in the following terms:

The Native Title Act provides the mechanisms for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act adopts the legal rights and interests of persons holding other forms of title as the bench mark for the treatment of the holders of native title.⁹

Many of the provisions of the NTA are unique and without parallel in other jurisdictions. This is a consequence of the highly unusual situation that confronted the Commonwealth Government after the *Mabo* decision in 1992. The NTA contains a number of novel solutions to the discrimination issues inherent in any attempt to integrate the property rights of Indigenous peoples into a modern federal state. The 1993 Act furthermore is considered beneficial to native title holders and complimentary to the RDA. Non-discrimination principles are incorporated into the NTA in a number of key provisions such as the 'freehold test' in the NTA's future act division.

There are some practices of the Commonwealth Parliament and Executive Government within the reporting period that are highly unusual and completely untested in relation to racial discrimination. One example is the

⁵ *Mabo v Queensland* (No.2) (1992) 170 CLR 1, p. 42.

⁶ Submerged in the land.

⁷ *Mabo v Queensland* (1988) 166 CLR 186.

⁸ (1995) 69 ALJR 309.

⁹ (1995) 69 ALJR 309, p. 352.

practice of legislatively validating titles. One validation has already occurred in 1993 and a further validation has recently taken place due to the enactment of the of Commonwealth Government's *Ten Point Plan*.

Another idiosyncratic feature of Australian practice within the reporting period is the continued application of the High Court's 1985 decision in *Gerhardy v Brown*.¹⁰ The High Courts decision in *Gerhardy v Brown* is generally seen as involving a rejection of the view that the CERD, as incorporated in Australian law by the RDA, possesses a substantive equality dimension. This formalist view of racial equality has a number of perverse consequence in terms of compliance with the CERD.

The *Native Title Amendment Act 1998* (the Amendment Act) was proclaimed on 27 July 1998. Accordingly, the second planned validation, that is discussed in greater detail below took effect on 27 July 1998. Prior to the passage of the Amending Act, no amendments had been made to the NTA as enacted in 1993. There is no doubt that there are features of the Amending Act that are questionable on the basis of racially discrimination. There is not adequate space in this paper to deal with all the racial discrimination issues raised by the Amending Act.

Validation and the CERD

Validation is the legislative rectification of a non-Indigenous interest in land made unlawful because it arbitrarily extinguished native title in contravention of a law that prohibits racial discrimination or protects native title. Validation is not synonymous with extinguishment although the two concepts are closely related. Validation involves the excusing of the unlawful extinguishment of native title.

At common law, native title is extinguished by any inconsistent crown grant. No compensation is necessarily payable and once the title is extinguished it cannot be revived. The indigenous land holder had no right to compensation or negotiation. Historically, the parcel by parcel grant of land was how Australia was settled and also how, parcel by parcel, native title was extinguished.

The need for validation arises due to the modification of the common law defeasibility of native title by the enactment of legislation providing protection against racial discrimination. Validation is related to the back-to-front nature of Australia's recognition of native title. After 1975, the RDA provided generalised protection to native title holders from arbitrary deprivations of property. After 1 January 1994, the NTA provided more specific protection for native title holders. The 1993 NTA is generally seen as complimentary to the RDA and consistent with the CERD.

The enactment of the RDA in 1975 fundamentally changed the common law concerning the defeasibility of native title although this was not known at the time. In the first *Mabo* case,¹¹ a majority of the High Court of Australia in 1988 found that any extinguishment of native title without compensation will constitute an arbitrary extinguishment of property and be unlawful under the RDA. The majority found that subsection 10(1) of the RDA guarantees equality before the law for all racial groups. In relation to land, this had the consequence that indigenous people who possess native title must be given the same security of tenure and capacity to enjoy their traditional rights to land as other land owners. Additionally, native title cannot be expropriated for reasons additional to those justifying appropriation of other interests in land on less stringent conditions.¹²

After the *Mabo* (No.2) decision in 1992, there was intense legal speculation that some post-1975 grants of land were invalid because they arbitrarily extinguished native title. Accordingly, the NTA contains a validation regime that validates 'past acts' that may be invalid due to conflict with the RDA. Additionally, the NTA provides dispossessed native title holders with a statutory right to compensation. It is important to remember

¹⁰ (1985) 159 CLR 70.

¹¹ *Mabo v Queensland* (1988) 166 CLR 186.

¹² The unanimous decision of the High Court in *Western Australia v Commonwealth* 128 ALR 1 contains a very good precis of the effect of the RDA on the extinguishment of native title in the head note.

that any pre-1975 act that was valid when it was done will extinguish native title to the extent of any inconsistency and is not affected by the NTA or RDA in any sense.¹³ Therefore most of the extinguishment of native title that has taken place in Australia, is unaffected by either the RDA or the NTA.

The 1993 NTA dramatically altered the law concerning the prospective extinguishment of native title. One of central purposes of the 1993 NTA was to ensure that native title was in the future protected from arbitrary extinguishment. It is for this reasons that the NTA demanded that 'future acts' must be in accordance with the future act provisions of the Act. A key feature of the NTA is the extinguishment principle that provides that native title can only be extinguished through the mechanism of the Act.¹⁴ According to the 1993 NTA, a grant of 'an impermissible interest' after 1 January 1994, without reference to the future act provisions of the Act was invalid to the extent that it affected native title.¹⁵ The grant, or up grade, of a pastoral lease over land where native title exists after 1 January 1994 was an impermissible act under the 1993 NTA and the grant was invalid if the procedures of the 1993 NTA were not utilised.

The first point in the current Commonwealth Government's *Ten Point Plan* is the validation of any act or grant made by State or Territory governments between 1 January 1994 and 23 December 1996¹⁶ that were made without reference to the future act provisions of the NTA. This validation is one the ten points that were agreed to in the final 'compromise' that is contained in the *Native Title Amendment Act 1998*.

The main reason for this second validation is to regularise dealings in land by the Queensland and Western Australian State Governments that were made with out reference to the future acts division of the 1993 NTA. The reason why Western Australia and Queensland did not follow the future act provisions of the NTA are twofold.

First, both Governments refused to acknowledge that the NTA affected their capacity to deal in land. This is illustrated by the Western Australian Government's change in policy after the High decision in *Western Australia v Commonwealth* in 1995. After this decision, the Western Australian Government commenced utilising the future act division of the NTA. Queensland did not alter its policy although in the same period appeared to place its faith in the imminent election of a federal coalition government that would retrospectively rectify the situation.

The second reason concerns the common belief that pastoral leases extinguished native title. This belief was found to be wrong after the High Court's judgment in the *Wik* case. Prior to the *Wik* decision, a number of State Governments dealt in existing pastoral leases on the assumption that there was no possibility that native title could exist over the land in question. The *Wik* decision meant that some of these dealings in land would be legally questionable.

One a purely technical level, the second validation contained in the Native Title Amendment Act 1998 is no different to the validation that took place in 1993. *Prima facie* all validations are questionable under the CERD. Validation is about negating protection from racial discrimination in order to benefit non-Indigenous owner of property. There is a very strong argument that the whole practice is in breach of the CERD and never justifiable. There are nevertheless two reasons that may allow the 1993 validation to be distinguished from the one currently proposed as less objectionable in terms of the CERD.

The first reason is a pragmatic one. No State or Territory government prior to 2 June 1992 could have reasonably been expected to 'factor' native title in to their dealings in land. The state of the law prior to the *Mabo* decision in 1992 was simple and clear. Australia was terra nullius and no interests in land was recognised independently from a crown grant. The doctrine of terra nullius was repeatedly affirmed by Australian and Imperial Courts and as late as 1971 by the Northern Territory Supreme Court in *Milirrpum v*

¹³ *Western Australia v Commonwealth* 128 ALR, 38.

¹⁴ Section 11, NTA.

¹⁵ Section 22, NTA.

¹⁶ Date of the High Court's *Wik* decision.

Nabalco.¹⁷ It should be noted that the Milirrpum decision was heavily criticised and the existence of native title from the mid 1970's onward was considered 'arguable'.¹⁸ Nevertheless, for State and Territory Governments managing land, native title could not prior to the Mabo (No.2) be reasonably considered a limitation on their capacity to manage land.

The second reason is more significant and has important implications for racial discrimination law. The validation that occurred in 1993 was part of a package of measures, many of which were favourable to native title holders and indigenous people generally. The 1993 validation is commonly seen as a 'trade off' for the beneficial provisions of the NTA such as the right to negotiate the setting up, and financing, of an indigenous land fund. Accordingly, the 1993 validation may be justified under the CERD on the basis it was proportionate within the overall package of measures contemplated by the Government in 1993.¹⁹ Namely that it was part of a 'deal', the balance of which was favourable to indigenous people. This argument suggests that governments have a margin of appreciation when dealing with Indigenous peoples interests and some deviation from the standards set by human rights treaties such as the CERD may be permissible so long as the overall policy of government is reasonable in terms of striking a fair compromise between the rights of indigenous and non-indigenous land owners.

The difficulty with the current proposed validation is that no such mitigating factors can be produced to justify it. The main justification is political and commercial expediency. Another problem is that if the 1993 validation is acceptable under the CERD surely one reason is that it was a 'one shot' validation and necessary because of the pre-1992 concealed existence of native title. To paraphrase Oscar Wilde, 'to have one validation may be regarded as a misfortune, two looks like carelessness.'

Equality Jurisprudence

To a large extent Australian equality jurisprudence continues to reflect the situation prior to the *Mabo* decisions. The leading Australian case on racial equality is still the 1985 High Court decision in *Gerhardy v Brown*.²⁰ *Gerhardy v Brown* is widely seen as providing authority for the proposition that the RDA provides a general guarantee concerning formal equality with an exception for matters capable of characterisation as 'special measures'

There has been persistent criticism of the High Court's approach to racial discrimination in *Gerhardy v Brown* as broadly out of step with accepted international approaches to non-discrimination and providing no clear way to recognise the unique position of Australia's Indigenous peoples other than through charitable "special measures".²¹ One particularly persuasive critic of the High Court's decision in *Gerhardy v Brown* is Professor Sadurski.²² Professor Sadurski characterised the decision as one where the court came to the right decision for

¹⁷ (1971) 17 FLR 141.

¹⁸ In 1979, the High Court stated that the existence of native title was 'an arguable question if properly raised' in *Coe v Commonwealth* (1979) 53 ALJR 403. In 1987, the High Court described the existence of native title as 'a question of fundamental importance' in *Northern Land Council v Commonwealth* (No.2) (1987) 61 ALJR 616.

¹⁹ The European Court of Human Rights has developed a concept of proportionality in relation to arbitrary extinguishments of property. For example, in the *Scollo* case, the Court observed 'an interference must strike a fair balance between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights': *Scollo v Italy*, European Court of Human Rights, 28 September 1995, Series A No. 315-B, 32.

²⁰ (1985) 159 CLR 70.

²¹ See: I Brownlie, "The Rights of Peoples in International Law", in J Crawford (Ed), *The Rights of Peoples*, Clarendon Press, Oxford, 1988, p.9; G Nettheim, Indigenous Rights, Human Rights and Australia", (1987) 61 *Australian Law Journal*, 291, p.299; W Sadurski, *Gerhardy v Brown: Reflections on a Landmark Case that Wasn't*, (1986) 11 *Sydney Law Review*, p.30; S Pritchard, "International Law" in *Aborigines and Torres Strait Islanders, Laws of Australia*", Law Book Company, 1993, pp.34-35.

²² W Sadurski, *Gerhardy v Brown: Reflections on a Landmark Case that Wasn't*, (1986) 11 *Sydney Law Review*,

the wrong reason. The reasoning was considered defective because the court refused to accept that certain distinctions based on race could be reasonable and not racially discriminatory under the RDA and by implication the CERD. According to Professor Sadurski, the error of the High Court in *Gerhardy v Brown* is its refusal to recognise that some practices might make distinctions based on race and not be discriminatory or 'special measure' but justified on the basis that the practice is an instance of reasonable differentiation based on race. He warns that reliance on 'special measures' is problematic for Indigenous peoples and recent events in Australia very clearly illustrate this.

Before native title was recognised by the High Court in the *Mabo* [No.2] decision, the status of Australian equality jurisprudence was largely of theoretical and ideological interest. Nothing turned on whether Indigenous Australians could possess distinct types of interests as the only distinct entitlements enjoyed by indigenous peoples were 'special measures.' The framework of indigenous entitlement was fundamentally welfare based and Indigenous people were ultimately dependent on the political wing of government for the maintenance of any distinct entitlements that they might enjoy.

The possibility of native title rights fundamentally changes the otherwise welfare based framework of Indigenous entitlement in Australia. Native title is important in any debate about equality because it is an underlying 'right' that some indigenous groups enjoy because of their unbroken association with land. In terms of the typology of racial discrimination law, native title is likely an instance of reasonable differentiation based on race. That is native title involves a distinction based on race that is reasonable as it reflects the history and current circumstances of a particular Indigenous group. Native title is not a special measure because it is not something that emanates from the State, it is not temporary and is not 'designed' to deal with disadvantage. This feature of native title has important consequence potentially for the political and legal construction of equality in Australia.

If native title is characterised as an instance of reasonable differentiation based on race, serious issues of racial discrimination arise when government seek to limit or curtail it. Whereas 'special measure' are within the prerogative of the political wing of government to initiate, not initiate or cease to support.

One of the striking features of the current Commonwealth Government's approach to native title and indigenous rights generally is that it has appealed directly to formal equality, and *Gerhardy v Brown*, to justify curtailing indigenous rights.

The current Commonwealth governments appeal to formal equality was first used within the context of the *Hindmarsh Island Bridge Act* 1996. The *Hindmarsh Island Bridge Act* amended the *Aboriginal and Torres Strait Islander Heritage Act* 1984 by exempting an area of land between Goolwa and Hindmarsh Island in South Australia from the operation of the *Aboriginal and Torres Strait Islander Heritage Act*. When faced with accusations that the amending bill might be racially discriminatory, the response of the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon Senator John Heron, was simple. The *Aboriginal and Torres Strait Islander Heritage Act* is a special measure and accordingly it is legitimate for the political wing of government to limit or curtail the operation of the measure in any way that it considers appropriate. The *Heritage Act* legislation is apparently a 'special measure' because it gives *Aboriginal and Torres Strait Islander* people rights not enjoyed by the rest of the community. The reasoning is as follows. According to *Gerhardy v Brown*, any right enjoyed by one racial group that is not racially discriminatory must be a special measure, therefore the *Aboriginal and Torres Strait Islander Heritage Act* is a special measure. Accordingly the yardstick is formal equality.

In general, this reasoning is problematic as it provides no real choice when dealing with the distinct entitlements of Indigenous peoples. Everything is a special measure and subject to the vagaries of executive government. The *Aboriginal and Torres Strait Islander Heritage Act* may be a special measure but, in my view, there are also a number of compelling reasons for it being classified as an instance, at least in part, of reasonable differentiation based on race. The problem with the reasoning of *Gerhardy v Brown* is that such speculation is precluded.

In evidence given to the Senate Legal and Constitutional Legislation Committee during its consideration of the Hindmarsh Island Bridge Amendment Bill 1996, the status of the Aboriginal and Torres Strait Islander Heritage Act as a special measure was very clearly stated as the reason why the rights contained in the Act could be altered if the political arm of government considers it necessary. Mr Henry Burmester, Chief General Counsel, Attorney-General's Department in an opinion on the Bill tabled during the Committee's inquiry noted:

The High Court decision in *Gerhardy v Brown* (1985 159 CLR 70) recognised that the need for and extent of a special measure was a matter for political and not legal judgment (esp pp137–8). It is, therefore, open to the Parliament to conclude that there is no longer a need for special heritage legislation to apply to a particular community or to a particular area or areas. In this regard, the Bill is no different to a Bill that was to exclude the Heritage Act from applying, eg in all national parks or in areas where buildings were already constructed.²³

In the broader context of Indigenous rights, the current Government has repeatedly stated that it considers itself only bound to observe that formal equality is complied with. The desire to achieve formal equality has been expressly stated by the Government as the justification for dismantling the right to negotiate.²⁴ In defending amendments put forward in 1996—in particular, those that curtailed the right to negotiate—the Government argued that in order to honour its promise to respect the RDA, it was merely required to ensure that native title holders were left in a situation of formal equality with other title holders. On this basis, it was suggested, the 'special rights' provided by the right to negotiate could be removed without giving rise to racial discrimination.²⁵

One of the Government's chief legal advisers has stated that whether a matter is a 'special measure' or consistent with formal equality provides the test as to compliance with the RDA. Mr Robert Orr, General Counsel, Attorney-General's Department, observed in his evidence to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund last November:

In assessing the current government amendments, therefore, and advising in relation to them, the approach has been taken that the amendments need to leave the [Native Title] Act either as a special measure or provide formal equality. Provided that the amendments maintain provisions as special measures or provide formal equality, they comply with the Racial Discrimination Act.²⁶

The reliance by the current Commonwealth Government on *Gerhardy v Brown* is questionable on a number of levels although the inappropriateness of a strict formal equality approach is particularly apparent if the recent jurisprudence of the CERD Committee is examined. In a recent general recommendation concerning Indigenous people adopted by the CERD Committee last year, the Committee very clearly stated that providing for and recognising the distinct entitlements of indigenous people does not contravene the CERD.

On 18 August 1997, the CERD Committee adopted a general recommendation concerning Indigenous peoples. In this general recommendation the Committee sought to outline some of the applicable principles relating to the unique situation of Indigenous peoples within the State and States Parties obligations under the CERD concerning Indigenous peoples. The Committee affirmed that discrimination against Indigenous peoples falls within the scope of the CERD.

The Committee made a number of important observations concerning the importance of the preservation of the culture and historical identity of Indigenous peoples within the structure of the modern State. Significantly, the

²³ Senate Legal and Constitutional Legislation Committee, *Hindmarsh Island Bridge Bill 1996*, December 1996, p. 18.

²⁴ Senator the Hon Nick Minchin, *Sydney Morning Herald*, 1 June 1996, p. 138.

²⁵ The Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, Second Reading Speech, Native Title Amendment Bill 1996, p. 17.

²⁶ *Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Wednesday, 27 November 1996, p. NT3599.

general recommendation assumes that the preservation of distinct Indigenous structures and practices is entirely consistent with the CERD.

In particular, the Committee called on States Parties to

- a. recognise and respect Indigenous peoples' distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- b. ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous origin or identity;
- c. provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d. ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- e. ensure that Indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages.²⁷

On the question of land the Committee called on States Parties to 'recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources.'²⁸ What the CERD Committee would make of the current Commonwealth Government's equality jurisprudence would be interesting to find out.

Conclusion

The breath and complexity of what has occurred in Australia since the recognition of native title by the High Court on 2 June 1992 requires quite dispassionate and thorough reporting to accurately give a context to current actions. The 1993 NTA is the most significant measures taken during the reporting period as it seeks to incorporate the principle of non-discrimination into the solution of a critical practical and political problem. Namely the incorporation of native title, long unrecognised, into a modern federal state. The status of the Amending Act is less laudable.

As the NTA is Commonwealth legislation, there has been no capacity to test some of its more innovative provisions against the standard of racial discrimination law in Australian courts. The issue of whether Commonwealth legislative practice concerning native title complies with the principle of non-discrimination has been non-justiciable. This is due to a combination of constitutional factors such as the fact of Commonwealth dominance in the area of native title, the existence of a plenary power of the Commonwealth Parliament to make laws with respect to any race without reference to the principle of non-discrimination and lack of an entrenched right to non-discrimination in Australian law. The current reporting process holds out the possibility of doing just this although it is important to realise that the CERD Committee is not a court.

If State Party reporting is to mean any thing, Australia's tenth eleventh and twelfth period report under the CERD should be significant documents. Unfortunately changes in political leadership at the federal level may mean that there will be difficulties in reporting thoroughly on all relevant matter. Essentially, the current Commonwealth Government is required to report of the activities of its predecessor. This state of affairs is obviously problematic. Another related issues is that much of the material is complex and political and capable of different interpretations. These factors highlight the importance of timely reporting and the importance of

²⁷ Committee on the Elimination of Racial Discrimination, CERD/C/51/Misc.13/Rev4 (19 August 1997), p.2.

²⁸ Committee on the Elimination of Racial Discrimination, CERD/C/51/Misc.13/Rev4 (19 August 1997), p.2.

the involvement of non-government organisations in providing the Committee with information on the reporting period.

Race Discrimination and Indigenous Issues: The Perspective of ATSIC in the Current Climate

Greg Marks *

Today I will present a perspective on the situation of native title at the present time, and identify some concerns about the international law implications of the proposed amendments to the *Native Title Act*. In doing so I note the dramatic results of the Queensland election and the uncertainty which now infects the political process in Australia. The ramifications of the Queensland election outcome affect a few key policy areas in particular, and of course native title, in the form of the so-called Wik legislation, is one of the major areas of contention.

We live in particularly uncertain times when it comes to native title. So, in presenting a view of where the native title debate is at, and possible international law implications, it is not possible to be definitive, and what may seem to be a sensible course of action today may have to change tomorrow because of developments which have not been predicted.

Nevertheless, the ATSIC Board has chartered a certain course, and for the time being proposes to follow this approach.

Parliamentary consideration of the Native Title Amendment Bill 1997 came to an apparent dead end when the Senate, in the early hours of Thursday 9 April, refused to give ground to the Government on the so-called sticking points, and when later that morning the House of Representatives refused, for the second time, to accept most of the amendments to the Bill which had been made by the Senate. The Bill was laid to one side, thus establishing grounds on which to seek a double dissolution.

The previous day indigenous representatives present at Parliament House had walked out in protest at what they perceived as a rather sordid process of trading away rights which they felt had been established in law through High Court decisions and through the *Native Title Act 1993*.

As we know, the Government and other players in the Senate had in fact come very close to a compromise. As also is public knowledge, that compromise fell through over details of the proposed state-based regime to replace the Right to Negotiate on pastoral leases and other non-exclusive tenures.

In the light of this parliamentary deadlock, ATSIC has refocussed its attention on the fundamentals of what native title means in the Australian context, and what is the most productive and constructive way forward.

The amendments process has been expensive of time and resources, and it is a moot point whether it has all been necessary. The Chairman of ATSIC, Gatjil Djerrkura, said to the Parliamentary Joint Committee in September last year:

It is time to reconsider whether all these amendments are necessary, and whether they all need to be considered now. Let's just deal with what needs to be dealt with.¹

This was good advice. It was not accepted and instead we have endured many months of contention and divisive disputation over this very complex piece of amending legislation.

It does not appear to be a constructive approach for ATSIC to merely wait passively for a double dissolution election. Indeed, a double dissolution election may not solve the legislative impasse—who would be brave

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¹ ATSIC Submission on the Native Title Amendment Bill 1997 to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 24 September 1997.

enough to forecast the make-up of the Commonwealth parliament after such an election?

ATSIC has come to the view that the legislative process has monopolised the native title agenda. The concentration on legislation may have been unavoidable, but it has also been confusing and alienating to many in the community.

ATSIC sees co-existence as at the essence of the native title debate, and this is what ATSIC wants to get back to. The productive way to make co-existence work is through the agency of agreements.

It is ATSIC's intention to shift the focus of its efforts away from the legislation, to the degree that political developments allow, and to contribute instead to the task of making native title work through agreements. There are a number of activities in hand or being developed to meet this objective.

I turn now to the Native Title Amendment Bill, in respect of its possible implications for international standards and obligations.

There are potentially significant problems in the proposed legislation in terms of its compliance both with the spirit and letter of Australia's international obligations. We do not believe that the international dimensions of the native title debate have been given sufficient attention to date.

As far as we know, there has been no systematic analysis of the proposed amendments legislation in terms of international law. ATSIC has noted such potential problems in its publications on the proposed amendments.

There has been a certain degree, at a fairly general or rhetorical level, of claim and counter claim as to whether the legislation meets international standards. But there appears to have been little close, detailed or rigorous analysis.

Instead the native title debate appears in the main to be considered by Government and others as primarily a domestic issue.

This is unfortunate. It may be seen as a failure of the Australian international law community in influencing the development of policy and law in this country if international law is relegated to the margins of the debate concerning native title.

It is important to note in this context that the development of the common law doctrine of native title reflected international law considerations. In *Mabo v Queensland No 2*² the High Court referred to the consideration of the doctrine of *terra nullius* by the International Court of Justice in the *Western Sahara Case*³ in deciding the central issue that *terra nullius* should no longer be accepted as the foundation of the common law treatment of indigenous claims to land in Australia.

In the context of the influence of customary international law in Australia, Professor Ivan Shearer has pointed out:

The significance of customary international law as a source of Australian law, while masked to some extent by the incorporation of important parts of that law by statute, will continue to grow as the parallel growth of customary law out of conventional law comes to be discerned, especially in the fields of human rights and the protection of the natural environment.⁴

In passing, I would note in this context that major Conventions which Australia has not yet ratified, in

² *Mabo v Queensland (Mabo (No 2))* (1992) 175 CLR 1

³ *Western Sahara, Advisory Opinion*, 1975 ICJ 12.

⁴ I A Shearer, 'The Relationship Between International Law and Domestic Law' in BR Opeskin and D R Rothwell eds *International Law and Australian Federalism* at 61.

particular the *ILO Convention No 169 Concerning Tribal and Indigenous Peoples*⁵, are potentially relevant to Australia as sources of emerging customary law in respect of indigenous peoples' rights including consultation requirements concerning traditional lands and resources.

Australia has ratified a number of relevant UN human rights conventions, thereby accepting clear legal obligations and the consequent reporting requirements. Complaints mechanisms are available to Australians under both the ICCPR⁶ and the ICERD.⁷

All in all, Australian law and practice has increasingly been drawn into the world of international standards and jurisprudence.

It is disturbing, that, given these considerations, legislation concerning fundamental human rights of indigenous peoples may have been developed without the closest regard to the international human rights regime and without earnest efforts to comply with both the spirit and letter of such standards.

The Government claims to be well aware of Australia's international treaty obligations in the human rights area and, to the extent these obligations are relevant, to have taken them into account in drafting the Native Title Amendment Bill.

However, it can be argued that in respect of some of the provisions of the legislation at least, there is doubt about compliance with established major international norms, including, but not restricted to, non-discrimination.

If this be the case, defences based on the sovereignty or supremacy of Parliament will not wash in today's world. It is not a derogation from the sovereignty of Parliament for that Parliament to use its best endeavours to maintain consistency between domestic legislation which affects human rights and established international standards.

What then are the areas of the legislation which ATSIC believes may be problematic in terms of international law?

I will not try to provide a comprehensive answer to this question. A helpful overview of problem areas and the international standards which are at risk is given by professor Garth Nettheim in his article "The international implications of the Native Title Act amendments" in the February 1998 issue of the *Indigenous Law Bulletin*⁸ and I would recommend that article for your consideration.

I will briefly indicate some areas where we believe there may be significant problems, and suggest that these examples may be indicative of wider problems with the legislation in terms of potential non-compliance.

A central feature of the current Native Title Act is the Right to Negotiate, which provides for a negotiation and arbitration process in respect of the grant of mining tenements, and for the compulsory acquisition of native title land for the benefit of third parties.

The amendments diminish the utility of this Right to native title holders. They significantly restrict the scope of the application of the Right, and also restrict the procedures available, while allowing for increased ministerial intervention.

To justify these changes the Government relies on the arguments that the Right to Negotiate is a statutory right

⁵ LO Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

⁶ The International Covenant on Civil and Political Rights 1966 (ICCPR).

⁷ The International Convention on the Elimination of All Forms of Racism 1966 (ICERD).

⁸ Garth Nettheim "The international implications of the Native Title Act amendments" *Indigenous Law Bulletin* Vol 4, Issue 9, February 1998 at 12.

not founded in the common law, that it is a special measure, as allowed for and defined by the ICERD, and that therefore it is entirely at the discretion of the Parliament to change or reduce this Right. The Government further argues that by ensuring native title holders have the same procedural rights as other landholders, eg pastoralists, native title holders are provided with formal equality.

The central question, from an international law perspective, is whether these proposed amendments, and the legislation which would result from them, meet international standards. This is not a straightforward issue, and we are not attempting here to provide a definitive answer to the question.

However, it does seem that the right of indigenous peoples to participate in, to be consulted about, and to provide consent in some instances, in respect of developments on their land, has become established at international law. These participation or consultation rights are linked, in particular, to decisions about use and exploitation of resources.

For example, the Committee on the Elimination of Racial Discrimination in 1997 commented as follows:

The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use communal lands, territories and resources ...⁹

Without going through the various relevant provisions of both ratified and unratified conventions, Human Rights Committee and Racial Discrimination Committee findings etc, it seems that a right of consultation for indigenous peoples in respect of their ancestral lands has emerged in international law.

How far this right runs is a moot point. But it can be quite confidently asserted that this right goes beyond mere consultation on a formally equal footing with other non-indigenous members of the community.

At a bare minimum it accords such formal equality. But to say that this is as far as international standards go is doubtful. The central importance of the special or spiritual attachment of indigenous people to their land must be taken into account.

The 1995 General Comment of the Human Rights Committee in respect of Article 27 is relevant here:

...[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples... The enjoyment of those rights may require positive legal means of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁰

The proposed changes to the Right to Negotiate are problematic in terms of international standards. Garth Nettheim contends that the Right to Negotiate approximates current international standards.¹¹

In these circumstances, reliance on formal equality may be seen to be discriminatory on the basis of the requirement to provide substantive equality.

In respect of extinguishment, you may recall claims that the Bill provides for "bucket loads of extinguishment". Allowing for a degree of hyperbole, the extinguishment provisions remain another area which must surely be problematic in terms of international standards.

Examples of provisions which potentially effect extinguishment of native title rights, either immediately or over time, include:

⁹ Committee on the Elimination of Racial Discrimination. General Recommendation XXIII(51), 1997.

¹⁰ Human Rights Committee. General Comment on Article 27, 1995.

¹¹ Nettheim, *supra* note 9, at 13.

- Purported confirmation of extinguishment in Division 2B of the Native Title Amendment Bill 1997 including the permanent extinguishment of native title for a wide range of specific kinds of leases, both past and present. in Schedule 4; and
- Provisions such as the diversification activities on pastoral leases eg intensive cropping which could result de facto in the inability of native title holders to exercise their rights.

Extinguishment provisions in the absence of determinations at common law, appear to be a fundamental diminution of the opportunity for indigenous people to pursue their claims to native title, contrary to international law standards designed to protect the right to own property in association with others and to inherit.

The potential loss of property rights, given the attachment of indigenous people to land, can infringe cultural rights as well, and may invoke provisions such as Article 27 of the ICCPR.¹² As I have indicated, the underlying problem is that it would seem far from clear that such interference with the exercise of native title rights as is provided for in this legislation has been systematically assessed in terms of international standards.

The examples I have given to do not provide a comprehensive account. These are difficult areas of identifying the nature and scope of the relevant human rights norms, and their application to the particular provisions of the legislation.

Further, there is the whole question of the relationship between these peoples and the states within which they find themselves, often without their consent, and accordingly the reach of the norm of self-determination and its relevance to these provisions. As James Anaya has pointed out, the Human Rights Committee has not kept from adjudicating what amount to issues of self-determination and group rights common to indigenous peoples, for example in the *Lubicon Lake Band* case.¹³ This raises issues of the lack of negotiation and consent in respect of the proposed amendments, in contrast to the original Act which was negotiated with indigenous representatives.

However, there can be no doubt of the central place of non-discrimination in the international human rights regime, both in customary and conventional international law.

It will be appreciated that the dangers inherent in any significant failure on the part of Australia to meet the standards required for non-discriminatory law and practice, may be profound, if somewhat indirect.

In the domestic sphere the perspective that Australian laws do not comply with international standards can undermine their credibility and acceptability. Perceptions may develop that the domestic system is unable, or unwilling, to deliver just outcomes consistent with international obligations.

On the international plane we know the consequences that can flow. The dangers of being seen to derogate from our international obligations in respect of the human rights of indigenous peoples are considerable.

It is time for the Native Title Amendment Bill to be subjected to rigorous, open and frank scrutiny in terms of the potential compliance or non-compliance of its major provisions with the relevant international human rights and non-discrimination norms and standards.

It is suggested that the international law community needs to give itself to this task. It can be argued that there is no higher priority, if international law is to have real meaning and relevance in the Australian context.

¹² Article 27 provides for the right of minorities to their own culture, religion and language.

¹³ James Anaya "Indigenous peoples in International Law" OUP 1996 p 163.